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# Vol. I
# TRANSCRIPT OF RECORD
(Pages 1-628)

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# Supreme Court of the United States

OCTOBER TERM, 1953

## No. 19

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THEATRE ENTERPRISES, INC., PETITIONER,

*vs.*

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO PICTURES, INC., ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR CERTIORARI FILED MARCH 9, 1953
CERTIORARI GRANTED MAY 25, 1953

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1953

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## THEATRE ENTERPRISES, INC., PETITIONER,

vs.

## PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO PICTURES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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# IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 10734

THEATRE ENTERPRISES, INC.

vs.

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Unversal Film Exchanges, Inc., United Artists Corporation, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Warner Bros. Circuit Management Corporation, Columbia Pictures Corporation.

## COMPLAINT—Filed March 20, 1950

To the Honorable the Judges of the Said Court:

The plaintiff above named brings this civil action against the defendants above named and complains and alleges as follows:

### First Cause of Action

1. This action is brought under sections 4 and 16 of the Clayton Act of October 15, 1914 (15 U.S.C.A. 15, 26), sections 1 and 2 of the Sherman Act of July 2, 1890 (15 U.S.C.A. 1, 2) and section 1 of the Robinson-Patman Act of June 19, 1931 (15 U.S.C.A. 13).

2. Plaintiff is a Corporation duly organized and existing under the laws of the State of Maryland, having its principal place of business at 302 Park Avenue, Baltimore, Maryland, and is engaged in the business of exhibiting motion pictures at its Crest Theatre located at Reisterstown Road and Rogers Avenue in the said city.

3. Paramount Film Distributing Corporation is a Corpo- [fol. 7] ration organized and existing under the laws of the State of New York and is engaged in the business of producing, distributing and exhibiting motion pictures in interstate commerce, either directly or through subsidiary

or associated companies, and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District at 248 North 12th Street, Philadelphia.

4. Loew's Incorporated is a Corporation organized and existing under the laws of the State of Delaware, and is engaged in the business of producing, distributing and exhibiting motion pictures in interstate commerce, either directly or through subsidiary or associated companies, and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District at 1233 Summer Street, Philadelphia.

5. RKO Radio Pictures, Inc. is a Corporation organized and existing under the laws of the State of Delaware and is engaged in the business of producing and distributing motion pictures in interstate commerce, either directly or through subsidiary or associated companies, and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District at 250 North 13th Street, Philadelphia.

6. Twentieth Century-Fox Film Corporation is a Corporation organized and existing under the laws of the State of New York, and is engaged in the business of producing, distributing and exhibiting motion pictures in interstate commerce, either directly or through subsidiary or associated companies, and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District at 302 North 13th Street, Philadelphia.

7. Universal Film Exchanges, Inc. is a Corporation [fol. 8] organized and existing under the laws of the State of Delaware and is engaged in the business of distributing motion pictures in interstate commerce and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District at 251 North 13th Street, Philadelphia.

8. United Artists Corporation is a Corporation organized and existing under the laws of the State of Delaware and is engaged in the business of distributing motion pictures in interstate commerce and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District at 302 North 13th Street, Philadelphia.

9. Warner Bros. Pictures, Inc., is a Corporation organized and existing under the laws of the State of Delaware and is engaged in the business of producing, distributing and exhibiting motion pictures in interstate commerce, either directly or through subsidiary companies, and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District at 1028 Market Street, Philadelphia.

10. Warner Bros. Pictures Distributing Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a Corporation organized and existing under the laws of the State of New York and is engaged in interstate commerce, either directly or through subsidiary companies, in the business of distributing and exhibiting motion pictures, and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District at 230 W. 13th Street, Philadelphia.

11. Warner Bros. Circuit Management Corporation, a wholly owned subsidiary of Warner Bros. Pictures, Inc., is a Corporation organized and existing under the laws of the State of New York and is engaged in interstate com-
[fol. 9] merce, either directly or through subsidiary companies, in the buiness of distributing and exhibiting motion pictures and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District at 1028 Market Street, Philadelphia.

12. Columbia Pictures Corporation is a corporation organized and existing under the laws of the State of New York having its principal place of business at 729 Seventh Avenue, New York City, New York, and is engaged in the business of producing and distributing motion pictures in interstate commerce, either directly or through subsidiary or associated companies in various parts of the United States and in foreign countries, and has an agent and transacts business in the Eastern District of Pennsylvania, and has an office in said District at 1240 Vine Street, Philadelphia.

13. The motion picture business consists of three departments or phases, to wit,

(1) Production or manufacture of pictures;

(2) Distribution or licensing of pictures; and,
(3) Exhibition of pictures.

14. Said business in all its phases constitutes a part of interstate commerce.

15. The defendants produce and distribute approximately 95% of the first class feature motion pictures produced in the United States.

16. No motion picture exhibitor can successfully operate a first-run feature motion picture theatre in the United States without being supplied with pictures produced or distributed by the defendants.

17. The Crest Theatre is properly located and adequately equipped for exhibition of first class motion pictures on [fol. 10] first-run having 1,600 seats and the finest appointments and equipment, including the most modern type of air-conditioning and sound. The said theatre in all respects is comparable to and in many respects, particularly as to its extensive free parking facilities and its large television lounge, is superior to any theatre in downtown Baltimore or its environs.

18. There are seven first-run theatres in down-town Baltimore including one theatre operated by the defendant, Warner Brothers Circuit Management Corporation, and two theatres operated by the defendant, Loew's Inc. For a number of years past these said seven theatres have had the available first-run product divided in an arbitrary and rigid manner, with the result that each theatre in effect has had an illegal franchise for that product allocated to it and with the further result that no new exhibitor may compete in the first-run field. This arrangement has been made possible only by the agreement and connivance of the defendants in pursuance of their own conspiracy to dominate the distribution and exhibtion of motion pictures in the City of Baltimore.

19. Plaintiff since October, 1948, has attempted to obtain a supply of first-run motion pictures for exhibition at the Crest Theatre but defendants have failed and refused to license any such pictures to it.

20. As the result of the failure and refusal of the defendants to license their pictures for first-run exhibition at the Crest Theatre, plaintiff, without abandoning is claim

to first-run product but in an attempt to open its theatre, keep it in operation and thus minimize damages, sought and was able in February, 1949, to license subsequent-run product for the Crest, but only under the terms and with the results set forth in the Second Cause of Action stated below in this Complaint.

[fol. 11] 21. There is no substantial competition between the Crest Theatre and the first-run theatres in down-town Baltimore.

22. The refusal of the defendants to license first-run pictures to the Crest Theatre was in furtherance of the defendants' conspiracy to dominate the distribution and exhibition of motion pictures in Baltimore and elsewhere and constitutes an unlawful restraint of trade and competition in interstate commerce in violation of the Clayton Act and the Sherman Act.

23. The United States of America has instituted an action on its behalf against the defendants herein entitled United States of America v. Paramount Pictures, Inc., et al, in the United States District Court for the Southern District of New York, in which it charged these defendants with a conspiracy to violate sections 1 and 2 of the Sherman Anti-Trust Act. The said District Court has entered its decree in which it found these defendants guilty of a nationwide conspiracy to violate the Sherman Anti-Trust Act, which findings have been affirmed by the Supreme Court of the United States (92 L. ed. 882). Further, on February 8, 1950, the said District Court entered its reformed final decree in the said case.

24. As the result of the failure and refusal of the defendants to license their pictures for first-run exhibition at the Crest Theatre, plaintiff has suffered damages in the amount of $205,000.

## Second Cause of Action

25. The averments contained in paragraphs 1 to 23 inclusive are hereby incorporated by reference.

26. Although the defendants, on and after February 26, 1949, did license subsequent-run product to the Crest Theatre, they unlawfully discriminated against the plaintiff by exacting from it a film rental greater than that paid to them by comparable or inferior theatres for similar product,

by withholding reasonable clearance between theatres actually presently in substantial competition and by imposing unreasonable and discriminatory clearances between theatres not in substantial competition.

27. This discriminatory conduct of the defendants, in [fol. 12] relation to the licensing of subsequent run pictures to the Crest, was the result of an unlawful conspiracy on the part of the defendants to dominate the distribution and exhibition of motion pictures in the City of Baltimore and elsewhere and constitutes an unlawful restraint of trade and competition in interstate commerce in violation of the Clayton Act and Sherman Act.

28. As the result of the discriminatory conduct of the defendants with regard to their licensing of subsequent-run pictures to the Crest Theatre, plaintiff has suffered damages in the amount of $52,000.

Wherefore, the plaintiffs demand:—

1. That summonses be issued and directed to each of the defendants commanding them to appear and answer the allegations contained in this complaint and to abide by and perform such orders and decrees as the Court may make in the premises.

2. That the defendants be enjoined from imposing clearance restrictions on license agreements with the plaintiff's Crest Theatre in favor of theatres in down-town Baltimore and that defendants be ordered forthwith and perpetually thereafter to license pictures to the plaintiff free of said clearance provisions.

3. That the defendants be enjoined from discriminating against plaintiff in any way in the licensing of their motion pictures and that the defendants be enjoined from withholding reasonable clearance between the plaintiff's Crest Theatre and those theatres with which it is presently in substantial competition.

4. That the defendants be ordered to pay to plaintiff the full cost of this suit and include as a part thereof a reasonable attorney's fee for the services of plaintiff's attorneys.

5. That the plaintiff be awarded damages for the loss of [fols. 13-37] its first-run business in the amount of $205,000

to be trebled under the provisions of the Sherman Anti-Trust Act; or, in the alternative, damages for the loss of its subsequent-run business in the amount of $52,000 to be trebled under the provisions of the Sherman Anti-Trust Act.

6. That the plaintiff be afforded such further relief as the court shall deem just and proper.

Gray, Anderson, Schaffer & Roma. By: William A. Gray, Attorneys for Plaintiff.

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[fol. 38] [File endorsement omitted]

In United States District Court for the District of Maryland

Theatre Enterprises Inc., Plaintiff,

v.

Paramount Film Distributing Corporation, et al., Defendants

Answer of Twentieth Century-Fox Film Corporation—Filed April 21, 1951

Comes Now the defendant Twentieth Century-Fox Film Corporation, by its attorney, R. Dorsey Watkins, and for its answer to the complaint herein:

Answering the First Cause of Action

1. Answering paragraph 1 of the complaint, denies that plaintiff has any cause of action against this defendant under the statutes enumerated, and denies that this defendant has done any acts in violation of said laws.

2. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2, 3, 4, 5, 7, 8, 9, 10, 11, 12 and 15 of the complaint.

3. Denies the allegations contained in paragraph 6 of the complaint, except it admits that it is a New York corpo-

[illegible] is engaged in the business of producing and distributing motion pictures, and a part of its business as a distributor of motion pictures is for interstate commerce. (Tel. 23) That it is a combination in certain portions which, and subdivisions of which, are engaged in the business of operating and managing motion picture theatres, that is, transmitting motion pictures from States of Pennsylvania, that is, for the other States of the United States, namely, Pennsylvania, New Jersey, and others that it serves the Court, Chestnut Street [illegible] Washington, D. C. other located at 815 F Street, N. W., Washington, D. C.

4. Answering the allegations contained in paragraphs 12 and 13, admits that a part of its business as a distributor of motion pictures is for interstate commerce, and denies that the purchase or exhibition of motion pictures is for interstate commerce.

5. Denies the allegations contained in paragraphs 16, 17, 18, 20, 21, 22 and 23 of the complaint.

6. [illegible] information sufficient to form a belief as to the truth of the allegations contained in paragraph 19 of the complaint, except it admits that the Court [illegible] of the operation of theatres, has requested that motion pictures distributed by this defendant be licensed by the Court Theatre on 15th [illegible] in Baltimore.

7. Denies the allegations contained in paragraph 24 of the complaint, except it admits that it was a defendant in the action entitled *United States v. Paramount Pictures, Inc., et al.*, [illegible] 66 F. Supp. 323, in the United States District Court for the Southern District of New York, and respectfully refers this Court to all of the proceedings therein for a true and correct account of said proceedings.

[fol. 45] Answering the Second Cause of Action

8. Answering paragraph 25 of the complaint, repeats and reallages with the same force and effect as if set out here and incorporates by reference the answers to paragraphs 1 to 23, inclusive, of the first cause of action for the denials and averments therein contained.

9. Denies the allegations contained in paragraphs 26, 27 and 28 of the complaint.

Wherefore, having fully answered the complaint herein, Twentieth Century-Fox Film Corporation demands judgment, dismissing the complaint, together with its costs.

E. Dorsey Watkins, Attorney for Twentieth Century-Fox Film Corporation. Office and Post Office Address: 10 Light Street, Baltimore 2, Maryland.

Of Counsel:

Piper, Watkins, Arvesen & Sparton, Baltimore, Md.

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Proof of service (omitted in printing)

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[fol. 41] [Title acknowledgment omitted]

In United States District Court

[Title omitted]

Answer of Defendant RKO Radio Pictures, Inc.—Filed April 21, 1951

Comes now the defendant RKO Radio Pictures, Inc., by E. Dorsey Watkins, its attorney, and for its separate answer to the complaint of the plaintiff herein, states as follows:

Answering the First Cause of Action

1. Admits that plaintiff seeks to invoke the jurisdiction of this Court under the statutes specified in paragraph 1 but denies that it has violated, is violating or intends to violate said statutes or any of them or that it is liable to the plaintiff by reason of such statutes or for any other reason.

2. Is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 except that it admits that plaintiff operates the Great Theatre located at the address specified in said paragraph.

10. Denies each and every allegation contained in paragraph 30 which refers or is intended to refer to it except that it admits that on occasion it has licensed pictures distributed by it for exhibition in plaintiff's theatre on a run subsequent to first run Baltimore. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

11. Denies each and every allegation contained in the first two sentences of paragraph 31 except that it admits and alleges that the United States of America instituted the action referred to therein under the anti-trust laws of the United States in the United States District Court for the Southern District of New York; that some of the defendants herein were defendants in said action; that the District Court entered a decree in said action and made Findings of Fact and Conclusions of Law on December 31, 1945; that said decree was not a final decree; that the Supreme Court of the United States affirmed in part and reversed in part the judgment of the District Court and [fol. 24] remanded the cause for further proceedings; that on November 5, 1948, prior to the taking of any testimony on the remand a consent decree was entered as to this defendant; that said cause was severed as to this defendant as of November 5, 1948; and that this defendant was not and has not been a party to the proceedings in such action thereafter. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third sentence of said paragraph.

## Answering the Second Cause of Action

12. In answer to paragraph 35 realleges the answers to paragraphs 1 to 23 inclusive, set forth above in paragraphs 1 to 10 inclusive.

13. Denies each and every allegation contained in paragraph 36 which refers or is intended to refer to it except that it admits that since about February 1949 on occasion it has licensed motion pictures distributed by it for exhibition in plaintiff's theatre on a run subsequent to first run Baltimore. Alleges that it is without knowledge or in-

formation sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

14. Denies each and every allegation contained in paragraphs 27 and 28.

Wherefore this defendant demands judgment dismissing the complaint and assessing to the plaintiff all costs and disbursements of this action.

R. Dorsey Watkins, Attorney for the Defendant RKO Radio Pictures, Inc.; Office and Post Office Address: 10 Light Street, Baltimore 2, Maryland.

Of Counsel:
Piper, Watkins, Avirett & Egerton, Baltimore, Md.

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[fol. 45] Proof of service (omitted in printing)

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[fol. 46] [File endorsement omitted]

In United States District Court

[Title omitted]

Answer of Paramount Film Distributing Corporation—Filed April 23, 1951

Comes Now the defendant, Paramount Film Distributing Corporation, by its attorney, R. Dorsey Watkins, and for its separate answer to the complaint in the above proceedings, respectfully represents:

First Defense

As to the First Cause of Action

1. Admits that the plaintiff seeks to invoke the jurisdiction of this Court under the statutes specified in paragraph 1, but denies that it has violated such statutes, or any of them, and further denies that it is liable to the plaintiff by reason of such statutes, or for any other reason.

2. Admits that the Crest Theatre is located at Reisterstown Road and Rogers Avenue in the city of Baltimore, Maryland and that the plaintiff has some connection with the operation of said theatre. Except as so expressly admitted, this defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.

[fol. 47] 3. Admits that this defendant is engaged in the business of distributing motion pictures throughout the United States, that it has an agent and transacts business in the Eastern District of Pennsylvania and that it has an office in said District at 248 North 12th Street, Philadelphia, Pa. Except as so expressly admitted, it denies the allegations contained in paragraph 3.

4. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4, 5, 6, 7, 8, 9, 10, 11 and 12.

5. Admits that the motion picture business generally consists of the three phases enumerated in paragraph 13.

6. Admits that some phases of the business of distributing motion pictures involve interstate commerce and except as so expressly admitted, this defendant denies the allegations contained in paragraph 14.

7. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15.

8. Denies the allegations contained in paragraph 16.

9. Admits that the Crest Theatre has approximately 1600 seats. This defendant denies that said theatre is properly located for the exhibition first run in the city of Baltimore, Maryland of first class feature motion pictures and further denies that said theatre is comparable in all respects and superior in many respects to any theatre in downtown Baltimore or its environs. Except as so expressly admitted and denied, this defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17.

[fol. 48] 10. Admits that there are several first run theatres in downtown Baltimore, Maryland, one of which is operated by the defendant, Warner Bros. Circuit Management Corporation. This defendant denies that it has any

knowledge or information sufficient to form a belief as to whether certain other of those theatres are operated by one of the other defendants to this action. Except as so expressly admitted and denied, this defendant denies the allegations contained in paragraph 18.

11. Admits that in or about October 1948 the plaintiff requested feature motion pictures distributed by this defendant for exhibition first run Baltimore, Maryland at the Crest Theatre and that this defendant has not licensed any such pictures to the plaintiff. Except as so expressly admitted, this defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19, insofar as the same refer, or arte intended to refer, to the other defendants.

12. Admits that, commencing in or about March 1949 and from time to time thereafter, this defendant has licensed various motion pictures distributed by it for exhibition at the Crest Theatre on a run twenty-one (21) days after first run Baltimore, Maryland. Except as so expressly admitted, this defendant denies the allegations contained in paragraph 20 insofar as the same refer, or are intended to refer, to this defendant and denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph insofar as the same refer, or are intended to refer, to the other defendants.

13. Denies the allegations contained in paragraphs 21 and 22.

[fol. 49] 14. Admits, as alleged in the first two sentences of paragraph 23, that the United States of America instituted an action against this defendant and some of the other defendants named herein in the United States District Court for the Southern District of New York entitled "United States of America against Paramount Pictures Inc., et al." being Equity Number 87-273, and that said Court entered a Decree in said action, dated December 31, 1946. It denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third sentence of said paragraph. Except as so expressly admitted and denied, this defendant denies each and every

allegation contained in said paragraph and respectfully refers this Court to the records, files and proceedings had in the Court and Cause described in said paragraph for a true and accurate account of the facts in regard thereto.

15. Denies the allegations contained in paragraph 24.

As to the Second Cause of Action

16. This defendant, in answer to the allegations of paragraph 25, makes reference to the answers heretofore set forth in response to the allegations of paragraphs 1 through 23, inclusive, of the complaint and realleges the said answers in the same manner as though set forth in full herein.

17. Denies the allegations contained in paragraph 26 insofar as the same refer, or are intended to refer, to this defendant and denies that it has any knowledge or information sufficient to form a belief as to the truth of said allegations insofar as the same refer, or are intended to refer, to the other defendants.

18. Denies the allegations contained in paragraphs 27 and 28.

[fol. 50] Second Defense

The complaint fails to state a claim against this defendant upon which relief can be granted.

Wherefore, this defendant prays judgment dismissing the complaint and assessing to the plaintiff all costs and disbursements of this action.

R. Dorsey Watkins, Attorney for Paramount Film Distributing Corporation. Office and Post Office Address: 10 Light Street, Baltimore 2, Maryland.

Of Counsel: Piper, Watkins, Avirett & Egerton, Baltimore, Md.

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Proof of service (omitted in printing).

[fol. 51] In United States District Court

[Title omitted]

[File endorsement omitted]

Separate Answer of Columbia Pictures Corporation—Filed April 23, 1951

Answering the First Cause of Action

The defendant, Columbia Pictures Corporation, by R. Dorsey Watkins, its attorney, for its answer to the complaint herein:

1. Admits that the plaintiff attempts to bring this action under the statutes referred to in paragraph 1 of the complaint, but this defendant denies that the plaintiff has any cause of action under said statutes or any of them.

2. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the complaint.

3. Admits the allegations contained in paragraph 12 of the complaint except that this defendant denies that its activities are conducted in interstate commerce.

4. Admits the allegations contained in paragraph 13 of the complaint.

[fol. 52] 5. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the complaint, insofar as the same relate to the other defendants and denies the allegations thereof insofar as they are intended to relate to this defendant.

6. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 15 and 16 of the complaint.

7. Denies each and every allegation contained in paragraphs 17 and 18 of the complaint.

8. Admits that it has declined the plaintiff's request for the rights to license its copyrighted feature motion pictures for exhibition in the Crest Theatre on a so-called first run for the city of Baltimore and, in that connection, this defendant avers that the Crest Theatre was not and is not suitable for such exhibition. Except as so admitted this

defendant denies each and every allegation contained in paragraph 19 of the complaint insofar as the same related to it and states that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations thereof.

9. Admits that from time to time it has licensed motion pictures distributed by it for exhibition in the Crest Theatre on an availability of second run for the City of Baltimore and, except as so admitted, this defendant denies each and every allegation of paragraph 20 of the complaint.

10. Denies each and every allegation contained in paragraphs 21, 22 and 24 of the complaint.

[fol. 53] 11. Denies that the allegations contained in paragraph 23 of the complaint correctly or adequately describe the proceedings had and the results reached in the equity suit entitled United States of America vs. Paramount Pictures, Inc., et al., or that the said action is relevant or material to the present action. This defendant avers that the records of the said proceeding on file with the said United States District Court for the Southern District of New York are the best and only competent evidence of their contents.

Answering the Second Cause of Action

12. For answer to the allegations of paragraph 25 of the complaint this defendant makes reference to the answers heretofore set forth in response to the allegations of paragraphs 1 through 23 of the complaint and realleges the said answers in the same manner as though here set forth at length.

13. Denies each and every allegation contained in paragraphs 26, 27 and 28 of the complaint.

Wherefore, defendant Columbia Pictures Corporation prays for judgment dismissing the complaint together with the costs and disbursements of this action.

R. Dorsey Watkins, Attorney for Columbia Pictures Corporation. Office and Post Office Address: 10 Light Street, Baltimore 2, Maryland.

Of Counsel: Piper, Watkins, Arbrett & Egerton, Baltimore, Md.

Proof of service (omitted in printing).

[fol. 54] In United States District Court

[Title omitted]

[File endorsement omitted]

Answer—Filed April 25, 1951

The defendant Lowe's Incorporated for its answer to the complaint herein:

First Cause of Action

1. Admits that this action purports to be brought under the Acts of Congress referred to in paragraph 1 of the complaint, but denies that it individually or jointly with any other defendant or defendants has violated, now is violating, or intends to violate any of the anti-trust laws of the United States as alleged in the complaint or otherwise.

2. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2 of the complaint, except that it admits that the plaintiff has a place of business at 302 Park Avenue, Baltimore, Maryland and that the plaintiff has some connection with the operation of the Crest Theatre located at Reisterstown Road and Rogers Avenue in the said city.

3. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 3, 5, 6, 7, 8, 9, 10, 11 and 12 of the complaint, but for the purposes of this action only admits such of the allegations of each of said paragraphs as are admitted in the answer of the particular defendant to which said allegations relate.

4. Admits the allegations of paragraph 4 of the complaint except that it denies that its business of producing or of exhibiting motion pictures is in interstate commerce.

5. Admits the allegations of paragraph 13 of the complaint.

6. Denies the allegations of paragraph 14 of the complaint.

7. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of [fol. 55] paragraph 15 of the complaint.

8. Denies the allegations of paragraph 16 of the complaint.

9. Denies the allegations of paragraph 17 of the complaint except that it admits that the Crest Theatre has approximately 1,600 seats and fine appointments and equipment, including modern types of air conditioning and sound.

10. Denies the allegations of paragraph 18 of the complaint insofar as they relate to it except that it admits that two first run theatres in down-town Baltimore are operated by a subsidiary of Loew's Incorporated and alleges that there are more than seven first-run theatres in down-town Baltimore. This defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 18 insofar as they relate to other defendants.

11. Denies the allegations of paragraph 19 of the complaint insofar as they relate to it except that it admits that the plaintiff in October, 1948 requested Loew's Incorporated to license its feature motion pictures to the plaintiff for first-run exhibition in Baltimore at the Crest Theatre and that this defendant refused to comply with such request. This defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 19 insofar as they relate to the plaintiff or to other defendants.

12. Denies the allegations of paragraph 20 of the complaint insofar as they relate to it except that it admits that it has licensed the plaintiff to exhibit feature motion pictures in the Crest Theatre on a first suburban run in Baltimore. This defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 20 insofar as they relate to the plaintiff or to other defendants.

13. Denies the allegations of paragraph 21 of the complaint.

14. Denies the allegations of paragraph 22 of the complaint insofar as they relate to it and states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 22 insofar as they relate to other defendants.

[fol. 56] 15. Denies the allegations of paragraph 23 of the complaint except that it admits that the United States of

America instituted an action entitled "United States of America v. Paramount Pictures Inc., et al." in the United States District Court for the Southern District of New York; that this defendant and some of the other defendants herein were defendants in said action, and that certain proceedings were had in said action, but for a true statement as to such proceedings and the nature and effect thereof, this defendant refers to the original records on file respectively with the Clerks of the United States District Court for the Southern District of New York and of the United States Supreme Court.

16. Denies the allegations of paragraph 24 of the complaint.

Second Cause of Action

1. The defendant Loew's Incorporated hereby incorporates by reference the statements, denials, allegations and admissions set forth in paragraphs 1 to 16 inclusive of this answer.

2. Denies the allegations of paragraph 26 of the complaint insofar as they relate to it except that it admits that since about February, 1949 it has licensed feature motion pictures distributed by it to the plaintiff for exhibition in the Great Theatre on a first suburban run in the City of Baltimore. This defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph 26 insofar as they relate to other defendants.

3. Denies the allegations of paragraph 27 of the complaint insofar as they relate to it and states that it is without knowledge or information sufficient to form a belief as to the truth of said allegations insofar as they relate to other defendants.

4. Denies the allegations of paragraph 28 of the complaint.

C. Stanley Thompson, 1540 Broadway, New York 19, New York; J. Cookman Boyd, Jr., Davison Chemical Building, Baltimore 1, Maryland, Attorneys for Loew's Incorporated.

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Proof of service (omitted in printing).

[fol. 57] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF UNIVERSAL FILM EXCHANGES, INC.—Filed April 26, 1951

Universal Film Exchanges, Inc., by R. Dorsey Watkins, its attorney, for its answer to the complaint herein states that it:

First Cause of Action

1. Denies plaintiff has any cause of action against it by reason of the acts of Congress referred to in paragraph "1" of the complaint.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs "2", "3", "4", "5", "6", "8", "9", "10", "11", "12", "15" and "16".

3. Admits the allegations of paragraph "7" of the complaint.

4. Admits the allegations of paragraph "13" of the complaint.

5. Denies the allegations in paragraphs of the complaint numbered "14", "17", "20", "21", "22" and "24".

[fol. 58] 6. Denies the allegations contained in the second and third sentences of paragraph "18" of the complaint. Admits that there are seven theatres in downtown Baltimore which have in the past exhibited motion pictures on a first run basis but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph "18".

7. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "19" of the complaint except that it admits that plaintiff has sought to negotiate with it for licenses to exhibit Universal pictures first run Baltimore at the Crest Theatre and that this defendant has not licensed any pictures for first run exhibition at said theatre.

8. Denies each and every allegation contained in paragraph "23" of the complaint except that it admits that

the United States of America instituted an action against defendants including Universal Film Exchanges, Inc. entitled *United States of America v. Paramount Pictures, Inc., et al*, in the United States District Court for the Southern District of New York in which this defendant, among others, was charged with violations of sections 1 and 2 of the Sherman Anti-Trust Act; that said District Court entered a decree from which this defendant appealed to the United States Supreme Court; that the United States Supreme Court rendered an opinion concerning said decree and remanded the cause to said District Court for further action in conformity with its opinion; that said cause was thereupon remanded to said District Court and that on February 8, 1950 said District Court rendered a final decree in said court against this defendant. This defendant denies that [1454-59] the allegations contained in paragraph "20" of the complaint are properly pleaded and further denies that said allegations are relevant, competent or material to this cause.

Second Cause of Action

9. Answering paragraph "25" of the complaint, it repeats the answers heretofore given in answers "1" to "19" of the complaint.

10. Denies the allegations contained in paragraph "26" insofar as they relate or refer to it and lacks knowledge or information sufficient to form a belief as to the truth thereof insofar as they relate or refer to others.

11. Denies each and every allegation contained in paragraphs "27" and "28" of the complaint.

Wherefore, defendant Universal Film Exchanges, Inc., by its attorney, prays judgment, dismissing the complaint as against it and for its costs and disbursements.

R. Dorsey Watkins, Attorney for Universal Film Exchanges, Inc. Office and Post Office Address: 10 Light Street, Baltimore 2, Maryland.

Of Counsel: Piper, Watkins, Avirett & Egerton, Baltimore, Md.

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Proof of service (omitted in printing).

[fol. 30] [File endorsement omitted]

In United States District Court

[Title omitted]

Answer of Defendant United Artists Corporation—Filed April 26, 1951

Defendant, United Artists Corporation, by R. Dorsey Watkins, its attorney, answering the complaint herein, respectfully alleges:

As to the First Cause of Action

1. Defendant denies each and every allegation contained in Paragraph "1" of the complaint, except that it admits that plaintiff seeks to invoke the jurisdiction of the Court under the statutes of the United States commonly known as the Sherman Act and the Robinson-Patman Act.

2. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs "2", "3", "4", "5", "6", "7", "9", "10", "11", and "12" of the complaint.

3. Defendant admits for the most part the correctness of the allegations contained in Subdivisions 1, 2 and 3 of Paragraph "13" of the complaint, but reserves the right [fol. 31] on the trial to supplement, add to or subtract from any or all of the same.

4. Defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph "14" of the complaint, except that it admits that certain phases of said business have been held from time to time to be interstate commerce.

5. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph "15" of the complaint, except that it avers that defendant United Artists Corporation is engaged solely in the distribution of motion pictures produced by others.

6. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph "16" of the complaint.

9. Denies each and every allegation contained in Paragraph "11" of the complaint, except that it admits that the Orpheum Theatre is located in the City of Baltimore and within 3,000 seats.

8. Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph "16", and denies each and every other allegation contained in said paragraph.

9. Denies each and every allegation contained in Paragraphs "17", "20", "21" and "22" of the complaint, except that defendant admits that during the period in question plaintiff has represented the defendant United [fol. 29] Artists Corporation in licensing motion pictures for exhibition at the Orpheum Theatre on a first run, and that United Artists Corporation, during the period in question, licensed motion pictures to the plaintiff for exhibition at the Orpheum Theatre on an availability of 21 days after first run.

10. Denies each and every allegation contained in Paragraph "23" of the complaint, except that it admits that the case of United States of America, vs. Paramount, et al, has been decided and a decree entered against this defendant, and reserves the right upon the trial of this action to refer to the contents of the aforesaid decree.

11. Denies each and every allegation contained in Paragraph "24" of the complaint.

As to the Second Cause of Action

12. Defendant repeats and realleges the allegations contained in Paragraphs "1" to "11" inclusive, of this Answer, with the same force and effect as if fully again set forth herein, and further alleges:

13. Denies each and every allegation contained in Paragraph "26" of the complaint, except that it admits that during the period in question it did license motion pictures for exhibition to the Orpheum Theatre.

14. Denies each and every allegation contained in Paragraph "27" of the complaint.

15. Denies each and every allegation contained in Paragraph "28" of the complaint.

[fol. 63] Wherefore, defendant United Artists Corporation demands judgment dismissing the complaint herein, together with the costs and disbursements of this action.

R. Dorsey Watkins, Attorney for United Artists Corporation, Office and Post Office Address: 10 Light Street, Baltimore 2, Maryland.

Of Counsel: Piper, Watkins, Arnett & Ingersoll, Baltimore, Md.

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Proof of service (omitted in printing).

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[fol. 64] [File endorsement omitted]

In United States District Court

[Title omitted]

Answer of Defendants Warner Bros. Pictures Distributing Corporation, Corporation and Warner Bros. Circuit Management Corporation to the Complaint—Filed April 25, 1951.

Defendants Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation, by R. Dorsey Watkins, their attorney, for their answer to the complaint herein, respectfully show to the Court and allege that they:

As to the First Cause of Action

1. Deny that they have violated any of the acts of Congress set forth in paragraph 1 of the complaint.

2. Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs 2, 3, 4, 5, 6, 7, 8, 12 and 15 of the complaint.

3. Deny each and every allegation contained in paragraphs 9, 10 and 11 of the complaint, except admit that Warner Bros. Pictures, Inc. is a Delaware corporation engaged in the business of producing motion pictures; that

defendant Warner Bros. Pictures Distributing Corporation is a New York corporation and all of its stock is owned by Warner Bros. Pictures, Inc.; that Warner Bros. Pictures [fol. 66] Distributing Corporation is engaged in the business of distributing motion pictures and that certain phases of the distribution of motion pictures involve interstate commerce; that Warner Bros. Pictures Distributing Corporation transacts business in the Eastern District of Pennsylvania and has an office at 320 West 13th Street; that defendant Warner Bros. Circuit Management Corporation is a New York corporation and all of its stock is owned by Warner Bros. Pictures, Inc.; that it is engaged in the business of rendering various services to affiliated corporations operating motion picture theatres, such as the buying and booking of pictures; that it transacts business in the Eastern District of Pennsylvania and has an office at the Earl Theatre Building in Philadelphia.

4. Deny each and every allegation in paragraph 14 of the complaint, except admit that certain phases in the distribution of motion pictures involve interstate commerce.

5. Deny each and every allegation in paragraphs 16, 17, 21, 22 and 24 of the complaint.

6. As to the first sentence in paragraph 15 of the complaint, deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, except admit that an affiliated corporation of these defendants operates one theatre in downtown Baltimore in competition with several other theatres in downtown Baltimore. Deny the remaining allegations of paragraph 18.

7. Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations con- [fol. 66] tained in paragraph 19 of the complaint insofar as they refer to the other defendants and deny said allegations insofar as they refer to this defendant.

8. Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the complaint insofar as they relate to the other defendants and deny said allegations insofar as they refer to these answering defendants, except admit that plaintiff opened its theatre with a Warner pic-

ture on an availability of 21 days after the completion of the first run downtown exhibition and has continued to license Warner pictures on that availability.

2. Deny that the allegations of paragraph 29 are in any way relevant hereto, and deny said allegations, and respectfully refer the court to the record in *United States* v. *Paramount Pictures, Inc., et al*, United States District Court for the Southern District of New York, Equity No. 87-273, for the proceedings had therein and the various decrees entered therein.

As to the Second Cause of Action

10. Incorporate by reference herein the foregoing answers to paragraphs 1 to 29 of the complaint as their answer to paragraph 30 of the complaint.

11. Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 31 insofar as they refer to the other defendants and deny said allegations insofar as they refer to these answering defendants.

[fols. 87-88] 12. Deny each and every allegation contained in paragraphs 27 and 28 of the complaint.

Wherefore, defendants demand judgment dismissing the complaint herein together with the costs and disbursements of this action.

Warner Bros. Pictures Distributing Corporation, Warner Bros. Circuit Management Corporation, By R. Dorsey Watkins, Their Attorney. Office and Post Office Address: 10 Light Street, Baltimore 2, Maryland. Of Counsel: Piper, Watkins, Avirett & Egerton, Baltimore, Md.

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Proof of service (omitted in printing)

[fol. 332] In United States District Court

[Title omitted]

Interrogatories Propounded by Defendants to Plaintiff —Filed November 16, 1951

1. State in detail the computation by which the damages of Two Hundred Five Thousand Dollars ($205,000.00) claimed in Paragraph 24 of the complaint were derived.

2. State in detail the computation by which the damages of Fifty-Two Thousand Dollars ($52,000.00) claimed in Paragraph 28 of the complaint were derived.

E. Dorsey Watkins, Attorney for Defendants Paramount Film Distributing Corp., RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., United Artists Corporation, Warner Bros. Pictures Distributing Corporation, Warner Bros. Circuit Management Corporation, Columbia Pictures Corporation; J. Cookman Boyd, Jr., Attorney for Defendant Loew's Incorporated.

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Proof of service (omitted in printing).

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[fol. 333] [File endorsement omitted]

In United States District Court

[Title omitted]

Plaintiff's Answers to Defendants' Interrogatories— Filed December 7, 1951

The computations of the measure of damage claimed in Paragraphs 24 and 28 of the Complaint were made before the actual filing of the Complaint at a time when plaintiff did not have available to it any data concerning the grosses earned by and film rental paid by first-run theatres in the City of Baltimore and similar information concerning the

neighborhood theatres in the City of Baltimore which have been and still are competing with the Crest Theatre in the exhibition of subsequent run pictures. The theory of damage which is stated below, therefore, was arrived at on the basis of the plaintiff's own estimate of damage and while it represents a theory of damage which the plaintiff believes is clearly permissible under the rules of law enunciated by the Supreme Court of the United States and other federal courts in pertinent cases, plaintiff does not intend to bind itself exclusively to the said theory of damage but reserves for itself the right to submit other possible theories of damage to the jury in accordance with applicable principles of law. The statement which follows, consequently, is designed to answer specifically interrogatory 1 and 2 as propounded [fol. 354] by the defendants.

Answering interrogatory number 1, plaintiff's basic idea is that by being denied access to first-run pictures its Crest Theatre did not gross as much as it would have grossed if it had exhibited pictures on first-run. If the jury finds that the plaintiff is entitled to recover it would be entitled to award as a measure of damage the difference between what the Crest Theatre actually earned during the damage period and what it would have earned if it had exhibited first-run pictures.

During the period from February 26th, 1949 to February 25th, 1950 (which is just three weeks shorter than the time presently covered by the Complaint) the Crest grossed $117,638.00 on which it paid a film rental of $38,532.00. It was estimated that if it had exhibited first class pictures on first-run the Crest would have grossed, in the same period of time, approximately $8400.00 a week or $436,800.00 for 52 weeks. It was further estimated that a film rental averaging 35% or $152,880.00 would have been paid on this total gross, leaving a net gross of $283,920.00. Since the Crest actually grossed $117,638.00 on which it paid a film rental of $38,532.00 it netted $79,106.00. Subtracting this net of $79,106.00 from the net of $283,920.00, which it would have made with first-run pictures as noted above, leaves a difference of $204,814.00. This latter figure was rounded to $205,000.00 claimed in paragraph 24 of the Complaint.

This theory or computation of damage, while not the only possible theory of damage available to the plaintiff for sub-

mission to the jury, is substantiated by the following statistics. The Crest Theatre played "The Stratton Story" [fol. 355] for four days, Saturday, Sunday, Monday and Tuesday, and played the picture clear in its area. It netted at its key-run admission prices $2709.81. If this picture had been played at first-run admission prices, it would have netted $4726.55 without taking into consideration any increase whatever in the total number of patrons. This figure represents $675.00 per tenth of playing time or $6,750.00 per week. It was further estimated that there would inevitably be an increase in the total number of patrons at the Crest Theatre if it were to play first-run pictures. This increase, it was conservatively estimated, would be at least 25%. On this projection it was concluded that the Crest Theatre would be able, with a continuity of top first-run product, to earn a weekly net box office receipt of $8400.00.

Answering interrogatory number 2, the plaintiff approached the theory and computation of damage for its second cause of action on the same general basis outlined above: It is entitled to receive by way of damage the difference between what it actually earned playing pictures on a key or subsequent run basis under the discriminatory conditions alleged in the Complaint and what it would have earned if it had not been so discriminated against. The plaintiff estimated that it would have earned approximately $1,000.00 a week more than it actually did earn. Again this theory or computation of damage, while not the only one available to the plaintiff for submission to the jury, is borne out by the following statistics. The Crest Theatre played "The Stratton Story" clear in its area. This picture which was exhibited in the Crest during seven units of playing [fol. 356] time brought in net box office receipts of $2709.81 or $387.00 per tenth or $3870.00 per week. On this basis the Crest would have earned, during 52 weeks of playing top quality product clear in its area without being discriminated against by the distributors, a minimum of $201,240.00. Even if the Crest were then to pay an average film rental of 35% on such a gross it would have paid $70,434.00 film rental leaving a net of $130,806.00. This latter figure is to be contrasted with the net of $79,106.00 which the Crest actually had after paying a film rental of $38,522.00 on its actual gross of $117,628.00. The difference is thus, $51,700.00, a

figure which was again rounded to $52,000.00 claimed in paragraph 22 of the Complaint.

Theatre Enterprises, Inc., by Harry D. Myerberg.

Dated: December 6, 1951.

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Proof of service (omitted in printing).

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[fols. 357-358] *Duly sworn to by Harry D. Myerberg. Jurat omitted in printing.*

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[fol. 359] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

REQUEST FOR DIRECTED VERDICTS—Filed May 15, 1952

1. Each of the defendants separately moves the Court to direct a verdict in its favor with respect to the first count on the ground that there has been offered in this case no evidence legally sufficient to permit the plaintiff to recover against said defendants, or any of them, on said first count.

2. Each of the defendants separately moves the Court to direct a verdict in its favor with respect to the second count on the ground that there has been offered in this case no evidence legally sufficient to permit the plaintiff to recover against said defendants, or any of them, on said second count.

Dated.

William C. Coleman.

May 15, 1952.

[fol. 360] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANTS' MOTIONS FOR INSTRUCTED VERDICTS—Filed May 26, 1952

First Cause of Action

Each of the defendants separately moves for instructed verdicts in its favor on the first cause of action on the grounds that:

(a) General grounds applicable to all defendants.

1. There has been offered no evidence in this case legally sufficient to permit a recovery against the defendants, or any of them.

2. Any verdict against the defendants or any of them would be contrary to the weight of the credible evidence.

3. There is no evidence that any defendant conspired with any other defendant against the plaintiff.

4. The plaintiff is in substantial competition with downtown Baltimore first-run theatres, and the defendants are separately entitled to license their pictures for exclusive first-run exhibition in the downtown first-run theatres, with clearance of 21 days over the plaintiff.

[fol. 361] 5. Each of the defendants in licensing its pictures for exclusive first-run exhibition in Baltimore at downtown theatres exercised its right independently to select its own customers.

6. Each defendant in licensing its pictures for exclusive first-run exhibition in Baltimore at theatres located in the downtown area independently exercised its right to deal with proven satisfactory customers.

7. To the extent that the defendants acted similarly with respect to the plaintiff, they were merely solving an identical situation in a similar manner and did not act as a result of an agreement or conspiracy.

8. The plaintiff has offered no evidence of injury from the alleged conspiracy of the defendants.

9. The plaintiff has offered no competent evidence of

injury occasioned by the alleged conspiracy of the defendants.

10. The plaintiff has offered no evidence of damages from the alleged conspiracy of the defendants.

11. The plaintiff has offered no competent evidence of damages occasioned by the alleged conspiracy of the defendants.

(b) Specific grounds as to particular defendants.

1. The defendant Warner Bros. Circuit Management Corporation is not engaged in the licensing of pictures for exhibition by others.

2. There is no evidence of any request by the plaintiff to the defendant Columbia Pictures Corporation for the [fol. 362] licensing to the plaintiff within the damage period of Columbia pictures first run, either exclusive or day and date.

3. The defendant Loew's Incorporated in exhibiting pictures in the Century, Valencia and Parkway Theatres was exercising its right to license its pictures for exhibition in its own theatres in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it.

4. The defendant Warner Bros. Pictures Distributing Corporation in exhibiting pictures in the Stanley Theatre was exercising its right to license its pictures for exhibition in its own theatre in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it.

Second Cause of Action

Each of the defendants separately moves for instructed verdicts in its favor on the second cause of action on the grounds that:

1. There has been offered no evidence in this case legally sufficient to permit a recovery against the defendants, or any of them.

2. Any verdict against the defendants or any of them would be contrary to the weight of the credible evidence.

3. There is no evidence that any defendant conspired with any other defendant against the plaintiff.

4. Each of the defendants in licensing its pictures for ex-

hibition in Baltimore exercised its right independently to select its own customers.

[fol. 363] 5. The plaintiff has offered no evidence of injury from the alleged conspiracy of the defendants.

6. The plaintiff has offered no competent evidence of injury occasioned by the alleged conspiracy of the defendants.

7. The plaintiff has offered no evidence of damages from the alleged conspiracy of the defendants.

8. The plaintiff has offered no competent evidence of damages occasioned by the alleged conspiracy of the defendants.

9. There is no legally sufficient evidence of any discrimination against the plaintiff in favor of other theatres exhibiting pictures on first neighborhood run.

10. There is no legally sufficient evidence of a conspiracy among the defendants or any of them to discriminate against the plaintiff in favor of other theatres exhibiting pictures on first neighborhood run.

11. There is no legally sufficient evidence of refusal to grant the plaintiff reasonable clearance over other theatres in substantial competition with it.

12. There is no legally sufficient evidence of a conspiracy to refuse to grant the plaintiff clearance over theatres substantially in competition with it.

13. There is no legally sufficient evidence of any discrimination by any of the defendants against the plaintiff with respect to the rates charged the plaintiff for the exhibition of its pictures.

[fols. 364-365] 14. There is no legally sufficient evidence of a conspiracy by any of the defendants to discriminate against the plaintiff with respect to the rates charged the plaintiff for the exhibition of its pictures.

Motion "overruled"—26 May, 1952.

William C. Coleman, Chief Judge, U. S. District Court.

[fol. 366] [File endorsement omitted]

In United States District Court

[Title omitted]

Plaintiff's Requests for Instructions—Filed May 26, 1952

To the Honorable, the Judge of the Said Court:

And Now, to wit, this 23rd day of May, 1952, comes the plaintiff Theatre Enterprises, Inc., by its counsel and respectfully requests the learned Trial Judge to instruct the jury as follows:

1. The plaintiff Theatre Enterprises, Inc., has brought this action against the defendants Paramount Film Distributing Corp., Loew's Incorporated, RKO Radio Pictures, Inc., Twentieth Century Fox Film Corporation, Universal Film Exchanges, Inc., United Artists Corporation, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Warner Bros. Circuit Management Corporation and Columbia Pictures Corporation, under the Acts of Congress known as the Clayton Act and the Sherman Act.

Section 1 of the Sherman Act provides, among other things, that

> "Every contract, combination in the form of trust or [fol. 367] otherwise, or conspiracy, in restraint of trade or commerce among the several states, . . . is hereby declared to be illegal . . ."

Section 2 of the Sherman Act provides, among other things, that

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, . . . shall be deemed guilty of a misdemeanor . . ."

Section 5 of the Sherman Act provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-

trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

Section 1 of the Clayton Act, the second Act of Congress under which this suit is brought, insofar as here applicable, defines "anti trust laws" as including the Sherman and Clayton Acts, defines "commerce" as meaning trade or commerce among the several states, and defines "person" or "persons" as including corporations. Section 4 of the Clayton Act is the same as Section 5 of the Sherman Act and authorizes any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws to bring suit for three-fold damages.

2. The corporations which are defendants in this case are "persons" within the meaning of the Acts of Congress.

3. All three phases of the motion picture business involved in this case—production, distribution and exhibition—constitute a part of interstate commerce within the meaning of the Acts of Congress.

*William Goldman Theatres, Inc. v. Loew's Inc., et al.*, 150 F. 2d 738, 744 (C. A. 3, 1945).

[fol. 368] 4. The antitrust laws forbid monopolies and restraints of competition concerning all articles or commodities in interstate commerce but particularly motion pictures because of the public interest involved in the recreation, education and informative services which the motion picture industry furnishes.

*William Goldman Theatres, Inc. v. Loew's Inc., et al.*, 150 F. 2d. 738, 742, 744 (C. A. 3, 1945).

*Gittone v. Warner Bros. Pictures, Inc.*, 30 F. Supp. 823, 839 (D. C., E. D. Pa. 1939) reversed on other grounds in 110 F. 2d 293).

5. A conspiracy is an agreement, express or implied, between two or more persons to do an illegal act or to do a legal act in an illegal manner. It is a combination by two

or more persons to accomplish an unlawful purpose by concerted action.

6. An unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators.

*Interstate Circuit, Inc., et al. v. United States*, 306 U. S. 208, 227 (1939).

*United States v. Masonite Corporation, et al.*, 316 U. S. 265, 275 (1942).

7. There are two kinds of evidence, direct and circumstantial. Direct evidence is evidence which, if believed proves the existence of the fact in issue without any inference or presumption; while circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist. Both kinds of evidence are of equal validity and in arriving at your verdict you are to consider all of the evidence, both direct and circumstantial.

8. In this modern era of increasing subtleties it is rare indeed for a conspiracy to be proved by direct evidence and therefore circumstantial evidence may be enough for you to conclude that a conspiracy did in fact exist among these defendants and cause you to render your verdict for the [fol. 3095] plaintiff in this case.

*Interstate Circuit, Inc., et al. v. United States*, 306 U. S. 208 (1939).

*William Goldman Theatres, Inc. v. Loew's Inc., et al.*, 150 F. 2d. 738, 743 (C. A. 3, 1945).

*Milgram v. Loew's, Inc., et al.*, 192 F. 2d 579, 583, (C. A. 3, 1951) cert. denied April 21, 1952.

9. Uniform participation by competitors in a particular system of doing business, where each is aware of the others activities, the effect of which is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the antitrust laws.

*William Goldman Theatres, Inc. v. Loew's, Inc., et al.*, 150 F. 2d. 738, 745 (C. A. 3, 1945).

*Milgram v. Loew's, Inc., et al.*, 192 F. 2d. 579, 583, 584, (C. A. 3, 1951) cert. denied April 21, 1952.

10. The defendants in this case have the burden of attempting to explain away the inferences of conspiracy which the law says that you may infer from their uniform course of conduct.

*Goldman Theatres v. Loew's, Inc., et al.*, 150 F. 2d. 738 (C. A. 3, 1945).

*Milgram v. Loew's, Inc., et al.*, 192 F. 2d 579, 584 (1951) cert. denied April 21, 1952.

11. The uniformity of policy on the part of defendants in this case of first unanimously denying the plaintiff access to first-run motion pictures, even though plaintiff offered to pay high guaranteed film rental, and then unanimously granting plaintiff subsequent run pictures, is evidence which supports strongly the inference of concert of action and conspiracy on the part of the defendants.

*Milgram v. Loew's, Inc., et al.*, 192 F. 2d 579, 583, (C. A. 3, 1951) cert. denied April 21, 1952.

12. The past proclivity of these defendants to unlawful conduct violating the antitrust laws, as found by the Supreme Court of the United States in an action brought by the government, may be considered by you in reaching your decision in the present case since the conspiracy charged by the plaintiff here is identical in scope and nature to one [fol. 270] of the conspiracies, the existence of which was condemned by the Supreme Court—concerted action to fix a uniform system of runs and clearances.

*Milgram v. Loew's, Inc., et al.*, 192 F. 2d 579, 584. (C. A. 3, 1951) cert. denied April 21, 1952.

13. The words "restraint of trade" in the Sherman Act are to be construed as including "restraint of competition". The requirement of the law as established by the Congress is full, free and untrammeled competition in all branches of interstate commerce in order to secure equality of opportunity.

*United States v. Eastern States Retail Lumber Dealers' Association*, 234 U. S. 600 (1914).

*Ramsay Co. v. Bill Posters' Assn.*, 260 U. S. 501, 512 (1923).

*Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30, 43 (1930).

*United States v. Crescent Amusement Co.*, 323 U. S. 173, 187 (1944).

*William Goldman Theatres, Inc. v. Loew's, Inc., et al.*, 150 F. 2d. 738, 742 (C. A. 3, 1945).

15. In arriving at your verdict it is immaterial that the motion picture business in Baltimore, Maryland, may be a very small part of the industry as a whole. In principle, and within the intendment of the Sherman Act, the public interest is as much concerned with the improper control of the interstate market for the single city of Baltimore as for the country as a whole.

*White Bear Theatre Corp. v. State Theatre Corp.*, 129 F. 2d. 630, 635 (C. A. 8, 1942).

*United States vs. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 226 n. 59 (1940).

*William Goldman Theatres, Inc. v. Loew's, Inc., et al.*, 150 F. 2d. 738, 744 (C. A. 3, 1945).

*Dubinsky Theatre Corp. v. Belcher & Katz Corp.*, 95 F. Supp. 962, 966 (N. D. Ill., E. D., 1951).

*Milgram v. Loew's, Inc., et al.*, 192 F. 2d. 579, 585 (C. A. 3, 1951) cert. denied April 21, 1952.

16. The fact that the distributor defendants may or do own the pictures that they distribute does not relieve them from the obligation of licensing or rent their pictures in [fol. 371] such manner as will not result in a violation of the provisions of the Sherman Anti Trust Act.

*Interstate Circuit, Inc. et al. v. United States*, 306 U. S. 208, 227 (1939).

16. The defendants in this case produce and distribute more than 90% of the better or most sought after motion pictures distributed in the United States.

*Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30, 36 (1930).

*Interstate Circuit, Inc. et al. v. United States*, 306 U. S. 208, 214 (1939).

*United States v. Crescent Amusement Co.*, 323 U. S. 173, 180 (1944).

*White Rose Theatre Corp. v. State Theatre Corp.*, 129 F. 2d. 660, 663 (C. A. 3, 1942).

*William Goldman Theatres, Inc. v. Loew's et al.*, 150 F. 2d. 738, 741 (C. A. 3, 1945).

*Gitone v. Warner Bros. Pictures, Inc.*, 70 F. Supp. 923 (E. D. Pa. 1950) reversed on other grounds 110 F. 2d. 292.

*United States v. Paramount Pictures, et al.*, 66 F. Supp. 323, 334 (S. D. N. Y. 1946) affirmed in 334 U. S. 131 (1948).

17. All operators of first-run motion picture theatres in the United States are dependent upon the defendants in this case for the supply of pictures necessary to keep their theatres in operation. No such operator can reasonably be expected to survive in the competitive field of the motion picture industry unless he is given a fair opportunity to license pictures distributed by these defendants.

*White Rose Theatre Corp. v. State Theatre Corp.*, 129 F. 2d. 660, 663 (C. A. 3, 1942).

*William Goldman Theatres, Inc. v. Loew's et al.*, 150 F. 2d. 738, 741 (C. A. 3 1945).

*Gitone v. Warner Bros. Pictures, Inc.*, 70 F. Supp. 923 (E. D. Pa. 1950) reversed on other grounds 110 F. 2d. 292.

*United States v. Paramount Pictures, et al.*, 66 F. Supp. 323, 334 (S. D. N. Y. 1946) affirmed in 334 U. S. 131 (1948).

18. Under all the evidence in this case you may conclude that the plaintiff's Great Theatre has all of the necessary qualifications including size, equipment, appointments, management, location and access to potential patronage for successful use as a first-run feature motion picture theatre in the City of Baltimore.

[fol. 272] 19. The location of a motion picture theatre is only one factor to be considered along with many other factors in determining its suitability for exhibiting motion pictures on an early run, some of those other factors being its seating capacity, its age, the admission price which it charges patrons, the facilities which it provides for the

conflict and convenience of its patrons and the population base on which the theatre may draw for its patronage.

20. Under all the evidence in this case you must conclude that the plaintiff has made unilateral efforts to obtain first-run feature motion pictures from the defendants for exhibition in the Great Theatre, insofar as you consider that element of the case material.

21. In arriving at your verdict it is proper for you to consider, among all the other aspects of the case, the fact that five of the defendants own a large number of theatres located in various parts of the United States, and that all five of these defendants supply each other with a substantial number of feature pictures for use in the theatres owned or operated by each of these five defendants.

22. It would also be proper for you to consider whether or not the fact of this theatre ownership would be likely to influence the non-theatre owning defendants, in the distribution of their pictures, to unlawfully favor the theatre-owning defendants in a situation such as Baltimore where an independent seeks to enter the exhibition business.

23. In arriving at your verdict in this case it is proper for you to take into consideration the fact that the defendant Warner Bros. Circuit Management Corp. and the defendant Loew's, Incorporated both operate first-run theatres in the so-called downtown area of the City of Baltimore in which they exhibit as first-run not only their own pictures but also [fol. 373] pictures produced and distributed by other defendants. It is the plaintiff's claim that one of the real reasons for the refusal of the defendants to license their first-run pictures to the Great Theatre was the mutual desire on the part of all defendants to benefit Warner and Loew's in their first-run exhibition activities in the City of Baltimore in return for similar favored treatment for themselves in other parts of the country.

24. In this case one of the questions with which you are concerned is the question whether or not the defendants, or any of them, entered into an unlawful combination with respect to the motion picture distribution and exhibition business in the City of Baltimore or acquiesced in such practice knowing that each of the other defendants would likewise do so, but in arriving at your verdict it is proper

for you to consider the facts in evidence pertaining to the business relations of the defendants in other parts of the country, and to give effect to these facts insofar as you may believe that they tend to show that the defendants, or any of them, have between themselves an understanding, express or implied, to give to Warner Bros. Circuit Management Corp. and Loew's Inc. in Baltimore a substantially better opportunity to obtain product than the opportunity afforded the plaintiff.

*Holmes v. Goldsmith*, 147 U. S. 150, 164 (1893).
*Williamson v. United States*, 207 U. S. 425, 450 (1908).
*Morris v. United States*, 112 F. 2d. 522, 527, 528 (C. A. 5, 1940) cert. denied 311 U. S. 663.
*United States v. Vehicular Parking Ltd., et al.*, 52 F. Supp. 751, 754 (D. Del. 1943).

25. A union or combination of an exhibitor with a distributor in a program which restrains or limits the competition that may be offered by the owner of a theatre equipped to compete on first run may constitute a violation of the antitrust laws.

*United States v. Crescent Amusement Co.*, 323 U. S. 173, 185 (1944).
*William Goldman Theatres, Inc., v. Loew's Inc., et al.*, 150 F. 2d. 738, 742, 744 (C. A. 3, 1945).
[fol. 374] *Bordoneare Bros. Theatres v. Paramount Pictures*, 176 F. 2d. 594 (C. A. 2, 1949).

26. If you find from the evidence that there was a substantial unanimity of action taken by the distributor defendants in connection with the competitive situation in Baltimore, or a knowing participation or acquiescence in a plan, the necessary consequence of which, if carried out, was to restrain or impede competition, you may infer that there was an unlawful agreement in violation of the antitrust laws and return a verdict against such defendants.

*Interstate Circuit, Inc., et al. v. United States*, 306 U. S. 208, 221 (1939).
*William Goldman Theatres, Inc. v. Loew's, Inc., et al.*, 150 F. 2d. 738, 743 (C. A. 3, 1945).
*Bordoneare Bros. Theatres v. Paramount Pictures*, 176 F. 2d 594 (C. A. 2, 1949).

27. The fact that this case grows out of the demand of a single theatre owner in the City of Baltimore for access to first-run motion pictures does not mean that the case involves a local situation only so as to prevent the plaintiff recovering a verdict since the reasons for refusing the plaintiff's Crest Theatre first-run pictures is wholly directed to the position in the motion picture industry of a theatre located outside of the downtown center city area. The problem, therefore, directly concerns a matter of national policy as participated or acquiesced in by all of the defendants for application throughout the country.

*Milgram v. Loew's Inc., et al.*, 192 F. 2d. 579, (C. A. 3, 1951) cert. denied April 21, 1952.

28. The evidence in this case shows that every one of the defendants had knowledge of and was fully aware of the policies and decisions of all of the other defendants in refusing access to first-run pictures not only to the plaintiff but also to the operators of similar theatres outside the downtown area in larger cities throughout the country.

*Milgram v. Loew's Inc., et al.*, 192 F. 2d. 579, (C. A. 3, 1951) cert. denied April 21, 1952.

[fol. 375] 29. It is undisputed in this case that all the defendants uniformly denied the plaintiff first-run pictures for its Crest Theatre. The real issue to be decided by you is, therefore, whether the total denial of the first-runs in this fashion is reasonable or unreasonable.

30. The decision of the defendants in this case to deny the Crest Theatre first-run pictures was effectuated through the device of clearance whereby the Crest Theatre was required to wait a period of 21 days or longer after the first-run exhibition of the defendants' pictures had terminated before being itself able to license such pictures. The system of clearance thus imposed upon the plaintiff's Crest Theatre was uniformly adopted by all of the defendants.

31. The Supreme Court of the United States has unqualifiedly condemned as violative of the antitrust laws any system of clearances which has acquired a fixed and uniform character and which is made applicable to situations with-

out regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade.

*United States v. Paramount Pictures*, 334 U. S. 131, 146 (1948).

32. There is no substantial competition between the plaintiff's Crest Theatre and any of the first-run theatres located in the downtown area of the City of Baltimore.

33. The mere fact that some competition may exist between the Crest Theatre and the downtown first-run theatres in the City of Baltimore has no bearing upon the real issue in this case which is whether a general system of clearance, uniform in that if carried out it would deny first-run pictures to every theatre located outside of the downtown area of a city with the object of eliminating first-run competition by such type of theatre, is a lawful restraint upon commerce.

*Milgram v. Loew's Inc., et al.*, 94 F. Supp. 416, 422 (1950).

[fol. 376] 34. Progress under the competitive system comes from the constant development of new forms and methods and their entry into free competition with the old. Unless, or until, they have been demonstrated to be detrimental to the public, they should so far as possible be allowed to find their proper place in the industry, rather than have a place assigned to them by a dominant group with monopolistic power. The erection of a fence around an industry to keep out newcomers is wholly repugnant to the policy which underlies our antitrust legislation.

*Milgram v. Loew's Inc., et al.*, 94 F. Supp. 416, 421 (1950).

35. The president of the plaintiff corporation who was the active operating executive managing the Crest Theatre is an experienced and able motion picture operator and the plaintiff corporation is a financially responsible organization capable of carrying out its commitments.

36. If you find that the plaintiff has been damaged by the unlawful acts of the defendants, it would be proper for you, among other possible ways, to estimate the amount of damage by comparing the amount of actual gross business done

by plaintiff with the amount of gross business that you may conclude the plaintiff would have done but for the unlawful acts of the defendants.

37. With respect to the possible amount of your verdict, I instruct you that if you find that the plaintiff has been damaged by the unlawful acts of the defendants, the plaintiff is entitled to a verdict in an amount sufficient to fully compensate the plaintiff for loss of gross revenue which you conclude the plaintiff would have earned but for those unlawful acts.

38. If you decide that the plaintiff is entitled to a verdict it will then be your duty to estimate the amount of plaintiff's loss and you should not be deterred from making that cal- [fol. 377] culation because the plaintiff seeks to recover for the loss of unrealized profits that cannot be determined with absolute exactness. In estimating the amount of plaintiff's loss I charge you that it is sufficient if a reasonable basis of computation is given you although the result is only approximate. Such a reasonable basis has been presented to you in this case and you should therefore to the best of your ability proceed under all the evidence to estimate the amount of plaintiff's loss once you have concluded that the plaintiff has been injured by any illegal conduct on the part of the defendants or on the part of any two or more of them.

*Bigelow v. R. K. O. Radio Pictures et al.*, 327 U. S. 251, (1946);

*Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F. 2d 561 (C. A. 7, 1951) cert. denied 96 L. ed. 228.

39. In suits under our antitrust laws once the fact of damage has been found the amount of damage may be reasonably approximated. In reaching your conclusion as to the amount of the verdict I charge you members of the jury that you may act on probable and inferential proof as well as on direct and positive proof.

*Bigelow v. R. K. O. Radio Pictures, et al.*, 327 U. S. 251 (1946);

*Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F. 2d. 561 (C. A. 7, 1951) cert. denied 96 L. ed. 228.

40. Under all the evidence in this case you must return a verdict for the plaintiff in such amount as you estimate the plaintiff's loss to have been.

41. A course of conduct which suppresses competition necessarily restrains commerce and is therefore violative of the antitrust laws.

*William Goldman Theatres, Inc. v. Loew's, Inc., et al.*, 150 F. 2d. 738, 743 (C. A. 3, 1945).

42. The purpose of the antitrust laws of the United States is to secure equality of opportunity for all persons within [fol. 378] our economy. That purpose is thwarted if group power is used to eliminate or discriminate against a competitor who is equipped to compete.

*William Goldman Theatres, Inc. v. Loew's, Inc., et al.*, 150 F. 2d. 738, 743 (C. A. 3, 1945).

43. Where a person has an available theatre to exhibit first run pictures in a city the size of Baltimore, where such business annually grosses receipts in excess of a million dollars and where the public has a vital interest in the recreation, education and informative services which this art form furnishes, a course of conduct by those who distribute all the product in that business which eliminates from competition on first run the owner of an available theatre equipped to compete constitutes a violation of the antitrust laws.

*William Goldman Theatres, Inc., v. Loew's, Inc., et al.*, 150 F. 2d. 738, 743, 744 (C. A. 3, 1945).

44. If you believe in this case that the plaintiff's Crest Theatre was fairly entitled under our system to access to first run pictures, either on an exclusive or a day and date basis, then, since it is undisputed that it was denied access to first run pictures, you must return a verdict for the plaintiff against some or all of the defendants if you find that such denial was due to concerted action, joint acquiescence or conscious parallel action.

45. The showing of motion pictures is, of course, a local affair, but action by a combination of distributors whereby competition from an exhibitor is suppressed or restrained is a conspiracy in restraint of trade and a conspiracy to

monopolize a part of the trade or commerce among the states, each of which is prohibited by the antitrust laws.

*United States v. Crescent Amusement Co.*, 323 U. S. 173, 183, 184, (1944).

[fol. 379] 46. Congress has declared that the rule of trade and commerce should be competition not combination.

*United States v. Crescent Amusement Co.*, 323 U. S. 173, 187, (1944).

47. In arriving at your verdict in this case you must give consideration to the fact that some of the defendants "failed to tender the testimony, at their command, of officers or agents who knew, or were in a position to know, whether in fact an agreement had been reached among them for concerted action . . . The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable . . . ."

*Interstate Circuit, Inc., et al. v. United States*, 306 U. S. 208, 225, 226 (1939);
*Runkle v. Burnham*, 153 U. S. 216, 225 (1894);
*Kirby v. Tallmadge*, 160 U. S. 379, 383 (1896);
*Bilokumsky v. Tod*, 263 U. S. 149, 153, 154 (1923);
*Vajtauer v. Commissioner*, 273 U. S. 103, 111, 112 (1927);
*Mammoth Oil Co. v. United States*, 275 U. S. 13, 52 (1927);
*Local 167 v. United States*, 291 U. S. 293, 298 (1934);
*William Goldman Theatres, Inc. v. Loew's, Inc., et al.*, 150 F. 2d. 738, 743 (C.A. 3, 1945).

48. As respects statements made by some witnesses for the various defendants that they did not join a conspiracy or combination to restrain competition, I charge you that you may completely disregard such testimony if you find that a necessary and direct consequence of the acts of these defendants in denying first-run pictures to the Crest Theatre resulted in a restraint of competition in the exhibition of

first-run pictures in the City of Baltimore. You may disregard such testimony because persons must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary.

*Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 243 (1899);
*United States v. Ready Co.*, 226 U. S. 324, 370 (1911);
*United States v. Patten*, 226 U. S. 525, 543 (1913);
*United States v. Masonite Corp.*, 316 U. S. 265, 275 (1942).

[fol. 280] 49. In deciding whether or not to believe the testimony of the witnesses called by the defendants to explain their reasons for denying first-run pictures to the Crest Theatre, you should give consideration to the fact that the defendants made important policy decisions, concerning the right of a theatre located outside of the so-called downtown area to exhibit first-run pictures, without having made any serious attempt to test the validity of those decisions. You may conclude, therefore, that the opinions of the defendants with regard to these matters were purely conjectural.

*Milgram v. Loew's, Inc., et al.* 192 F. 2d. 579, 585, (C. A. 3, 1951) cert. denied April 21, 1952.

50. In deciding whether or not the reasons advanced by the defendants for denying first-run pictures to the Crest Theatre were the real reasons for their refusal to license such pictures, and whether or not the policies of the defendants were arrived at independently, I charge you that you may disregard as irrelevant the alleged fact that the downtown first-run theatres may have enjoyed a greater amount of "drop-in" trade or matinee patronage.

*Milgram v. Loew's, Inc., et al.*, 192 F. 2d. 579, 585, (C. A. 3, 1951) cert. denied April 21, 1952.

51. In testing the credibility and the validity to be given the so called business reasons advanced by the defendants for denying first-run pictures to the Crest Theatre you must measure those reasons against the fact that plaintiff has offered to pay a guaranteed film rental equal to or greater

than the probable total rental to be paid by downtown theatres.

*Milgram v. Loew's, Inc., et al.*, 192 F. 2d. 579, 585, (C. A. 3, 1951) cert. denied April 21, 1952.

52. I charge you that the fact that the defendants have advanced substantially the same reasons for identical, equivocal actions is of itself sufficient evidence from which you may infer guilt on their part.

*Milgram v. Loew's, Inc., et al.*, 192 F. 2d. 579, 585, (C. A. 3, 1951) cert. denied April 21, 1952.

[fol. 381] 53. I charge you that if you find that the distributor-defendants each had its first-run customer in Baltimore and during the time covered by this lawsuit made little or no effort to license its pictures on a first run to any other theatre in Baltimore, and if you find that the operators of the downtown theatres each had a fixed source of supply of first-run pictures from certain of the distributor-defendants and did not seek to license the pictures of any other distributor on a first-run, then from such circumstances you may infer that this arrangement was the result of an unlawful conspiracy to monopolize the exhibition of first-run pictures and restrain trade or commerce in the exhibition of first-run pictures in the City of Baltimore, to the exclusion of the plaintiff from the first-run exhibition field in Baltimore.

*Fifth & Walnut, Inc. v. Loew's, Inc., et al.*, 216 F. 2d 587, 592 (1949), cert. denied 338 U. S. 895 (1949).

54. An act harmless when done by one alone may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy and may be prohibited or punished if the result be hurtful to the public or to the individual against whom the concerted action is directed, and while defendants in the instant case, acting alone and in the absence of conspiracy, might refuse to license the showing of motion pictures first run in the Crest Theatre for the reasons defendants have assigned here, they cannot, when acting together in a conspiracy or by conscious parallel action to dominate the first-run exhibition

of motion pictures, explain away that conspiracy by testimony of normal processes of competition or by comparison of their theatres with that of plaintiff.

*Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F. 2d 561 (C. A. 7, 1951) cert. denied 96 L. E. 228.

[fol. 382] 55. The mere size of the business of these defendants is in itself an earmark of monopoly power, since size carries with it an opportunity for abuse. The fact that the power created by the size of these defendants has been utilized in the past to crush or prevent competition is potent evidence that an illegal purpose or intent attends the monopoly power so held by these defendants.

*United States v. Swift & Co.*, 286 U. S. 106, 116;

*United States v. Aluminum Company of America*, 148 F. 2d, 416, 430;

*United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 174 (1948).

56. I charge you that in reaching their decision to construct and operate a motion picture theatre at Baltimore, Maryland, plaintiff was entitled to rely upon the fact that it would be accorded by the defendants every opportunity which the law allows to obtain motion picture films for exhibition in that theatre.

*Charge of Court in Applebaum v. Paramount*, (D. C. W. D. S. Div. Miss. 1951).

57. While the granting of a clearance period to one theatre over another theatre is not in and of itself a violation of the Sherman Act, where the clearance granted is unreasonable in either time or extent, or where it is granted as part of an arbitrary system of clearances, or where it is granted for the purpose of suppressing competition, the granting of such a clearance becomes violation of the Sherman Act.

*Charge of Court in Applebaum v. Paramount*, (D. C. W. D. S. Div. Miss. 1951).

58. In order to establish a monopoly it is not necessary to show that defendants controlled all of the product in question, but only that they controlled a sufficient amount of

[fol. 383] it to make it difficult, if not impossible, for any person to engage in business in the territory in question, without obtaining at least some of the product which defendants control.

*Charge of Court in Applebaum v. Paramount* (D. C. W. D. S. Div. Miss. 1951).

59. Where a number of motion picture distributors engage in a consistent course of conduct directed toward a common end, it may be presumed that they do so as a result of a tacit or explicit agreement or understanding between themselves.

*Charge of Court in Applebaum v. Paramount* (D. C. W. D. S. Div. Miss. 1951)

60. The fact that he could obtain motion pictures for exhibition on subsequent runs and so operate his theatre as a subsequent run motion picture theatre does not prevent the actions of the motion picture distributors and those with whom they combine and conspire from being in violation of the Sherman Act.

*Charge of Court in Applebaum v. Paramount* (D. C. W. D., S. Div., Miss. 1951).

61. The system of preferring old customers has been used by these defendants in the past as a ready excuse for a fixed system of runs and clearances and was to that extent unlawful.

*United States v. Paramount Pictures*, 85 F. Supp. 881, 896 (1949).

[fol. 384] 62. A combination and conspiracy within the meaning of the Sherman Act may exist between a motion picture distributor and a wholly- or partially-owned subsidiary corporation engaged in the business of a motion picture exhibition.

*Charge of Court in Applebaum v. Paramount* (D. C., W. D., S. Div., Miss. 1951).

63. A motion picture distributor is not justified in preferring a customer with whom it has done business in the past to a new customer, where the new customer offers an

equal or better opportunity for the exhibition of the motion picture distributor's films in the community, and is willing to offer equal or better terms to the distributor for the exhibition of its films.

*Charge of Court in Applebaum v. Paramount* (D. C., W. D., S. Div., Miss. 1951).

64. A motion picture distributor is not justified in giving preference in the exhibition of its films to a theatre in a community which is part of a chain or circuit of theatres, over an independent theatre, where the independent theatre offers an equal or better opportunity for the exhibition of the films, and the operator of the independent motion picture theatre is willing to meet the terms asked by the motion picture distributor for the leasing of its films for exhibition in that community.

*Charge of Court in Applebaum v. Paramount* (D. C. W. D., S. Div., Miss. 1951).

65. A motion picture theatre obtains no vested right in the early-run exhibition of motion picture films by virtue of the fact that it has exhibited motion picture films on an early run in the past; but on the contrary, if a new motion picture theatre in the same community offers an equal or better opportunity for the early-run exhibition of motion [fol. 385] picture films, and the operator of such new theatre is willing to meet the terms asked by the motion picture distributor for the early-run exhibition of those films, then the motion picture distributor is under a duty to give the operator of the new motion picture theatre an opportunity to exhibit those films on an early run either on an exclusive or day and date basis.

*Charge of Court in Applebaum v. Paramount* (D. C., W. D., S. Div., Miss. 1951).

66. The licensing of motion picture films for exhibition by any method upon any run in any theatre in any manner other than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres,

or others, is an illegal practice within the meaning of the Sherman Anti-Trust Act.

*Charge of Court in Applebaum v. Paramount* (D. C., W. D., S. Div., Miss. 1951).

77. You are in no way concerned with the fact that under the law the plaintiff, if successful, will recover treble the amount of damages fixed by you. That provision of the law expresses the will of the Congress concerning the punishment that shall fall upon those who are guilty of violating the antitrust laws, but you are not to be influenced one way or the other by reason of that fact. If you find that the plaintiff is entitled to recover then you shall fix the amount of damages that it has actually suffered as a direct and proximate result of the wrongs of the defendants. You shall under no circumstances attempt to divide the amount of damages thus fixed by three because of the existence of the trebling provisions of the Act.

[fol. 386] 68. The fact that the method adopted by the defendants in licensing their motion pictures for exhibition in the City of Baltimore was calculated to bring in the greatest amount of profit to them in no way justifies the illegal concert in the means employed by them to realize that profit, as profits otherwise unobtainable are always the principal object of monopoly and conspiracy.

69. In considering the power which these defendants have exercised over the distribution and exhibition of motion pictures as a result of their vast theatre holdings I charge you that you must consider them collectively in that regard rather than independently or individually.

70. These defendants have been found by the court in the Paramount case to have brought about an actual exclusion of independents from the first run field approximating in the aggregate 70% of the first run theatres in the 92 largest cities of the country of which Baltimore, of course, is one.

71. The power possessed by these defendants to fix runs and clearances has been found by the court not only to have existed but actually to have been exercised by these defendants so as to bring about the exclusion of independents who were or wished to be competitors in the first run field.

72. Although these defendants claim the right for themselves to decide what theatre shall be accorded first run pictures or to decide what clearance should be granted a particular theatre, I charge you that in reaching your decision in this case you should bear in mind as an important point that these same defendants have been found guilty [fol. 387] of abusing their discretion in making these same decisions as a consequence of which they have been found guilty of violating the antitrust laws.

73. The history of the motion picture industry and the notorious past practices on the part of these defendants for conduct which has been violative of the antitrust laws are such that the court has hitherto recognized a strong temptation on the part of these same defendants to continue their same illegal distribution practices.

74. By reason of their theatre holdings all over the country it has been found as a fact by the court that the best customers of each of the big five defendants were ordinarily one or more of the other defendants.

75. The defendants here have all been convicted, in a suit by the government, of conspiring to fix uniform runs and clearances and of imposing unreasonable clearances.

76. The theatre owning defendants, Warner, Paramount, Fox, Loew's and R. K. O. have all been convicted of engaging in the fixing of runs and clearances in order to limit the competition which independent exhibitors could give to the theatres owned by these defendants.

77. In the same suit it was adjudicated that the clearances and runs fixed illegally by the defendants have frequently worked to the disadvantage of independent exhibitors trying to compete with theatres owned by the defendants or by large circuits or other favored exhibitors.

78. In the same suit it was adjudicated that the clearances and runs fixed illegally by the defendants frequently worked to the disadvantage of exhibitors trying to break into the field with new theatres and compete with exhibitors who were old customers of the defendants.

[fol. 388] 79. It was adjudicated in the same suit that all the defendants had failed to live up to their legal duty of licensing motion pictures solely on the basis of the merits of the theatres involved, but had instead for various rea-

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sons discriminated against some exhibitors in favor of others in the runs and clearances granted their theatres.

80. The decree in the case of United States v. Paramount, et al., which has been introduced here, constitutes prima facie evidence that the defendants were guilty of the wrongful conspiracies and conduct which have just been stated to you. This means that unless the defendants have introduced credible evidence sufficient to convince you to the contrary, you must accept as true that the defendants engaged in the conspiracies and illegal conduct as aforesaid.

81. The Court instructs the jury that if it finds that the Crest was not in substantial competition with the theatres located in the downtown area of Baltimore City and that the Crest requested an opportunity to license pictures day and date with those theatres located in the downtown area, and that the distributor or distributors refused so to do, then the jury should find a verdict for the plaintiff in the first cause of action. The jury is further instructed that it is not necessary for both theatres to be under common ownership to be entitled to play day and date; further every distributor is legally bound to license pictures only on a picture by picture basis and theatre by theatre basis which means that it is illegal to consider whether an ex-[fol. 389] hibitor operates only one theatre or more than one theatre as a condition of licensing it pictures.

Respectfully submitted, Edwin P. Rome, Gray, Anderson, Schaffer & Rome, by Edwin P. Rome, Sol C. Berenholtz, Attorneys for Plaintiff.

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[fol. 390] In United States District Court

[Title omitted]

Plaintiff's Requests for Additional Instructions—May 26, 1952

To the Honorable, the Judge of the Said Court:

And now, to wit, this 26th day of May, 1952, comes the Plaintiff Theatre Enterprises, Inc., by its counsel and

respectfully requests the learned Trial Judge to further instruct the jury as follows:

82. As to plaintiff's claim of damage arising from the treatment accorded it on its subsequent run availability, its position is that the defendants: (1) improperly caused it to play day and date with theatres a mile or a mile and a half away from the Coast, (2) improperly and discriminatorily established and maintained a unique run in Loew's Incorporated's Parkway Theatre to the exclusion of all other subsequent run theatres in the City of Baltimore including plaintiff's Crest Theatre, (3) improperly and discriminatorily dealt with the Crest Theatre in the matter of film rentals, particularly in the matter of sliding scales, and (4) improperly exercised their domination and control over the distribution and exhibition of pictures in the [fol. 391] City of Baltimore by together withholding or granting subsequent run theatres permission to open a picture on Saturday as and when the exhibitor saw fit to do so, and thereby failed to license their product on the required basis of picture by picture and theatre by theatre.

83. I charge you that the distributor defendants are under a duty to license their product picture by picture and theatre by theatre without discrimination in favor of affiliated theatres, circuit theatres or others.

84. In so licensing their pictures the distributors may not take into consideration other than the particular picture and consequently may not withhold a particular opening date because of some supposed overall effect flowing from the playing of other pictures.

85. There is evidence in this case that the distributors, with knowledge of each others conduct, acted uniformly to refuse a Saturday opening to subsequent run theatres in Baltimore and thereafter granted it in order improperly to spread preferred playing time over a number of pictures. You may conclude from this evidence that the defendants were jointly or by conscious parallel action exercising their power to dominate the distribution and exhibition of pictures in Baltimore in violation of the antitrust laws.

86. The fact that the distributors treated all subsequent run exhibitors in the same manner is no defense if you find that the distributors acted uniformly or by conscious

parallel action to exert their control over the distribution and exhibition of motion pictures.

87. There is evidence before you that the Crest Theatre would have been able to produce a larger amount of gross [fol. 392] receipts if it had been permitted to open pictures on Saturday.

88. If you believe that the Crest was in substantial competition with the Uptown, Pimlico or Avalon Theatres, or any of them, then it was improper for the distributors to compel those theatres to play day and date.

89. There is evidence before you to establish that the Crest Theatre was able to gross a much larger amount of revenue when it was not required to play day and date with the Uptown, Pimlico or Avalon Theatres, or any one of them. If you find that the distributors acted in this regard uniformly or by conscious parallel action adhered to such a program then the plaintiff is entitled to recover for the loss suffered by it.

90. I charge you that as a general principle the further a theatre is from a focal point the less competition it represents to a theatre at the focal point and the less justification there is for clearance between those theatres.

91. The mere fact that Loew's Incorporated owned the Parkway Theatre in no way entitled that theatre to a preferred or superior playing position over other comparable subsequent run theatres in Baltimore.

92. The fact that the Parkway played pictures earlier than 21 days after first run may be used by you to infer that the clearance of 21 days imposed by the distributors on the Crest and other subsequent run theatres was unreasonable.

93. The distributors have the burden of establishing the reasonableness of the clearance imposed on the Crest.

[fol. 393] 94. The plaintiff's Crest Theatre had the right to an equality of treatment from the distributors in the matter of the film rentals charged and in the granting or withholding of sliding scales. If you find that the plaintiff was not fairly treated in this regard by the uniform or conscious parallel action of the defendants it is entitled to recover for the loss thus suffered.

95. There is no requirement that you try to allocate

portions of the damage to any one of the discriminatory practices charged by plaintiff or to any one or more of the defendants. If you find that the Crest Theatre would have earned a larger gross revenue if it had not been subjected to those practices and that the defendants acted uniformly or by conscious parallel action to bring those practices about, then you should find a verdict for the plaintiff in the amount of its loss.

96. It is only natural that persons who conspire with each other would tend to cloak or mask that conspiracy with seemingly valid business reasons for their conduct. I charge you therefore that you should consider that tendency in evaluating the reasons advanced here by these defendants and if you conclude that the purported reasons for their action have not been advanced in good faith you may disregard them and may conclude that the defendants acted uniformly, by joint acquiescence or conscious parallel action with the result that trade was restrained and competition lessened in the motion picture industry.

97. Plaintiff requests the Court to instruct the jury as as matter of law

1. In the case of United States v. Paramount these defendants were found to have violated the antitrust laws by evolving or acquiescing in a fixed and uniform [fol. 394] system of runs and clearances, and the defendants were enjoined from continuing those practices.

2. By the undisputed evidence in this case the practices complained of were found to have been adhered to by these defendants before, during and after the Paramount case.

3. The said practices have had the result of excluding the plaintiff from competing in the first-run exhibition field in the City of Baltimore and thereby restraining trade.

4. Therefore your verdict must be for the plaintiff on the first cause of action in such amount as you have found the plaintiff to have suffered as a result of the aforesaid conduct of the defendants.

Respectfully submitted, Edwin P. Rome, Gray, Anderson, Schaffer & Rome, by Edwin P. Rome, Sol C. Berenholtz, Attorneys for Plaintiff.

[fol. 396] In United States District Court

Order Refusing Plaintiff's Prayers

Plaintiff's Prayers Nos. 1 to 97 refused except as to such parts thereof that may be included in the Court's charge to the Jury.

William C. Coleman.

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[fol. 396] [File endorsement omitted]

In United States District Court

Defendants' Requests for Instructions Nos. 1 to 40 Inclusive—Filed 26 May, 1952

1. Separate Causes of Action

The plaintiff has alleged two causes of action. You must consider the evidence separately as to each cause of action.

[fol. 397] 2. Separate Consideration as to Each Defendant

The mere fact that plaintiff has seen fit to join a number of parties as defendants does not mean that all or any of them are liable. Plaintiff's claim must be judged separately as to each defendant, and the position of each defendant should be judged on its own merits.

This is especially true wherever the facts, circumstances or nature of the charges made or defenses asserted differ with regard to one defendant from those regarding all or some of the remaining defendants.

Each defendant is entitled to individual consideration of the evidence as applied to it to determine whether that particular defendant participated in any combination or conspiracy. No defendant should be prejudiced in the minds of the jurors merely because it has been named by the plaintiff with others, as a defendant in this case.

You may, under the evidence, find a verdict in favor of one defendant, even though you may also under the evidence find against some or even all of the other defendants.

(Judge Leibell's charge made on June 28, 1948, in the case of *Fifth and Walnut, et al.* v. *Loew's Incorporated, et al.*)

[fol. 398] 3. Burden of Proof—First Cause of Action

The plaintiff in this case, as in every civil case, has the burden of proving the essential elements which entitle it to recover, and in this case the plaintiff, as to each of the two alleged causes of action, has the burden of establishing that a conspiracy existed among these defendants or some of them to violate the anti-trust laws and so suppress independent competition, and further, that the plaintiff was damaged by the conspiracy. Those elements the plaintiff has the burden of establishing by a fair preponderance of the credible evidence.

Before plaintiff can recover on the first cause of action it must establish:

(1) An agreement, combination or conspiracy to limit the licensing of first-run pictures to certain exhibitors, to the exclusion of plaintiff and the Crest Theatre.

(2) That as a direct and proximate result of the illegal acts the plaintiff has been injured in its business.

(3) That the damages to its business are capable of reasonable ascertainment from the evidence in the case, without speculation or conjecture.

If the evidence fails to establish to your satisfaction any one of these elements, then your verdict must be for the defendants on the first cause of action. If the evidence as to any one of these essential elements is so evenly balanced that you cannot determine upon which side the preponderance or greater weight thereof lies, then your verdict must be for the defendants on the first cause of action.

[fol. 399] 4. Burden of Proof—Second Cause of Action

Before plaintiff can recover on the second cause of action it must establish:

(1) An agreement, combination or conspiracy to restrain trade in the licensing of pictures to the Crest Theatre by discriminating against the plaintiff.

(2) That as a direct and proximate result of the illegal acts the plaintiff has been injured in its business.

(3) That the damages to its business are capable of reasonable ascertainment from the evidence in the case, without speculation or conjecture.

If the evidence fails to establish to your satisfaction any one of these elements, then your verdict must be for the defendants on the second cause of action. If the evidence as to any one of these essential elements is so evenly balanced that you cannot determine upon which side the preponderance or greater weight thereof lies, then your verdict must be for the defendants on the second cause of action.

[fol. 400] 5. If Independent Action, Harm Immaterial

If from all the evidence, you believe that the defendants acted independently and without any illegal concerted action, then whatever harm may have been visited on plaintiff is merely one of the hazards implicit in our competitive system and your verdict must be for the defendants.

(Chovak v. RKO, et al. (C. C. A. 9th, decided April 24, 1952.)

[fol. 401] 6. Definition of Conspiracy

You are advised that a conspiracy is an agreement, express or implied, between two or more persons to do an illegal act or to do a legal act in an illegal manner. It is a combination by two or more persons to accomplish an unlawful purpose by concerted action. The essence of conspiracy is the unlawful combination, association or agreement. In order to establish the existence of a conspiracy, the plaintiff must show by preponderance or greater weight of the evidence that the minds of the defendants, united in a common unlawful agreement or design.

[fol. 402] 7. Mere Conjecture Is Not Proof of Conspiracy

Proof of conspiracy requires more than mere suspicion and conjecture. There must be either direct proof of conspiracy, or circumstantial evidence sufficiently strong as to give rise to an inference of conspiracy. The burden of proof is upon the plaintiff. If there was no common purpose and no uniformity of conduct between any defendant and the other defendants, the jury may consider those facts in determining whether that defendant entered into any combination or conspiracy with any of the defendants.

(From Judge Leibell's charge made on June 29, 1948 in *Fifth and Walnut, et al. v. Loew's Incorporated, et al.*)

[fol. 403] 8. Character of Proof Required

You should not reach any conclusion on any issue in this case unless your conclusion is based upon substantial evidence and the inferences reasonably to be drawn therefrom. Speculation or conjecture will not do. It is not enough if there has been created in your mind some doubt or suspicion as to the conduct of the defendants. The plaintiff must have adduced proof of such a nature as carries conviction to your mind, such as would influence you in the conduct of your own business or daily affairs. The character of the proof must be such as you would be willing to act upon and base a judgment on, in the disposal of your own important personal affairs.

(Judge Leibel's charge made of June 28, 1948, in the case of *Fifth and Walnut, et al.* v. *Loew's Incorporated, et al.*)

[fol. 404] 9. Guilt or Innocence—Equal Inferences

Before a fact sought to be established by the plaintiff, such as the alleged conspiracy, can be said to have been proved by circumstantial evidence alone, it is necessary not only that the circumstances proved by the evidence shall reasonably give rise to an inference of such fact, but also that no other equally reasonable inference to the contrary can be drawn from the same circumstances. If two reasonable inferences can be drawn from circumstances proved by the evidence, one consistent with the fact sought to be proved, such as the alleged conspiracy, and the other inconsistent therewith, you should not infer the fact sought to be proved from such circumstances alone.

(Judge Leibell's charge made on June 28, 1948 in the case of *Fifth and Walnut, et al.* v. *Loew's Incorporated, et al.*)

[fol. 405] 10. *No Motive for Conspiracy—Business Interests*

If you find from the evidence that the defendants had no motive for the alleged conspiracy and if you also find from the evidence that each of the defendants individually acted in accord with what it believed to be its best business interest, then you should find for the defendants.

[fol. 406] 11. *No Conspiracy if Defendants Acted for Business Reasons*

If you conclude from the evidence that each of the defendants refused to license feature films either exclusively, or day and date with downtown Baltimore, in the plaintiff's Crest Theatre because of what appeared to each of them to be sound business reasons, then you cannot infer a conspiracy because of such refusal even though you may find that the plaintiff suffered a financial loss by reason of its inability to license such product, and your verdict must be for the defendants.

[fol. 407] 12. *Positive Denials Overcome Inferences From Similarity*

Inference from similarity loses its importance when met by positive denials of such action. In the realm of commerce, similarity of action, at times, may be the result not of previous agreements, but of solving an identical situation in a similar manner.

*Fanchon & Marco v. Paramount Pictures, Inc., et al.* 100 F. Supp. 84.

[fol. 408] 13. *Similarity Under Like Circumstances No Conspiracy*

The fact that each of the defendants refused to license its pictures for first-run exhibition at the Crest Theatre is not evidence of any concert of action in violation of the anti-trust laws. Uniform action is not concert of action. Similarity of action under substantially like circumstances affecting each defendant is not proof of conspiracy.

*Westway v. Fox, et al.*, 30 F. S. 833;

*Windsor v. Walbrook*, 94 F. Supp. 388; aff. 189 F. 2d 797;

*Chorak v. RKO, et al.*, CA 9th April 24, 1952.

[fol. 409] 14. *Similarity Immaterial Where Similar Problem Presented*

The similarity of the business practices of certain defendants does not necessarily lead to the conclusion that they were in a conspiracy. If the jury finds that such simi-

larity results from nothing more than common business solutions to identical problems in competitive industry, the similarity of conduct would not require the conclusion that a conspiracy existed.

(Judge Leibell's charge made on June 28, 1948, in the case of *Fifth and Walnut, et al.*, v. *Loew's Incorporated, et al.*)

[fol. 410] 15. *Similarity Immaterial If Action Independent*

If you find from the evidence that there was any similar or identical action on the part of any two or more defendant distributors, but you conclude that what each did was the result of each having acted independently of any of the others, then you would not be justified in finding that such similar action was evidence of any agreement, combination, or conspiracy of the defendants in violation of the anti-trust laws.

(Judge Leibell's charge made on June 28, 1948, in the case of *Fifth and Walnut, et al.* v. *Loew's Incorporated, et al.*)

[fol. 411] 16. *21-day Clearance Not Evidence of Conspiracy*

The fact that each distributor granted 21 days clearance to the first-run exhibitor over the next succeeding run is not evidence of any conspiracy among the defendants. The evidence shows that if plaintiff were licensed to exhibit pictures on first run it wanted 21 days clearance over competing exhibitors. The 21 days clearance flowed from the staggered run and it was not the result of uniformity of action.

*Fanchon & Marco v. Paramount Pictures, Inc., et al.*, 100 F. Supp. 84.

[fol. 412] 17. *Instruction No. 13*

In considering evidence of a conspiracy it should be kept in mind that there are a limited number of pictures available for exhibition so that what an exhibitor gets for a given run is necessarily not available to his competitor. A distributor is, therefore, by the very act of distributing pictures, favoring some exhibitors at the expense of others. At best an inference of conspiracy would only arise if it appeared more to the interest of the distributors involved

to adopt a different pattern of distribution than the one actually employed. There is nothing illegal in the mere fact that plaintiff could not get pictures for the run it wanted. (Authority: *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*, 190 F. 2nd, 951, 958.)

[fol. 413] 18. *Right of Copyright Holder to License*

It is an undisputed fact that the motion picture feature films involved in this case were all copyrighted. The holder of a copyright under the laws of the United States acquires the exclusive right to reproduce or exhibit the copyrighted picture.

The holder of a copyright of a motion picture may exercise his exclusive right to reproduce or exhibit the picture himself or he may authorize others to do so pursuant to a license upon such lawful terms or conditions as he may prescribe. It was therefore lawful and proper for each defendant distributor, in the distribution of its copyrighted motion picture feature films, and in licensing the exhibition thereof, to fix the place of exhibition of such films and the time thereof and to include such other terms and conditions in such license as might appear to it desirable.

The license agreements between the distributors and the theatres each licensed first run in Baltimore are in themselves legal. They do not constitute an unreasonable restraint of trade and are not proof of the conspiracy here charged. To establish an unreasonable restraint of trade, the plaintiff must show that these license agreements were made pursuant to a conspiracy in which each of the distributors gave up its right to license whom it pleased and agreed with each other that it would license its pictures only in the manner that it did and that it would license no others.

*Westway v. Fox, et al.*, 30 F. Supp. 836; affirmed without further opinion.

[fol. 414] 19. *Reasonable Clearance Necessary and Lawful*

Each of the defendants has the right to license its pictures by licensing successive runs thereof and to grant reasonable clearance as between each of the successive runs. Clearance

is granted to protect the licensee in the run granted and reasonable clearance is not a violation of the anti-trust laws. As a practical matter the motion picture industry could not operate under a system of simultaneous releases and this fact underlies the doctrine that clearances and runs are not illegal per se.

*Chorak v. RKO, et al.*, CA 9th April 24, 1952;
*Westway v. Fox*, 30 F. Supp. 836.

[fol. 415] 20. *Granting or Refusing Clearance*

Each distributor acting individually has the right to grant or to withhold clearance between theatres which are in substantial competition.

[fol. 416] 21. *Clearance—Manner of Licensing*

In considering whether the defendants acted independently in granting or withholding clearance in licensing their pictures for exhibition at the Crest Theatre and in its competitive area, you should consider the manner in which each company licensed its pictures. If you find from the evidence that there is no direct proof of any conspiracy and if you also find that the defendants did not license in the same manner, you should find for the defendants on this issue.

[fol. 417] 22. No Legal Right to Demand Prior Runs

No theatre has the right, as a matter of law, to demand from a motion picture producer the right of prior runs. (Authority: In *Paramount Picture Theatre Corp. v. Partmar Corp.* U. S. D. Ct. Cal. 97 F. Supp. 552, Judge Westover said at 559: "During the past few years there seems to have developed within the motion picture exhibitors' industry the idea that any theatre had the right to demand prior runs. As a result, when prior runs have not been made available, they have applied to the courts for enforcement of that so-called right.

"We are not of the opinion that any theatre has the right, as a matter of law, to demand from a motion picture producer the right of prior runs, any more than the seller of automobiles has the right to demand of the manufacturer an agency within a restricted territory.")

An exhibitor, and that includes plaintiff, does not have the right to compel a motion picture distributor to give him a preferred run—this because as a very practical matter the motion picture industry could not operate under a system of simultaneous releases. (Authority: *Chorak v. RKO Radio Pictures, Inc., et al.*, U. S. Ct. of Appeals for the 9th Circuit, decided April 24, 1952.)

[fol. 418] 23. Right to Select Customers

It is the right of each distributor acting independently to select its customers. Therefore, the plaintiff has no absolute right to demand exhibition rights for first run of any of the pictures of any of the defendants.

(*Westway v. Fox et al.* 30 F. S. 836-7; *Fanchon & Marco v. Para. Pictures Inc., et al.* 100 F. Supp. 84)

Plaintiff has no absolute right to obtain a license to exhibit any motion picture distributed by any defendant on first run in the City of Baltimore.

[fol. 419] 24. Selection of Customers

If you find from the evidence that each of the defendants in licensing its pictures for first run exhibition in Baltimore endeavored to select that customer which would ultimately yield it the greatest revenue having due regard for its past business relations with the customer, the skill and character of management of the theatre, the size, location, equipment and drawing power of the theatre, then you should find for the defendants on the first cause of action.

(Finding of fact No. 15 made by Judge Chesnut in *Westway v. Fox et al.*, 30 F. Supp. 833.)

[fol. 420] 25. Downtown First Run—Business Interest

If you find from the evidence that the first run exhibition of a motion picture in the downtown business area of Baltimore has great importance in establishing a public demand to see the picture; and if you further find from the evidence that the first run exhibition of a motion picture in the downtown business area of Baltimore is generally accompanied by wide-spread publicity; and if you further find from the

evidence that the exclusive first run exhibition of a picture in a neighborhood theatre in Baltimore would not serve to exploit the picture as successfully as a first run exhibition in a downtown theatre, then you should find that each distributor acted in its best business interest in refusing to license its pictures for exclusive first run exhibition at the Crest Theatre.

[fol. 421] 26. Loew's—Right to License Exclusively Own Theatres

Loew's Incorproated had a stock interest in the corporation operating the Century, Valencia and Parkway Theatres. During all of the time in controversy Loew's Incorporated had a right, as a distributor, to prefer its own theatres as a customer in licensing its own pictures. The fact that Loew's Incorporated did license its pictures for first run exhibition in its own theatres rather than for first run exhibition in the Crest Theatre is not evidence of any conspiracy or any illegal action by Loew's Incorporated.

You are further advised that Loew's Incorporated had the right to license its pictures in its own Parkway Theatre 14 days after first run downtown, and ahead of other theatres, and its action in so doing is not evidence of any conspiracy or any illegal action by Lowe's Incorporated.

*Dipson Theatre v. Buffalo Theatre*, 190 F. 2d 951 (CA 2, 1951).

[fol. 422] 26a. Discrimination—Parkway

The evidence shows that Paramount, Warner, Fox, RKO, Columbia and Universal did not license any picture for exhibition at the Parkway Theatre during the period involved in this law suit. Therefore, you must find that these defendants did not grant clearance to theatres not in substantial competition with the Crest Theatre.

The evidence shows that only two United Artists pictures were exhibited at the Crest Theatre after their exhibition at the Parkway Theatre. The plaintiff's president testified that the exhibition of "The Stratton Story" at the Parkway Theatre ahead of the Crest Theatre did not damage the plaintiff. Therefore, I instruct you that plaintiff has failed

to sustain its burden of proof as to its claim that clearance was granted to theatres not in substantial competition with the Crest Theatre.

[fol. 423] 27. Warner Bros.—Right to License Exclusively Own Theatre

Warner Bros. Circuit Management Corp. owns and operates the Stanley Theatre. Its affiliate Warner Bros. Pictures Distributing Corp. during all of the time in controversy had the right to prefer its own theatres as a customer in licensing its own pictures for exhibition in the Stanley Theatre. The fact that Warner did license its pictures for first run exhibition in its own Stanley Theatre rather than for first run exhibition in the Crest Theatre is not evidence of any conspiracy or any illegal action by Warner Bros. Pictures Distributing Corp.

*Dipson Theatre v. Buffalo Theatre*, 190 F. 2d 951.

[fol. 424] 28. Columbia and Universal—Nature of Business

The defendants Columbia and Universal are engaged in the business of producing and distributing motion pictures. These defendants do not engage in the business of exhibiting motion pictures.

[fol. 425] 29. Paramount and RKO—Nature of Business

The defendants Paramount and RKO are engaged in the business of producing and distributing motion pictures. Since about December, 1949, Paramount has not been engaged in the business of exhibiting motion pictures and since about December, 1950, RKO has not been engaged in that business.

[fol. 426] 30. United Artists Corporation—Nature of Business

The defendant United Artists Corporation is engaged only in the business of distributing motion pictures produced by other persons. It does not engage in the business of exhibiting motion pictures.

[fol. 427] 31. Individual Refusal to License—No Public Prejudice

There is no prejudice to the public interest in each of the defendants individually refusing to license its pictures for first run exhibition at the Crest Theatre.

*Westway v. Fox et al.*, 30 F. Supp. 833.

[fol. 428] 32. Refusal to License

The plaintiff urges in support of the charge of a conspiracy that as a result of concerted action the defendants refused to sell the plaintiff first-run pictures. If any defendant so refused pursuant to its own business judgment and if such defendant was acting independently and not in a combination or conspiracy, the defendant was within its rights in so refusing.

(Judge Leibell's charge made on June 28, 1948, in the case of *Fifth and Walnut, et al. v. Loew's Incorporated, et al.*).

[fol. 429] 33. Long Established Customer—Natural to Prefer

The preference of one exhibitor over another is not, of itself, a combination in restraint of trade. It is quite natural that each of the defendant distributors would not be prone to substitute an unknown customer for a proven one.

*Windsor v. Walbrook*, 189 F. 2d, 798-9.

[fol. 430] 34. Competition Between Crest and Downtown Theatres

If you find from the evidence that the Crest Theatre is in substantial competition with the theatres located in downtown Baltimore, then the defendants are entitled to grant clearance to the downtown theatres over the Crest Theatre. In determining whether the Crest Theatre is in substantial competition with the theatres located in downtown Baltimore, you must consider whether the downtown first run theatres draw a portion of their patronage from the area from which the Crest Theatre draws its patronage. If you find that 10% to 15% of the patrons of the first run downtown theatres are drawn from the area from which the Crest

Theatre claims to draw, you are instructed that the Crest Theatre and the downtown theatres are in substantial competition.

[fol. 431] 35. Day and date—Business Reasons

If you find from the evidence that it is not practical from a business standpoint for two theatres not owned or controlled by the same person to exhibit a particular picture on a day and date (by which is meant the exhibition of the same pictures at two or more theatres, opening on the same day and closing on the same day) first run basis; and if you further find from the evidence that the defendants acting independently refused to license the Crest Theatre to play first run day and date because of the practical business difficulties, then you should find that the action of each defendant in refusing to license plaintiff to exhibit its pictures on this run was reasonable and proper.

[fol. 432] 36. Plaintiff's offers—Considerations as to

If you find from the evidence that the plaintiff was not acting in good faith in submitting offers for the right to exhibit pictures on first run at the Crest Theatre, then the rejection of such offers is no evidence of illegal conduct by the defendants to whom such offers were made. In determining whether plaintiff was acting in good faith in submitting these offers, you should consider the financial condition of the plaintiff, gross receipts of the Crest Theatre on other pictures, and the ability of the plaintiff to pay the film rental offered.

[fol. 433] 37. False Testimony

If you believe that any witness has testified falsely as to material matter, then you are at liberty to disregard the testimony of such witness entirely.

[fol. 434] 38. Contradictory Statements—Effect

If you find from the evidence that plaintiff in the fall of 1948 was seeking either an exclusive first run or a first run day and date with downtown Baltimore; and if you further find from the evidence that plaintiff's president first testi-

fied on deposition that plaintiff sought either an exclusive first run or a first run day and date with downtown Baltimore; and if you further find from the evidence that plaintiff's president then testified on deposition that plaintiff never sought an exclusive first run; then you may disregard all or any portion of the testimony of plaintiff's president.

[fol. 435] 39. Measure of damages

Even if you should find from the evidence that the defendants combined and conspired to restrain trade and if you also find that the plaintiff was injured in its business as the direct and proximate result of such illegal acts, nevertheless, the plaintiff's right to recover is limited to actual damages, that is, damages that have been sustained in the damage period, the amount of which can be determined with reasonable certainty from the evidence. It is not entitled to damages which are merely speculative, remote or uncertain.

[fol. 436] 40. Jury not to treble damages

Further, the amount of your verdict, if any, should be limited to plaintiff's actual damage; that is, it should be based on the extent to which plaintiff's business has been damaged. You do not first find the amount of the actual damage and then treble it and then report the trebled amount as your verdict. That would be wrong because the jury's verdict in a suit of this kind is trebled by the Court as a matter of law. If the jury were to do the trebling and then the Court trebled the jury's verdict the amount of the judgment would be nine times plaintiff's actual damage, although the statute provides that it shall be three times the actual damage.

(Judge Leibell's charge made on June 28, 1948 in the case of *Fifth and Walnut, et al. v. Loew's Incorporated, et al.*)

[fol. 437] IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUEST FOR INSTRUCTION NO. 41 AND ORDER REFUSING CLEARANCE GENERALLY—Filed May 27, 1952

A grant of clearance, when not accompanied by a fixing of minimum admission prices or not unduly extended as to area or duration, affords a fair protection of the interest of the licensee in the run granted without unreasonably interfering with the interest of the public. Clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures. The practice is of proved utility in the motion picture industry and necessary for the reasonable conduct of the business.

Without regard to period of clearance, licensing features for exhibition on different successive dates is essential in the distribution of feature motion pictures, and either a license for successive dates or one providing for clearance permits the public to see the pictures in later exhibiting theatres at lower admission prices, so that each class of the public may have the opportunity to see each motion picture at progressively reduced admission prices, as above stated.

The cost of each black and white print of each motion picture varies from $150 to $300, depending upon the length of the picture, while the cost of a technicolor print varies from $600 to $1,200, depending on length. Many of the bookings in the lower admission theatres are for less than the cost of the print; so that exhibits would be confined to the higher admission price theatres unless a method of successive runs with reasonable clearance for the protection of the earlier runs is used in the industry.

Defendants' prayer refused except as to such parts thereof that may be included in the court's charge to the jury.

William C. Coleman.

[File endorsement omitted.]

[fol. 438] IN UNITED STATES DISTRICT COURT

ORDER REFUSING DEFENDANT'S PRAYERS

Defendants' prayers Nos. 1 to 40 refused except as to such parts thereof that may be included in the court's charge to the jury.

William C. Coleman.

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[fols. 439-443] IN UNITED STATES DISTRICT COURT

[Title omitted]

DOCKET ENTRY

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[fols. 444-449] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed June 25, 1952

Mr. Charles M. Janne, Clerk:

Please enter an Appeal on behalf of the Plaintiff to the United States Circuit Court of Appeals for the Fourth Circuit from the verdict and judgment rendered and entered in this case on May 28th, 1952.

Sol C. Berenholtz, Attorney for Plaintiff, 1209 Court Square Building.

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Certificate of Service (omitted in printing).

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[File endorsement omitted.]

[fol. 450] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6512

THEATRE ENTERPRISES, INC., Appellant,

versus

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., ET AL., Appellees

Appeal from the United States District Court for the District of Maryland, at Baltimore. Civil.

OPINION—Filed January 5, 1953

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges.

Edwin P. Rome (Sol C. Berenholtz, and Gray, Anderson, Schaffer & Rome on brief) for Appellant, and J. Cookman Boyd, Jr., and R. Dorsey Watkins (Edward C. Raftery and E. Compton Timberlake on brief) for Appellees.

[fol. 451] SOPER, Circuit Judge:

This action was brought under the anti-trust laws * by Theatre Enterprises, Inc., a Maryland corporation, against the eight largest motion picture producing and distributing companies in the United States. The plaintiff sought injunctive relief as well as monetary damages for loss suffered as a result of the defendants' refusal to supply first-run motion pictures to the plaintiff's theater in the City of Baltimore pursuant to an alleged conspiracy during the period from February, 1949 to March, 1950. The suit was originally instituted in the District Court for the Eastern District of Pennsylvania but on motion of the defendants, under § 1404(a) of the Judicial Code, the case was transferred to the District of Maryland. The case came on for trial before a jury in the latter District and resulted in a verdict for all of the defendants; and the plaintiff appealed contending that the trial judge erred in denying

* 15 U. S. C. A. §§ 1, 2, 13, 15 and 16.

plaintiff's motion for a directed verdict in its favor and in giving certain instructions to the jury.

At the conclusion of all of the evidence the plaintiff prayed the court to instruct the jury that they must return a verdict for the plaintiff in such an amount as they estimated the plaintiff's loss to have been. In other words, the court was asked to instruct the jury that the plaintiff had proved its case against the defendants and that the only question for their decision was the amount of the damages which the plaintiff had suffered. In order to pass on the refusal of this instruction the evidence submitted to the court must be summarized. The task is the easier because the facts presented by Harry D. Myerberg, the president of the plaintiff corporation and its only witness, and by the [fol. 452] witnesses for the defendants are largely undisputed, and the decision turns on the question whether the only reasonable inference from the facts is that the defendants, in violation of the law, conspired to deny the plaintiff the rights to which it was entitled in the operation of its business.

The testimony on behalf of the plaintiff was to the following effect: For many years the showing in Baltimore of first-run motion pictures produced by the defendant companies had been confined to eight theaters located in the downtown section of Baltimore as follows: The Century and the Valencia, with seating capacity of 3,000 and 1600-1800 respectively, are both owned by Loew's. They have exhibited all of Loew's product, half of Universal's and some of United Artists'. The Stanley, seating 3,200 is owned by Warner's Circuit Management Corporation and exhibits all of Warner's films and one-half of Paramount's. In the 1920's Warner exhibited first-run exclusively at the Metropolitan, two and a half miles from downtown. Keith's, an independent, has played half of Universal's output, half of Paramount's and "whatever else is available." Seating capacity is 2200-2400. The New, seating 1300, is another independent and exhibits Fox films exclusively. The Hippodrome, seating 1800-2000, was also independently owned and exhibited RKO and Columbia films. The Town was opened in 1949 by the owner of the Hippodrome and split RKO and Columbia films with the Hippodrome. The Mayfair, independent, seating 1800, is situated next to the Stan-

ley, but unable to obtain a continuous flow of films from defendent companies, getting "slough" and films of the smaller companies.

The Crest Theatre was built at a cost of $460,000 by Theatre Enterprises, Inc., a corporation whose entire stock is owned by Myerberg and his brothers. It was completed in February, 1949. It is equipped with the most modern [fol. 453] improvements and with 1600 seats, and is physically suitable to play first-run pictures, and if located downtown, probably would have been acceptable for the preferred showings. It is situated in a shopping center at Reisterstown Road and Rogers Avenue, six miles from the nearest downtown theater, in the midst of a population center estimated at about 105,000 people.

In January, 1948, before construction of the Crest had begun, Myerberg applied for exclusive first-run privileges at the offices of the defendant distributors in Washington, D. C. He was told by all of them that no consideration could be given to his request until the theatre was near completion. When the theatre was under roof in October, 1948, Myerberg renewed his request and was told that the matter had to be decided by the New York home offices of defendants, and that he should set forth his requests by letter, which would then be referred to New York for decision. He wrote substantially identical letters requesting first-run to each defendant, except perhaps Columbia, which was approached subsequently.

Warner and Loew's advised Myerberg that each of them operated a first-run house in Baltimore, and that he should not anticipate receiving their product. The branch managers of all of the companies expressed surprise that Myerberg sought first-run outside the downtown area, contrary to the general practice of the industry. Myerberg engaged in further correspondence with defendants from October, 1948 until the theatre opened on February 26, 1949, and was "stalled" by one company and two others did not reply. He was able to see top officials of only three of defendants, and all of his efforts resulted in rejection of his request for first-run.

During the negotiations plaintiff made specific offers to various defendants for particular first-runs, and in all but [fol. 454] one case the offer included a substantial guar-

antee of film rental and a percentage of the gross receipts, and plaintiff offered to post certified checks. None of the offers was accepted and in some instances plaintiff received no reply.

Plaintiff persisted in its efforts to induce defendants to grant it first-run after the Crest opened, and when this proved fruitless, plaintiff engaged present counsel who entered into six more months' futile correspondence and then brought this suit.

Plaintiff at first urged that it was not in substantial competition with the downtown theaters, and therefore was willing to take first-run on a day and date basis, that is, simultaneous showing with downtown and other non-competing suburban houses. Defendants contended that the Crest was in substantial competition with the downtown theaters, and plaintiff therefore expressed willingness to bid competitively for exclusive first-runs. Plaintiff denied claiming any superior rights over other comparable neighborhood theaters sufficiently far from downtown Baltimore and from each other as not to be in substantial competition with either downtown or each other, and was willing to play with them first-run day and date. Plaintiff pointed to the Northwood, Boulevard, Senator and Edmondson Village as theaters entering into such a scheme.

Defendants uniformly denied plaintiff first-run and uniformly granted it first-subsequent-run. They each gave the same basic reasons for their action, principally that each had a policy which limited showing of first-run films throughout the country to theaters in the downtown areas of large cities, and theaters outside those sections were therefore precluded from the preferred run.

Defendants' executives testified that the movie business has developed in such a manner as the result of heavier [fol. 455] downtown traffic and more numerous downtown attractions to draw greater crowds, particularly for matinees. The defendants were primarily interested in obtaining the largest revenue possible from the exhibition of their pictures, and they said that downtown showings have greater exploitation and advertising value and that the downtown theaters may be properly called "show-case" theaters. In addition downtown theaters have been satisfactory customers of long standing.

Defendants further claimed that if they gave first-run to the Crest, they would lose their downtown customers as well as other subsequent-run customers. They declared that the Crest could not be successful with first-run and that they would not experiment with it. They further stated that the Crest could not be preferred to other similar neighborhood houses and if they should all be granted multiple first-runs the downtown theaters would be eliminated.

The unsuccessful efforts of the plaintiff to secure first-run pictures for its theater and the testimony of the defendants' witnesses indicate clearly in the plaintiff's opinion the existence of a nationwide policy, to which each defendant company adheres, that first-run pictures should be shown only in theaters in downtown sections of cities. Thereby the pictures are exploited and later they are made available to all sections of the city and all classes of people by the reduction of admission prices at later showings.

In six instances set out in the testimony exceptions to this policy have been allowed. Thus in Washington, D. C., and in Wichita, Kansas, an exhibitor which had been giving a first-run privilege to its own theater remote from the center of the city thereafter granted a similar privilege to an independant theater to avoid the charge of discrimination; and in Kansas City, Denver, Boston and Los Angeles exceptions have been made by exhibitors to their own theaters [fol. 456] distant from the center of the city. These exceptions have not been attended by the disastrous result envisaged by those who established the general policy.

Loew's, Warner, Paramount, RKO and Fox, sometimes referred to as the "big five", owned hundreds of theaters in the United States. Many exhibited first-run, almost all of them downtown. All of the defendants exhibited their films in theaters owned by the five theater-owning defendants, and there was cross-licensing among them. Defendants produce most of the desirable films in the United States.

In addition to the more general "business reasons," Warner opposed the Crest's request because it would destroy Warner's Stanley and all other downtown houses, and would mean the elimination of downtown theaters, of which Warner owned many among its 400 odd houses throughout

the country. Loew's likewise opposed the Crest because it would compete with the Century and the resulting spread of neighborhood first-run would curtail revenue from the exhibition of its pictures in downtown first-run houses operated by Fox, Warner, RKO and Paramount in other parts of the country.

Each defendant was aware of the downtown policy of the others and of the theater ownership of the "big five" mostly downtown, and of the system of cross-licensing. Paramount's representive knew that the other companies were going to sell the Crest Theater on a 21 day availability before that house opened. Fox's manager found that no downtown theater in Baltimore was willing to play first-run day and date with the Crest Theatre and decided to do what everyone else was doing. There has been frequent interchange of top sales and distribution personnel among the various defendants.

The effect of the defendants' policy has prevented the [fol. 457] plaintiff from competing in the first-run portion of the movie industry.

In accordance with § 5 of the Clayton Act, 15 U. S. C. A. § 16, the plaintiff, in addition to the testimony above set out, offered in evidence the pertinent portions of certain decrees issued by the court against the same defendants in *United States* v. *Paramount Pictures*, 334 U. S. 131,* in order to show that the defendants, prior to the opening of the Crest Theatre, had conspired with one another in restraint of trade in the moving picture industry in violation of the statutes on which the instant suit is based.

The defendants offered 19 witnesses whose testimony may be summarized as follows: It was explained that "run and clearance" are a well established and essential part of the distribution and exhibition of motion pictures. Indeed Myerberg himself stated during his testimony that "runs and clearances, basically, are all right." Each of the defendant distributors licenses each of its pictures for exclusive first-run in a theater in the downtown shopping area in Baltimore and normally the first-run exhibitor is given a

* See also D. C. N. Y., 66 F. Supp. 323, 70 F. Supp. 53, 85 F. Supp. 881.

clearance of 21 days over the next succeeding run called the "first-neighborhood-run." No such first-run was shown ever to have occurred in Baltimore. During the three years preceding the institution of the suit, 63 per cent of the first-run exhibitions in Baltimore were held in independent theaters. Myerberg agreed that there was no showing that any of the defendants conspired with the independent downtown exhibitors or with any of the neighborhood exhibitors.

The Crest Theatre is located in the northwest quadrant of Baltimore within a mile of two other neighborhood theaters one of which is comparable to the Crest in all material [fol. 458] respects except size; and there are numerous other theaters in the city which are equal or superior to the Crest in appointments and size, many of which are better located than the Crest in respect to public transportation services. Expert testimony placed shopping centers in three classifications, namely, primary centers which have 60 to 150 different stores with one large and several smaller department stores with a drawing power of 50 miles, such as the down-town retail business area in Baltimore; secondly, centers with 20 to 50 stores and at least one department store, of which there are half a dozen in Baltimore, and thirdly, neighborhood shopping centers with not more than 15 stores and no department stores. The Crest Theatre is located in a center of the last mentioned class.

Myerberg conferred with seven of the eight defendants in Washington, D. C., in October, 1948, and about October 12, 1948, sent to all the distributing companies, except Columbia, a letter requesting an outstanding film to open the theatre, preferably a "world premiere."

Myerberg had further conferences with the distributors during October, November and December, 1948. At first he requested exclusive first-run, assuming substantial competition with the downtown houses, and later he requested simultaneous run on the ground of no substantial competition.

United Artists told him that all its immediate releases were already sold, and did not reply to his letters. Warner said that it had its own theater and therefore would not license first-run to plaintiff. RKO said "no" after Myerberg spoke with a top official in New York. Loew's, like

Warner, said that it exhibited in its own theater. Universal rejected the request after its district manager came to Baltimore to examine the Crest, and concluded that the theatre was badly located, even for a neighborhood, and that the [fol. 459] area was already adequately served and overseated. Fox rejected plaintiff's offer because the location was suitable only for neighborhood operation, and later rejected a request for day and date first-run. Paramount wrote rejecting first-run on the ground that its business interests were best served by continued exhibition of first-run downtown rather than in suburban areas.

The Crest opened February 26, 1949, and was licensed to play first-neighborhood-run, approximately 21 days after the end of downtown first-run, the same availability given other indepenednt first-neighborhood-run houses.

Plaintiff's attorneys on November 1 or 2, 1949, wrote defendants asking them to experiment with the Crest, first-run, and in an exchange with Fox, asked Fox to experiment first-run day and date. Columbia and United Artists did not reply to these letters. RKO and Paramount did reply, and there is no evidence of replies by Loew's, Warner and Universal.

Prior to bringing this suit, plaintiff made offers for eight pictures to four of defendants. The reasons for their rejection are typified by the following examples. Myerberg asked for an extended first-run of "Samson and Delilah" (Paramount) and offered a guarantee of $35,000 against 50 per cent of the gross. On direct examination Myerberg said that he anticipated a run of from eight to ten weeks and a gross of over $80,000. On cross-examination it developed that this would require playing to 80,000 to 90,000 of the 105,000 people in the draw area, and Myerberg reduced his estimate to a five week run, with $50,000 gross, and failed to produce pencilled notes which he claimed to have made concerning the matter. Myerberg also asked for an exclusive first-run of "Jolson Sings Again" (Columbia), with a guarantee of $10,500 against 40 per cent of the gross, [fol. 460] and offered to post a certified check. The film had already been shown in Baltimore first-run two months before.

Testimony of experienced persons in the industry and the

testimony of experts was offered in contradiction of Myerberg's testimony in order to show that the downtown theaters in Baltimore draw a substantial number of persons from the outlying districts, such as that in which the Crest is situated. This was illustrated graphically during the transit strike in 1951 when the attendance of the showing of "Quo Vadis" was materially affected although this picture was hailed throughout the country as one of outstanding merit, and except in Baltimore, far outgrossed in its first week the earlier successful picture, "Gone with the Wind." Specific evidence tended to show that the downtown theaters draw 16.34 per cent of their attendance from the area which the Crest claims to serve and that from this area and two other outlying neighborhood areas the downtown theaters draw 37 per cent of their business.

The plaintiff company contends that the evidence above summarized permits of no other conclusion than that the defendants knowingly and deliberately conspired to restrain trade in violation of the statutes and that this conspiracy is shown by the course of conduct which the defendants knowingly, deliberately and uniformly pursued. The burden to prove the conspiracy is upon the plaintiff and there is no direct evidence that the defendants entered into an unlawful agreement; but it is said that such an agreement must necessarily be inferred from the unanimity with which the defendants have adopted the national policy of limiting first-run pictures to downtown theaters under a system of runs and clearances, and that in accord with this policy they have denied first-run pictures but granted the first-subsequent-run of their pictures to the plaintiff.

The plaintiff rests its case to a great extent upon certain [fol. 461] passages in the opinions in cases in the Third Circuit to which most of the defendants in the instant case were parties. In *Wm. Goldman Theatres* v. *Loew's, Inc.*, 3 Cir., 150 F. 2d 738, the court found that the defendants, who controlled the exhibition of motion pictures in downtown theaters in Philadelphia, had conspired to deny a similar privilege to another completely qualified downtown theater which the plaintiff had opened. In *Ball* v. *Paramount Pictures*, 3 Cir., 169 F. 2d 317, the court found that the defendant had conspired to take away from a theater

first-run pictures upon the termination of the tenant's lease, and had agreed to license the tenant to display these pictures in a new location; and in *Milgram* v. *Loew's, Inc.*, 3 Cir., 192 F. 2d 579, the court found that the defendants had conspired to deny first-run pictures to a drive-in theater somewhat removed from the center of the nearby city.

Each of these cases was tried without a jury and the circumstances of uniform action consciously taken by a number of persons were thought by the judge to justify an inference that they had engaged in an unlawful conspiracy, and certain expressions in the opinions of the Court of Appeals have led the appellant here to conclude that such an inference from uniform action is not merely permissible but compulsory, once the facts are found. Thus in the *Goldman* case it was said:

> "* * * Plaintiff's evidence shows that there is concert of action in what has been done and that this concert could not possibly be sheer coincidence. We think there must have been some form of informal understanding. The axiom is ancient that the deed speaks for itself and that man intends the probable consequences of his act. Here, the conclusion is justified that defendants acted in concert in excluding plaintiff. This conclusion is strengthened by the circum- [fol. 462] stance that defendants 'with like unanimity, failed to tender the testimony, at their command, of any officer or agent of a distributor who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action. * * *'". (p. 743)

* * * * * * *

> "* * * Uniform participation by competitors in a particular system of doing business where each is aware of the other's activities, the effect of which is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the statutes before us." (p. 745)

The last quoted statement is repeated in *Milgram* v. *Loew's, Inc.*, *supra*, at p. 584.

Notwithstanding these statements, we are not persuaded that it was the intention of the court to hold that it is not necessary to find that the defendants actually conspired if proof of conscious uniform action is adduced. Indeed in the *Milgram* case the court made the following statement:

> "* * * This uniformity in policy forms the basis of an inference of joint action. This does not mean, however, that in every case mere consciously parallel business practices are sufficient evidence, in themselves, from which a court may infer concerted action. Here we add that each distributor refuses to license features on first run to a drive-in even if a higher rental is offered. Each distributor has thus acted in apparent contradiction to its own self-interest. This strengthens considerably the inference of conspiracy, for the conduct of the distributors is, in the absence of a valid explanation, inconsistent with decisions independently arrived at." (p. 583)

[fol. 463] Subsequently in speaking of the *Goldman* case the court said:

> "* * * The key question in that case was whether the uniform action of all distributors in not licensing pictures on first run to Goldman was the result of a conspiracy." (p. 585)

See also the decisions in *Westway Theater* v. *Twentieth Century-Fox Film Corp.*, D. C. Md., 30 F. Supp. 830, 4 Cir., 113 F. 2d 932; *Windsor Theater Co.* v. *Walbrook Amusement Co.*, D. C. Md., 94 F. Supp. 388, 4 Cir., 189 F. 2d 797.

In the pending case, as we have seen, the defendants offered a substantial body of evidence tending to show a certain independence of action in dealing with Crest and to explain the reasons which led the industry generally to confine the exclusive showing of first-run pictures to downtown theaters; and it is urged on behalf of the defendants that the decision as to the Crest Theatre by each defendant was based on its experienced judgment as an individual operator, since it was obvious that the grant of first-run privileges to Crest would have led to like grants to neighborhood theaters similarly situated, to the great detriment if not the destruction

of the downtown houses generally. Similarly they contend that the adoption by each of them of the same solution of a problem common to the industry indicated the exercise of individual judgment rather than the formation of an unlawful conspiracy.

We think that there was evidence to support both of the inferences drawn by the opposing parties to the case and thus an issue was presented which was necessarily submitted to the jury for decision. In doing so the judge in effect instructed the jury as to the nature of an unlawful conspiracy and told them that the burden of proof was upon [fol. 464] the plaintiff to prove the conspiracy; but that the proof might consist of direct evidence of the fact or circumstantial evidence which gives rise to a logical inference of the existence of the fact; and that in considering the evidence in the case the jury should take into consideration the similarity of business practices of the defendants in general, and with respect to the Crest Theatre in particular, in determining whether there had been a conspiracy; but that if the similarity resulted from nothing more than a common business solution of identical problems in a competitive industry the similarity of conduct would not require a conclusion that the conspiracy actually existed. We find no error in this action of the trial judge.

The plaintiff raises numerous objections to the charge of the court. The District Judge in the opening paragraphs of the charge told the jury that the suit was brought under the anti-trust acts to recover damages suffered by the plaintiff during the period from the opening of its theatre up to March 20, 1950, "the date of the filing of this suit which was originally brought in Philadelphia but was transferred to this jurisdiction on defendants' motion for convenience of the parties, such being permitted since the suit might have been brought originally in this court." The plaintiff objects to the quoted passage on the ground that there was some doubt as to whether the suit could have been originally brought in Maryland against all defendants and because the right of removal was not settled until December 6, 1950 when the opinion in *Paramount Theaters* v. *Rodney*, 3 Cir., 186 F. 2d 111, was handed down.

There is nothing in the case, however, to indicate that

the charge as given was incorrect in this particular either in fact or in law. The only possible detriment to the plaintiff in this connection was the disclosure of the fact that it preferred to try the case in Philadelphia whereas the defend-[fol. 465] ants preferred to try the case in Baltimore. This was brought out by counsel for defendants in their closing argument; and counsel for the plaintiff replies that the case was brought in Philadelphia because of the doubts above mentioned. The plaintiff, however, manifested its reluctance to try the case in Baltimore by resisting the removal even after the right of removal was clearly established, so that the jury were in no way misled as to the essential fact.

The plaintiff objects to the instruction that its claim must be judged separately as to each defendant although it was asserting the existence of a national conspiracy which happened to have its impact in Baltimore. There is nothing in the point, since in the same part as well as in other portions of the charge, the judge made it quite clear that the gist of the plaintiff's case was the existence of a combination or conspiracy of the defendants and it was necessary that the jury consider the actions of each defendant separately in order to determine whether it was a member of the combination.

The instruction to the jury on the question of burden of proof is also assailed. The language objected to is contained in the following statement of the court:

> "* * * The burden of proof, as I have explained to you, rests upon the plaintiff. If there was no common purpose and no uniformity of conduct between any one defendant and any of the other defendants, you may consider those facts in determining whether that defendant entered into any combination or conspiracy with any of the other defendants. It is not enough that there has been created in your minds some doubt or suspicion as to the conduct of the defendants; the plaintiff must produce proof of such a nature as carries a conviction to your minds, such as would influence you [fol. 466] in the conduct of your own business or daily affairs. The character of the proof must be such as you would be willing to act upon and base a judgment upon in the disposal of important matters."

It is contended that this language placed the burden of proof beyond a reasonable doubt upon the plaintiff; but obviously this is not so; and moreover, the judge, prior to making the statement, had contrasted the burden of proof in civil cases with that in criminal cases which, as he pointed out, the jury had learned from their experience in previous criminal trials. The jury were expressly told that the burden of proof in a civil case of the kind before the court is met if it is supported by what the jury finds to be the weight of the credible evidence.

It is also contended that the judge should have told the jury in the words of the Third Circuit in the *Goldman* case, 150 F. 2d 738, 745, that uniform participation by competitors in a particular system of doing business, where each is aware of the other's activities, is sufficient to establish an unlawful conspiracy, if the effect is restraint of interstate commerce. This statement standing alone would have been misleading and insufficient, for although conscious similarity or uniformity of action may give rise to a reasonable inference of conspiracy, it does not compel a finding of conspiracy. We think that this was made clear to the jury by the charge of the court. The holding in *Interstate Circuit* v. *United States*, 306 U. S. 208, 225-226, is not to the contrary. In that case the trial judge had drawn a reasonable inference of conspiracy from the concerted action of the defendants, and the defendants had failed to tender any evidence as to whether an agreement had in fact been reached, and the Supreme Court said that since the proof supported the inference of concerted action the burden rested on the [fol. 467] defendants of going forward with the evidence to explain or contradict it. In the pending case the defendants did go forward with explanatory proof.

During the trial, the plaintiff in order to establish its charge of conspiracy against the defendants, offered in evidence the decrees issued against the same defendants by the court in *United States* v. *Paramount Pictures*, 334 U. S. 131, D. C. N. Y., 66 F. Supp. 323, 70 F. Supp. 53, 85 F. Supp. 881. In that case it was found that the same defendants, prior to the existence of the Crest Theatre, had conspired to restrain trade in violation of the anti-trust acts by agreeing illegally to fix prices and to impose unreasonable

clearances and in other ways, and decrees of injunction were accordingly issued against them.

The evidence was admitted in the instant case under the provisions of § 5 of the Clayton Act, 15 U. S. C. A. § 16, which provides that a final judgment rendered in a criminal prosecution or in a suit in equity brought by the United States under the anti-trust laws to the effect that a defendant has violated these laws, shall be prima facie evidence against the defendant in any suit brought against him by any other party under the said laws as to all matters respecting which the former judgment would be an estoppel as between the parties thereto.

The statute was applied in *Emich* v. *General Motors*, 340 U. S. 558, where the plaintiff sued to recover damages against certain defendants who had conspired to restrain trade in violation of the anti-trust acts, and it was held that the plaintiff was entitled to put in evidence the decree in a prior injunction suit brought by the government in which it was shown that the same defendants had entered into such a conspiracy and had effectuated it by illegally coercing the plaintiff and other persons. The decree was held to be prima facie evidence both of the conspiracy and of the ef- [fol. 468] fectuating acts. It was also held that the judge was free to exercise his discretion in explaining to the jury the issues decided in the prior case bearing upon the case on trial before him.

The Paramount decrees had no relation to the Crest Theatre since it was built after they were rendered, but they were offered to show that the defendants had entered into a prior conspiracy which was given effect when the plaintiff applied for first-run privileges. The judge resolved his doubts as to admissibility in favor of the plaintiff, and gave the following instructions to the jury:

> "• • • I instruct you that in that case, which was a suit between the Government and the same defendants, which was decided and covered by the decrees in that case, these same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous

places throughout the United States. Thus, these proven facts, I instruct you, become prima facie evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only prima facie evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibitions from the plaintiff, or have conspired [fol. 469] to restrict plaintiff to clearances which are unreasonable.

If you find that the plaintiff has sustained this burden of proving a conspiracy as just defined, then, I instruct you that, by virtue of the terms of the decrees in the previous equity suit, which form part of the evidence in this case, the burden of proving the reasonableness of the failure to give the plaintiff first run exclusively or day and date, that is, questions of clearance as well as the failure to give it any other clearance such as would be reasonable, rests not upon the plaintiff but upon the defendants."

We find nothing detrimental to the plaintiff in these instructions. The court correctly instructed the jury that the decrees were only prima facie evidence and not conclusive evidence of the conspiracy on which the plaintiff's case is based. This is in accordance with the terms of the statute and with the holding in *Fifth & Walnut, Inc.* v. *Loew's, Inc.*, 2 Cir., 176 F. 2d 587, 590, where it was held that the decision in the *Paramount* case was not conclusive of the question of conspiracy among the defendants in a private damage action involving a single city. See also *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 2 Cir., 190 F. 2d 951, 957-8.

There were other objections to the Judge's charge, all of which have been considered, but we find no error, and noth-

ing worthy of additional comment. The judgment is therefore

Affirmed.

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[fol. 470] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6512

THEATRE ENTERPRISES, INC., Appellant,

vs.

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., United Artists Corporation, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Warner Bros. Circuit Management Corporation, Columbia Pictures Corporation, Appellees

Appeal from the United States District Court for the District of Maryland

JUDGMENT—Filed January 5, 1953

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

January 5, 1953.

John J. Parker, Chief Judge, Fourth Circuit; Morris A. Soper, U. S. Circuit Judge; Armistead M. Dobie, U. S. Circuit Judge.

January 27, 1953, petition of appellant for a stay of mandate is filed.

[fol. 471] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1952

[Title omitted]

STIPULATION—February 24, 1953

It is stipulated and agreed, by and between counsel for the respective parties hereto, that for the purpose of the petition for writ of certiorari the printed record may consist of the following:

1. Appendix to brief of appellant in the United States Court of Appeals for the Fourth Circuit.
2. Appendix to brief of appellees in the United States Court of Appeals for the Fourth Circuit, and its Opinion.
3. The proceedings had before the United States Court of Appeals for the Fourth Circuit.
4. This stipulation.

It is further stipulated and agreed that the petitioner will cause the Clerk of the United States Court of Appeals for the Fourth Circuit to certify and file with the Clerk of the Supreme Court of the United States the complete record on [fol. 472] appeal; and that, in the event the petition for writ of certiorari is granted, the printed record shall consist of the printed record on the petition for writ of certiorari and such additional portions of the certified record as the parties may designate.

It is further stipulated and agreed that the parties hereto may refer in the petition for writ of certiorari and briefs to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

Gray, Anderson, Schaffer & Rome, by Edwin P. Rome, Sol C. Berenholtz, Counsel for Petitioner;
R. Dorsey Watkins, J. Cookman Boyd, Jr., Counsel for Respondents.

[fols. 473-474] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 649

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed May 25, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[fol. 475] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 19

[Title omitted]

RESPONDENTS' DESIGNATION OF RECORD—August 21, 1953

In accordance with the Stipulation as to Printing of Record, dated February 24, 1953, filed herein, Respondents hereby designate that for the purpose of consideration on the merits the following portions of the record certified to this Court by the Court of Appeals for the Fourth Circuit shall be printed:

1. Complaint.
2. Answers of the several defendants.
3. Interrogatories propounded by the defendants to the plaintiff.
4. Plaintiff's answers to defendants' interrogatories.
5. Transcript of proceedings (pages 1-1706, inclusive).
6. Plaintiff's exhibits Nos. 3, 6, 7, 8, 30, 62, 66, 71, 72, 73, 74, 75, 76, 82, 92, 93, 95, 96, 97.
7. Defendants' exhibits Nos. 16, 18, 19, 20, 21, 22, 32.
8. Defendants' request for directed verdicts.
9. Defendants' motions for instructed verdicts.

10. Plaintiff's requests for instructions (Nos. 1 to 81, inclusive).

[fol. 476] 11. Plaintiff's requests for additional instructions (Nos. 82 to 97, inclusive).

12. Court's ruling refusing plaintiff's prayers Nos. 1 to 97, inclusive.

13. Defendants' requests for instructions (Nos. 1 to 41, inclusive).

14. Court's ruling refusing defendants' prayers Nos. 1 to 40, inclusive.

15. Docket entry of May 28, 1952, showing entry of judgment on verdict in favor of the defendants.

16. Plaintiff's notice of appeal.

17. Opinion and judgment of the Court of Appeals for the Fourth Circuit.

18. Stipulation as to printing of record, dated February 24, 1953.

19. Order granting the petition for a writ of certiorari.

Bruce Bromley, Counsel for the following Respondents; Paramount Film Distributing Corp., Loew's Incorporated, RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., United Artists Corporation, 15 Broad Street, New York 5, N. Y.

Dated: August 21, 1953.

[fol. 1-2] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

No. 5303—Civil

THEATRE ENTERPRISES, INC.

vs.

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., United Artists Corporation, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corp., Warner Bros. Circuit Management Corp., Columbia Pictures Corporation

TRANSCRIPT OF PROCEEDINGS

Baltimore, Maryland, May 8, 1952.

The above-entitled case came on for trial, before His Honor, William C. Coleman, and a Jury, at 10:30 o'clock a. m.

APPEARANCES

For the Plaintiff: Mr. Sol C. Berenholtz, Mr. Edwin P. Rome.

For the Defendants: Mr. J. Cookman Boyd, Jr., for Loew's, Inc. Mr. R. Dorsey Watkins for all defendants, except Loew's, Incorporated. Mr. Edward C. Raftery and Mr. E. Compton Timberlake for all defendants.

[fol. 3] PROCEEDINGS

The Court: Case No. 5303, Civil Docket, Theatre Enterprises, Inc., against Paramount Film Distributing Corporation, and others, is the only case in the assignment this morning, specially assigned for this morning.

I understand a jury is wanted; and you have the jury list.

Mr. Berenholtz: Yes, Your Honor.

The Court: Are there any motions for admission?

Mr. Boyd: Yes, Your Honor. I would like to move the admission to the bar of this Court of Mr. E. Compton Timberlake, of the New York Bar. To my knowledge, Mr. Timberlake possesses the necessary qualifications.

The Court: How long have you been practising in New York, Mr. Timberlake?

Mr. Timberlake: If Your Honor please, I have been practising in New York since 1942. Before that, I practised in the District of Columbia.

The Court: We are very glad to have you admitted, if you will advance and take the usual oath of admission as an attorney.

(The oath of admission was then taken by Mr. Timberlake.)

Mr. Watkins: If Your Honor please, I would like to intro-
[fol. 4] duce to the Court Mr. Edward C. Raftery, of the New York Bar. Mr. Raftery was admitted in 1939, but I do not think he has ever appeared before Your Honor.

The Court: We are very glad to have you here, Mr. Raftery.

Mr. Berenholtz: May it please the Court, Mr. Rome has already been admitted in this court before Your Honor, I believe, on some motions on the interrogatories.

The Court: Yes, I recall.

Members of the Jury summoned for today's assignment, the case that will be heard today before a jury—and the jury, therefore, will be drawn from your number—involves a number of motion picture enterprises and motion picture corporations. It is appropriate for me to address the following question, generally, to all members of the panel, before the jury is selected. That question is as follows:

Are any of you connected with any moving picture enterprise, by employment or other association, or by stock ownership in any moving picture enterprise, or in any other way connected, directly or indirectly, that might have a tendency to prevent you from sitting in a case of this kind with complete neutrality, without any bias?

[fol. 5] Mr. John A. Miller: I own about 900 shares of Paramount Picture stock.

The Court: You are a stockholder in Paramount?

Mr. Miller: Yes.

The Court: Do counsel want Mr. Miller excluded from the list?

Mr. Rome: Unquestionably, in view of the reply.

The Court: Very well, Mr. Miller; you are excused.

Mrs. Patricia Roberts: I am not connected with the movie industry, but I know Mr. Myerberg.

The Court: You just have an acquaintance with whom?

Mrs. Roberts: With Mr. Myerberg.

Mr. Rome: Mr. Myerberg serves as president of the plaintiff company.

The Court: Mere acquaintanceship would not disqualify you.

Do counsel want to say anything?

Mr. Watkins: No, Your Honor.

The Court: I do not think that disqualifies you.

Gentlemen, you have the entire panel without any disqualification on the ground referred to, apparently.

(The jury was then duly impaneled and sworn, after which the following occurred:)

[Vol. 6] The Court: Very well, gentlemen, we are ready to proceed with the opening statements.

### Opening Statement on Behalf of the Plaintiff

Mr. Rome: With permission of the Court, members of the jury, as you have already heard, the case that is going to be presented before you is one which involves the motion picture industry. It is one which has been brought under the anti-trust laws of the United States.

The plaintiff in the case is the Theatre Enterprises, Incorporated, a Maryland corporation. Its president and executive head is Mr. Harry Myerberg, who sits here.

This case, members of the jury, involves the history of a company that wanted to enter into competition in the motion picture industry, and it was denied that opportunity by reason of a combination and a conspiracy on the part of the defendant companies that are here, to exclude Theatre Enterprises, Incorporated from participating as a first-run motion picture theatre operator in the City of Baltimore.

Now, if I may, I would like to impose upon your patience for a moment or two in order to try to set before you a little information about the motion picture industry. Most pictures, as you all know, of course, are made largely in Cali-

fornia. They are, however, distributed throughout the [fol. 7] country. They are made, a great number of them, those that are most valuable for exhibition purposes in theatres, are made by the eight large companies that are the defendants in this action. Those companies are generally known in the industry, so-called, as the "big eight." That is because of their size, the importance of their product and the fact actually, as we contend and shall attempt to prove to you, that it is impossible for an exhibitor, person or a company operating a motion picture theatre, to run his theatre successfully without having access to the motion pictures that are produced and distributed by these eight companies. These companies have offices all over the country from which they distribute to the theatres or exhibitors running their theatres the films which are actually projected upon the screen and which one sees when one goes into the theatre.

Now, in this instance the plaintiff company, Theatre Enterprises, created a theatre known as the "Crest Theatre" which is located on Reisterstown Road and Rogers Avenue in the City of Baltimore. That theatre was designed and built and actually opened in February of 1949. Of course its construction antedates that period of time.

Mr. Myerberg, who is the active head of Theatre Enterprises, Incorporated, and his brothers, had a plan for the development of a commercial center and a theatre located at that area, Reisterstown Road and Rogers Avenue in the City of Baltimore, and he visualized the creation there of a [fol. 8] magnificent new theatre with every modern improvement, every convenience for the public, with all kinds of new things, including such a new innovation as a television for the benefit of the patrons.

The purpose of such a theatre on the part of the plaintiff company was to show first-run motion pictures in the City of Baltimore. Now, theatres show pictures at different times. There is in the motion picture industry a thing called "run." "Run" is simply the time when a particular theatre exhibits a picture. There is such a thing as "first-run," which is the first exhibition of a particular picture in a theatre in a particular area. Then there is "second-run." Another theatre comes along and exhibits that same picture at a point subsequent in time to the first theatre. There was

also something in the motion picture industry called "clearance." "Clearance" is that period of time which elapses between the termination of the first exhibition, the first-run of a motion picture and the time when another theatre picks up that picture and also exhibits it.

You see, the films themselves that are shown on the screen are always the property of the companies themselves. They are only licensed to the theatre exhibitor. Generally, the manner in which they are licensed to the theatre is on a percentage of the gross receipts earned by the theatre from [fol. 9] its patronage.

Now, the problem of run is an extremely important one in the industry. Actually it is the sources of the largest amount of revenue that is derived from the motion picture industry. Is is extremely important for a theatre to have the benefit of a first-run of a motion picture in a particular area and, consequently, theatres normally try to vie for the advantage, the opportunity of showing that picture on first-run to the public.

Now, in this City of Baltimore, we will show you that for a period of years there have been a number of theatres, so-called first-run theatres, which have been concentrated in the downtown section of the City of Baltimore. Those theatres are the Century, the Valencia, Keith's Theatre, the New Theatre, the Hippodrome, the Town theatre. There is also the Stanley theatre and the Mayfair theatre.

Now, the plaintiff will show you that over a period of years these theatres have always exhibited the product of specific companies, first-run in the City of Baltimore, and the distributors, the defendants in this action, who produce and distribute these pictures to various theatres, have never made any real attempt to lease their product to any other theatre than the one, in some instances two particular theatres in the City of Baltimore which have over this period of time exhibited their product to the public.

[fol. 10] When the Crest theatre was built it was intended to have first-run pictures to show the public in that particular area. Reisterstown Road and Rogers Avenue, as you know, is in the northern perimeter of the city. It is located approximately five and one-half miles from the downtown section, and as you know, over a period of years there has

been a tremendous growth in the City of Baltimore, with a huge influx of population in that area. Also, as you know, there has been a change in the motion picture industry by reason of the fact it is growing more and more difficult for people to make their way into town at night to see a motion picture on first-run in the City of Baltimore or in any other city, the problem of the time getting from the outskirts of the city to the center of the city to attend a particular theatre, the traffic problems involved, the problems that attend finding a parking place after one gets downtown, the additional cost after one finds a parking place downtown. All of those things together have had an effect upon the theatre-going public, with the result that people generally have been reluctant to come downtown to theatres, and the plaintiff company in this case wanted to bring the theatre and the first-run pictures to the public to make going to a motion picture theatre just as convenient as other stores of different kinds, department stores and others having made it easy for the shopping public to go in and buy in one's immediate area. [fol. 11] It was with that purpose in mind that the Crest Theatre was designed and built. It is a magnificent house, containing 1600 seats, designed with every latest bit of equipment, not only to project the film on the screen with sound equipment, but also the convenience of the patrons has been uppermost in the minds of the owners of that theatre. There is a parking lot right there which provides free parking for almost 400 cars, and there is a greater amount of additional parking space available in the community there.

Now, when this idea first occurred to the people who ultimately erected the Crest Theatre, they took the step through Mr. Myerberg himself, of going to see the defendant companies at their offices in Washington. You will recall that I have told you there are a number of film exchange areas or branch offices in different parts of the country which actually distribute films. The City of Baltimore has film distributed to it through offices of all of these companies located in Washington.

Mr. Myerberg, in January of 1948, before ground had ever been broken for the Crest Theatre, went to Washington and saw each one of the companies in turn, saw the branch managers or other responsible personnel in those offices, and

made known to those people his intention and plan for the construction of a fine, new theatre in the City of Baltimore, which was going to be designed and built for a first-run [fol. 12] theatre in order to get people back into the theatres, in order to provide the convenience of the public with a fine showcase for first-run pictures in the City of Baltimore.

Now, without exception every person whom he saw in Washington representing the company at that time said: "Well, we are sorry, we can't do anything for you because you haven't your theatre yet. After you have your theatre well along, after it is constructed, you come back and see us at that time." So, Mr. Myerberg went back and proceeded with his plans for the construction of the theatre, and did so.

Now, there came a time in October of 1948, when the theatre was already under roof, it was contemplated at that time that in all likelihood the theatre would be able to be opened by November or perhaps Christmastime of 1948.

Consequently, it became imperative to make arrangements for the licensing of pictures to show in this fine, new Crest Theatre. Accordingly, Mr. Myerberg relied upon the earlier statements which had been made to him by the various representatives of the company and went back to the City of Washington in 1948 to all of those individuals, each one of these companies, and told them that his theatre was well along and was expected to be opened soon and he wanted a chance to license first-run pictures from all of the companies, and wanted to get a fine, new show to open his theatre because it was going to be the showcase, the show [fol. 13] place of Maryland, and it would be greatly to the advantage of the distributors to have their pictures shown in such a fine theatre.

Now, Mr. Myerberg's plan was that inasmuch as the Crest Theatre was located five and one-half miles from downtown, that his theatre, the Crest, could play a picture first-run either on an exclusive basis in the City of Baltimore, that is, that his theatre would play that picture alone first-run in the City of Baltimore or he would be able to play it day and date first-run in the City of Baltimore.

Day and date, ladies and gentlemen, means simply the fact that two theatres exhibit the same picture at the same time in a particular area.

Now, it was the thought of the plaintiff that by reason of the distance separating the downtown theatres from the Crest Theatre, that it would be perfectly proper and permissible for the Crest Theatre to play a picture first-run at the same time another house, let us say, the Century or the Town or the Hippodrome, might be playing that picture downtown in the City of Baltimore, the thought being that not only would they give the advantage to the distributor having two outlets for his product in the City of Baltimore, two places from which it would be deriving revenue, but also it would be a great help to the public who would be able to go to the theatre located in the area of the Crest without [fol. 14] having to run through the maelstrom of traffic and coming downtown, whereas the theatre which was already downtown would have the benefit of its patronage which would be drawn from its area.

That plan was once again broached to the companies in Washington and without exception everyone of the companies said "We don't see how this can be done. We will have to take it up with New York." The home offices of each one of these companies are located in New York City and they said: "We will have to take this up with New York, and you send us a letter with regard to this thing."

Now, there are two things which should be brought to your attention at this point. When Mr. Myerberg went to see the official of Warner Brothers, that official said: "As you know, Warner Brothers has its own theatre in the City of Baltimore, the Stanley Theatre, and we always exhibit our own product in our own theatre and, therefore, obviously you are not going to be able to get our product, but I don't see why you shouldn't be able to get first-run products from other companies which do not own or operate their own theatres in the City of Baltimore. I think they would be able to sell it to you."

Mr. Myerberg got approximately the same kind of an answer from the officials of Loew's Incorporated. That is the company that produces and distributes Metro-Goldwyn-Mayer pictures. That company also operates two theatres [fol. 15] in the City of Baltimore, Loew's Century and Loew's Valencia, which are generally considered to be first-run theatres. In addition to that Loew's also operates the Parkway Theatre, with which you may be familiar.

The official of Loew's said: "We have our own theatres and we put our own pictures in our own theatres. You cannot get anything from us, but you send us a letter and we will take it up with New York."

Now, the officials of the other companies—and I can name them by turn—all told Mr. Myerberg that that could not be the policy in their companies, that there is a policy in our company against giving pictures first-run to a theatre located outside of the downtown area of the city. The companies that took that position are Paramount, RKO, Fox, Columbia, Universal and United Artists. Those companies, those eight companies are the ones which market the finest motion pictures that are made not only in this country but they are the most desirable motion picture products sought throughout the world.

Now, following those interviews in Washington in October, 1948, letters setting forth the request by the Crest Theatre for first-run pictures were sent to each one of the companies in turn. Those letters were forwarded to New York and in some instances, members of the jury, this company that had gone into business here and erected the mag- [fol. 16] nificent theatre at a cost of almost a half million dollars, never even got the courtesy of a reply. In other instances, however, they got a number of replies which were to this same effect, that there is a policy in the motion picture industry which requires that first-run pictures go in the downtown areas of cities and no theatre located as your theatre is located, outside of the downtown area of a city, is going to have access to our product.

Those negotiations proceeded over a period of time. Mr. Myerberg went back, went back, went back to these companies attempting to persuade them, pointing out to them the advantages that would flow to the public and to themselves from the showing of pictures first-run either on an exclusive or a day-by-day basis with the downtown theatres in Baltimore, because thereby the public would have the advantage of this and also the distributors would derive great advantage from film rental.

In order to demonstrate the fact that the distributors would be able to make money from this kind of a proposition, Mr. Myerberg offered certain amounts of film rental for specific pictures from a number of companies, the idea

being, as I have told you, the exhibitor licenses from the distributor a particular picture and pays a certain percentage of the gross as film rental.

The plaintiff here had such confidence in the wisdom of [fol. 17] having the particular theatre located in that particular area that it offered to these various companies guaranteed film rentals which would have prevented any possibility of loss on the part of the distributor, which would have enabled them to prove the contention that had arisen, the issue that had arisen between the parties whether it was a good business proposition to have a theatre located there at Reisterstown Road and Rogers Avenue, or whether it would not work out. Uniformly everyone of these companies turned down those offers, despite the fact that we believe we will be able to demonstrate to you that those offers of film rental contained more money actually for the companies than they had been able to derive from the ordinary first-run showing of the theatres in downtown Baltimore.

You see there it is essential, members of the jury, to bear in mind the fact that distributors would not have been losing a client in the downtown area, as we contend it would be gaining another outlet in the City of Baltimore through the Crest Theatre. But uniformly every one of the distributors turned down the offers that were made, the requests that were made by the Crest Theatre for first-run product. And equally uniformly—and this is significant, every one of those companies, all eight companies, immediately offered the Crest Theatre a run of product 21 days after downtown [fol. 18] Baltimore. In other words, a picture will be shown first-run in downtown Baltimore. After it ended its showing in downtown Baltimore there would be a period of 21 days in which no member of the public could see that picture. That is the "clearance" I have referred to.

And then the Crest Theatre would have made available to it 21 days or more thereafter that product which was shown downtown. Every one of the distributors offered that to the Crest Theatre despite the fact that Loew's Parkway Theatre maintained a unique position in the motion picture exhibition field in the City of Baltimore, because Loew's Parkway Theatre had the only opportunity of any theatre in the City of Baltimore to license a picture other

than first-run on an availability earlier than 21 days after downtown Baltimore.

Now, by this time the theatre had been completed. It was essential to get it open. It was essential also to get it in operation in order to stop the loss which would necessarily flow from its remaining closed. Therefore, under protest, over objection, still maintaining its position that the Crest Theatre was entitled by every criterion of the motion picture industry to show first-run product in its theatre, the Crest Theatre opened with first subsequent run product in the City of Baltimore, 21 days after downtown.

Now, thereafter, efforts were continued on the part of the plaintiff company to persuade the distributors that it should [fol. 19] be afforded the opportunity to license these pictures. Every one of the efforts made over a period of months, ladies and gentlemen, failed. Mr. Myerberg made a trip to New York to see one of the higher officials. He saw other officials down here in Baltimore. With a singular unanimity of action, every one of the officials in the motion picture industry told him the same thing: "We cannot do it; there is a policy in the motion picture industry not to give first-run product to a theatre located outside of the downtown area."

Now, that brings us to the heart of the case, ladies and gentlemen: As a result of the inability of the Crest Theatre to get first-run product for its theatre, it suffered a financial loss.

[fol. 20] Undoubtedly, in the motion picture industry, a theater which shows or has a first-run contract will gross a whole lot more money at the box office than a theater that does not have a first-run contract. Thus, the Crest Theater was damaged by the difference between what it actually took in at the box office and what it could reasonably have been able to take in by first-run product; but that was not the end of the actions of these distributors.

Even after the Crest reluctantly, under protest, under the so-called neighborhood run, this is the first subsequent run in the city of Baltimore, the distributors, the defendants in this case, proceeded in a course of action which was discriminatory against this plaintiff. What I mean by that is this: it required the Crest Theater to play 21 days after downtown, whereas, they give a discriminatory action, they

give a discriminatory preference to the Parkway Theater in permitting it to play 14 days after downtown.

In addition to that, the Crest Theater was compelled to play day and date on the same day with theaters that were located within a mile of the Crest.

Now, you see the dilemma that that poses for these companies that are here, for the reason, while the Crest Theater was denied the opportunity to compete in the business, it is said that the Crest Theater is in substantial competi- [fol. 21] tion with the theaters downtown and, therefore, we will not give you the opportunity to compete.

Why is it in substantial competition? Because it will draw patronage from the same areas that the downtown theaters draw, but the same companies were drawn into a paradoxical position and an inconsistent position, we contend, which we will come to subsequently, that a theater a mile away, you must play it day and date with that theater, if you are going to have a product and, consequently, the Crest Theater was compelled to play day and date with the Uptown Theater located a mile away, with the Pimlico, with the Avalon—those are right in its own area, theaters obviously in substantial competition with it.

Now, those things, we say, stem not from the result of any independent business judgment on the part of these defendants who are here before you today, but were the result of a conspiracy on the part of these people, being the largest motion picture companies in the land, to dominate the distribution and exhibition of motion pictures, not only in the city of Baltimore but elsewhere throughout the United States. That was the purpose behind the refusal of these companies to give the first-run product to the Crest Theater, because, as it will come out before you during the course of this trial, the big five of these companies, RKO, [fol. 22] Paramount, Fox, Warner Bros., and Loew's are not only involved in the production of motion pictures but also engage in the exhibition phase of the business. That is, they own theaters. Together, they own thousands of them throughout the country.

Now, to give you some of the background of this case: The great bulk of these theaters are located in downtown areas of the cities of the country, and those are the theaters that produce for these distributors the largest part of their

revenue and, therefore, we contend that the purpose of their combination, the purpose of their conspiracy to prevent the Crest Theater from having first-run product, was to benefit themselves, because they were keeping these things to themselves, so that in the motion picture industry no newcomer could enter the field of first-run exhibition, not only in Baltimore but anywhere in this country, because, as I have told you, the uniform answer, as we have given you, is that the policy is not to permit first-run pictures to be played outside of the downtown area; and, members of the jury, we believe you will find, you will ultimately find, that the purpose back of that combination was to protect these people, themselves, by reason of their own theater holdings, concentrated in the downtown areas of cities.

Now, only five of these companies, themselves, own [fol. 23] theaters, out the other three companies, Universal, United Artists and Columbia, are equally involved, in that they exhibit throughout the country, the reason being, that although they, themselves, do not own theaters, their best customers throughout the country are these other defendants and, consequently, since they derive their revenues from these people, they go along with their agreement, their combination, their conspiracy, and agree with them that no new comer shall be permitted to enter the first-run field of the motion picture industry.

Ladies and gentlemen of the jury, this is not something we have thought up ourselves. Actually, there are two manners in which the Anti-Trust Laws of this country are enforced. A private individual, such as the plaintiff in this case, is empowered by the law to bring an action under the Anti-Trust Laws to get redress for himself, if he believes he has been damaged.

But the second opportunity for the enforcement of the Anti-Trust Laws of the United States arises out of the fact that the Government of the United States is equally empowered to bring an action in a court of law, so that the economic system of this country, which is that of free enterprise, shall be preserved and protected.

It has been laid down as the law of this land, and it is the thing which has made this action possible, that anyone [fol. 24] shall have an opportunity to go into business that he chooses to enter. It has been laid down as the law of

the economy of our country that the rule of that economy shall be competition, not monopoly, not control, not conspiracy to prevent the small individual, the small company, an independent, from getting into a new field of business; and we contend that that is exactly what we are fighting for here, fighting for the opportunity to compete in a field of business; and, peculiarly enough, ladies and gentlemen, we think, when this case is over, you will conclude that the denial of that opportunity to this plaintiff was contrary to the laws of the United States.

Now, the Government itself, being interested in the preservation of our economy and free enterprise, brought an action against these defendants. I shall not attempt to describe to you in detail at the moment the full extent and the significance of that action, but it will come out to you during the course of the trial, and the impact of that situation in Baltimore, the effect of that national conspiracy had upon Baltimore, and we will show, I believe, the significance of the Government's case, and that will be brought to your attention during the course of the trial, and His Honor will rule regarding the aspects of the law regarding that point; but it is against that background that this situation grew up in Baltimore.

[fol. 25] There has not been a new first-run theater in the city of Baltimore for years, ladies and gentlemen. I think you are all familiar with that fact.

This plaintiff, in pursuance of the theory of free enterprise, wanted to compete in the first-run field and was denied that opportunity, and suffered damages.

Now, I have already alluded to the fact, and will mention it as briefly as I can, that the measure of damages, as we see it, is the difference between what the plaintiff actually took in at the box office and what it would have taken in if it had access to these first-run pictures.

These amounts and figures will be set forth for you during the course of the trial, but also we contend that the plaintiff was damaged even on the subsequent run which was ultimately granted by the largess of these defendants in that as a result of the discriminatory treatment accorded to the Crest by these defendants it was not able to earn what it would have been able to earn from the box office if given the full and fair treatment which it was entitled to

under our economy and which it did not get. That measure of damages will also be made clear to you; but I do not want you to labor under the misapprehension that this plaintiff ever made any money out of the Crest Theater, because the Crest Theater actually operated at a loss.

It took in money at the box office, true enough, took in [fol. 26] a considerable amount of money, which will be used to show you the enormous grossing potentiality of this theater, the grossing potentiality which these defendants denied them; and when the evidence has been brought before you, ladies and gentlemen, we will ask you to conclude that this plaintiff has been improperly treated under the laws of The United States, the significance of these laws being set forth by His Honor; and at that time we will ask you to bring in a verdict for this plaintiff in the amount of damages that will compensate it for the great loss that it has suffered.

Remember, ladies and gentlemen, that the Government, itself, prosecuted these people, and the significance of that case, the issues in that case, as well as the issues in this case, will be made clear to you during the course of this trial; and, when that is made clear, we submit that there can be no other conclusion but that the plaintiff has suffered substantial damages, and that substantial damages should be awarded this plaintiff.

Thank you.

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[fol. 27] OPENING STATEMENT ON BEHALF OF THE DEFENDANTS

Mr. Raftery: May it please the Court and Members of the Jury, I think it would be very helpful if we considered the amusement business in general, so that we get a clear idea of run and clearance. This case is going to develop into a very simple case. It is a run and clearance case. That is all it is.

Mr. Myerberg says the downtown theaters in Baltimore, most of them independent theaters, by the way, have first-run pictures, and they are shown downtown ahead of the neighborhood.

In his deposition he says, "I would like to put into Balti-

more a new system of distribution. I would like to see the picture field established first run. I would like to see the same picture played out in my neighborhood on Reisterstown Road with first run. I would like to see Mr. Durkee, if he was allowed to have the same picture at Catonsville, the Boulevard, the Senator, and then at the Edmondson Village"—in other words, instead of having run and clearance, "I would like to have an exclusive run in my neighborhood"; and he described his neighborhood in the deposition as being as far north as Reisterstown; then over to the east as far as Roland Avenue, and then to Catonsville, and south as far as Park Circle.

In that area, he says, "I want an exclusive run and I [fol. 28] want 28 days clearance over the Uptown, the Pimlico, the Avalon, the Ambassador, the theater in Catonsville, and the new theater in Reisterstown." That is his idea of the new manner of distribution, that he wants to put into Baltimore, and thus change the entire manner and method that has been in existence in this state, and most of the states in the United States, for years and years.

Now, let's look at the amusement business a minute. The first form of amusement that those of us with white hair knew about was the legitimate theater. You had a theater downtown here in Baltimore, Ford's Theatre, and it would play Ziegfeld Follies, or Turn to the Right, or Lightning, or any of the Broadway plays, and that would be the only Theater in the city that would show them the first time around.

Later, maybe a year or two, if it was a legitimate play, that did not cost too much to set, the Lightnings and the Turn to the Rights would play in stock companies a year or two later. That was known as the legitimate theatre. That was run and clearance.

Then you had vaudeville. In the good days of vaudeville, B. F. Keith had a big following, and you had one big theater here in the city of Baltimore, and shows that would play that 40-week season, because they did not have air-conditioning in the summer in those days, and they either closed [fol. 29] down or put in stock companies in the summer, they played 40 weeks. These acts would not have the right to play in any other theater in Baltimore.

Later, they built family houses, where there was some

vaudeville along with the movie, and they may play several of them. Even in burlesque—I do not mean the burlesque of today, but Columbia burlesque, they gave the entertainment world people like Fannie Brice and Leon Errol, and many of the stars of the stage and screen, and they played one theater. It was exclusive.

Now, the movies came along. Movies were originally nickelodeons, showing one-reelers. It was 5 cents, and finally it got up to 10 cents, and later they started making feature pictures, until ultimately you got into sound pictures, and you began to have pictures like Gone With the Wind, and all the other important pictures, Snow White, and what-not, and they were able, because of the medium used, to make that form of entertainment available for every pocketbook of the public.

Now, this is public interest, and Mr. Rome is confused. The public interest is best served when you have the first run in the downtown area. The downtown theater spends a lot of money in advertising a picture. You look at the Sun, or any other papers in Baltimore, and you will see a big ad covering the first run of that picture. Those houses estab- [fol. 30] lish the value of that picture in the area, and after its value is established, either by the criticism of the critics or the advertising or word-of-mouth, the picture is then made available all the way down the line to the last run in the city.

Now, pictures are very costly. Your negatives are costly. Then you have the print problem, which we will develop through the witnesses.

In the last three years, the print problem has even become worse with the technicolor pictures. The black-and-white print is expensive, but the technicolor print is much more expensive, and a certain number of prints have to be made, as Mr. Rome stated.

In Washington, for instance, besides Baltimore, you have the city of Washington, and you have to think of Richmond and Norfolk, and all the other places in the area, and you have 8 or 14 prints of a picture which has to serve your runs in the exchange area. They cannot do it with just the local prints, so they will borrow them from Pittsburgh to Philadelphia, borrow them, and that has been what has been done in the last few years in the industry.

In Baltimore, if you look at the page in the paper that advertises the neighborhood houses, a very little ad, you will see, sometimes, 35 theaters in Baltimore playing the same picture on the same date. That is the exception, but [fol. 31] you will find 20, 21, it figures out, playing a picture on the same date. In order to service them, you have to have these staggered runs and have to arrange the staggered runs so that in Washington, say, in Washington, they all want the picture on the same date.

Another thing, under the stagger distribution, the film rental paid by the first run houses is what makes it possible to exhibit the pictures at the lower admission cost in the neighborhood theatres, because the film rentals in the neighborhhod do not in any way compare with the large film rental you get out of a theater like the Century, or the other theaters downtown.

Now, I mentioned, and I want to express it again, the Century, generally, has exhibited Metro pictures, and it exhibits pictures from one or two other distributors, so that is one first run theater downtown which Mr. Rome says is an affiliated theater. That means it is owned or controlled or operated by a company which has been in the distribution business and production business.

The Valencia, an upstairs house, which is either used as a move-over house, to move a picture from downstairs—it would be unprofitable to keep it in a large theatre, or it is playing second-rate pictures.

The Stanley is Warner Bros., but after you pass that setup, you have the greatest competition in the first-run [fol. 32] exhibition among some very important operators. Take, for example, Mr. Rappaport. I think it is conceded by Mr. Rome and the plaintiff that Mr. Rappaport has for many years operated the Hippodrome Theater as a downtown first run, and has played some of the finest pictures that have been released. I think he has played every Walt Disney picture that has been released in the last 10 or 12 years, and he has played Cinderella, Alice in Wonderland, and has also played most of the Sam Goldwyn pictures, who was one of the best producers in the business.

Now, Mr. Rome—I don't believe he did it intentionally, but he said there had not been a first run theater built in Baltimore in years; but Mr. Rappaport, who runs the Hip-

podrome, rebuilt a building over here at the Town Theater, which has been an expensive first run house since it was opened in 1947.

The Mayfair is a comparatively new theater, and that has been running first run, to my knowledge, for the last several years. I just wanted to correct that impression, because I don't believe Mr. Rome did it intentionally, but it is possible for a newcomer to come in, or an old one like Rappaport, to build a new first run theater in the downtown area.

You have the New theater, run by a man named Mechanic, independently. He has operated there for years and years, [fol. 33] to my knowledge.

You have Mr. Schanberger running Keith's for many years, so you have those downtown theaters actively competing for business in the downtown area.

Now, we expect to show that the downtown theaters draw--and we expect to show the nature and extent of the draw--from every part, not only of Baltimore City but the entire surroundings; in other words, Greater Baltimore; and that they are absolutely dependent upon that draw if they are going to stay in business in the high-rent area, which is the problem downtown, high taxes, high rent, high overhead.

Now, what happened? Mr. Myerberg went out to the corner of Reisterstown Road and Rogers Avenue. There was a large vacant tract of land on that corner. This was sometime in 1947 or 1948; and he and his brothers, or brother, I forget which, decided to build a shopping center. Now, it is not like Edmondson Village, which is a planned shopping center.

We expect to show that it was just the erection of a group of store buildings plus a 1600-seat theater or, I think, the record is 1,584, on Reisterstown Road, in an area that could not support a theater of that size.

You must remember, as our friend said, you know Rogers Avenue, further out about a mile, there is an excellent theater there, called the Uptown, in a much more popu- [fol. 34] lated area. You have banks and several commercial developments there, and you have far more action than you have down here at the intersection of Reisterstown and Rogers.

If you go down Rogers—and we expect to have the figures to prove the statements—you will find a woods, and then a large cemetery.

In his deposition, Mr. Myerberg said the cemetery was not there until after he went there, and it was not his fault that it was a cemetery there instead of people living there; but the fact is, it is there.

You go up Reistertown Road, all the way to Pikesville, and you find far more vacant land that you have residences or apartments.

You go down toward Park Circle, on Reisterstown Road, and you are immediately in the competitive neighborhood of the Avalon, the Pimilico, and the Uptown. He can see that he is in competition with Durkee's Ambassador, which is down toward Liberty Heights, not very far from this theater, but he build that theater with that large capacity, and then says, "I want either exclusive first-run pictures or I want to play pictures day and date downtown."

Now, in the examination of Mr. Myerberg, we expect to develop the shifting positions that he has taken on what he really wanted out there. We think, and we expect to show, that the theater, by virtue of its location, is wholly [fol. 35] unsuitable for the exhibition of first-run pictures.

The word "policy" was used. There is no policy involved in this situation. It is just common business judgment.

Why should a distributor, acting separately and independently, take his pictures away from an account and give it to him out on Reisterstown Road, with no hope of ever getting at your first run an amount equal or sufficient to make up that first-run revenue, which you have to have in a city like Baltimore, to make it possible to enable the public to see the picture in the various subsequent-run theaters in Baltimore?

You have over 90 second-run theaters in Baltimore. I think that is without the colored theaters. You have plenty of seats to take care of everybody in every section of the city.

Now, we expect to show that there is no conspiracy, there is no combination. If you believe his economic theory, you have to believe that we distributors of a picture want

to put a customer out of business. That is ridiculous. The more outlets we have for pictures, the more customers; and, the more customers we have, the more money we should get out of the situation but what happens when a theater goes into an over-seated area, such as we have described? I do not know what the results will develop, but I am sure [fol. 36] the opening of the Crest hurt the other theaters out there, in Pimlico, and all of them out there, because it had to draw the audiences from the other theaters; it had to hurt their business. And, if he had a loss, we are not responsible. If he made a mistake in judgment, in building a theater of that size in that neighborhood, we are not responsible for it. If he made a mistake in building a shopping center, we are not responsible for it.

Now, this enterprise was built by a company called the Pem Construction Company. That is not the plaintiff. Originally, the plaintiff leased the theater to Theater Enterprises, the plaintiff in this case, and the plaintiff in this action is a Maryland Corporation; and, when we finally get into the books, it had a paid-in subscribed capital—pardon me, a paid-in capital of $350. There is no paid-in capital into the company that is making these efforts to compete with downtown first run theaters. We were not able to find the sums the family contributed to both corporations. Subsequently, the theater was sold to this plaintiff, but no money passed. The entire sale was, if I recall, somewhere around $407,000. That was all paid in the form of a mortgage, and also, the plaintiff, in addition to assuming real estate mortgages, assumed mortgages on the chairs and equipment, and everything there.

Now, that is the plaintiff; he is suing us here for these [fol. 37] sums of money.

I submit that there should be no verdict for the plaintiff for a dollar in this case; that what we have done—and by "we" I mean the individual distributors of pictures—has been the normal, ordinary, reasonable, prudent things that a good businessman would do in trying to keep its pictures shown first-run in the downtown area, the only central shopping area in Baltimore, where all the transit comes down like spokes of a wheel, where your big department stores are, where your pedestrain traffic is, where you get matinee

business that you cannot get in any neighborhood; and that Mr. Myerberg should not be permitted to come into this state and upset the whole system, the whole manner of business here, because I do not believe,—even if he did, he would not improve himself; he would just go broke faster, as far as this theater is concerned, and "he would get into the downtown business a new theater that he had built," and you can rest assured that every neighborhood theater would rise up and would not let Mr. Myerberg stay there, but would want the equal right to exhibition that he would have with the downtown theaters.

It is a suicide maneuver on the part of this plaintiff, either to ask us to pay him a part of what he thinks he is going to lose on this shopping center, because of the impracticability of the entire project, or an attempt on his [fol. 38] part to put the downtown first-run theaters out of business; and, on those grounds, we expect a verdict for the defendants.

The Court: Very well, Mr. Rome, you may proceed.

Mr. Rome: If the Court please, I would like to offer in evidence certain paragraphs of the complaint and the answers of the defendants with regard to those paragraphs.

The Court: You do not need to put the pleadings in evidence. They are already before the Court.

Mr. Rome: Very well, sir.

I would like now to offer, if the Court please, the decrees that have been entered against these companies, these respective defendants, by the Courts, as a result of an action brought against these named defendants by The United States.

There is, first, a decree as to the major defendants, which would be Paramount, RKO, Fox, Loew's Incorporated, and Warner's, entered on February 8, 1950.

Mr. Raftery: If Your Honor please, I do not intend to participate in this, but he is erroneously describing the paper. I wish you would do it right.

Mr. Rome: I will stand on the description.

Mr. Raftery: There was no decree entered against Paramount.

Mr. Rome: Excuse me, I am sorry. I misspoke. There [fol. 39] was no decree contained in this particular document entered against Paramount.

There is another decree against Paramount, and, similarly, there was no decree entered in this document against RKO. There was another decree against RKO, and, so the record may be clear on it, I would repeat my offer of the decree against the major defendants, Loew's Incorporated, Warners, and Fox, entered by the United States District Court for the Southern District of New York on February 8, 1950.

I wish to offer in evidence, also, the final decree entered by the United States District Court for the Southern District of New York, on February 8, 1950, against the so-called minor defendants, the Universal, Columbia, and United Artists.

I want to offer in evidence the consent decree as to the RKO defendant, entered by the United States District Court for the Southern District of New York on November 8, 1948. I also wish to offer in evidence the consent decree entered against Paramount by the United States District Court for the Southern District of New York, March 3, 1949.

In view of the colloquy that took place at side bar, I will not further elaborate the offer in evidence, it being my understanding that Your Honor has consented to hear argument with regard to it.

Mr. Watkins: We object to the introduction of the evi-[fol. 40] dence.

The Court: I will postpone ruling on the admissibility of those decrees until I have heard counsel's argument. You may proceed with your other testimony.

Mr. Rome: Thank you, sir. I will call Mr. Myerberg.

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Thereupon, HARRY D. MYERBERG was called as a witness for and on behalf of the plaintiff and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record?

The Witness: Harry D. Myerberg.

Mr. Raftery: Your Honor, would it be practical or helpful to spread upon the record an agreement of counsel that

any objection made by one defendant shall be considered as having been made by all the defendants?

The Court: Very well.

Direct examination.

By Mr. Rome:

Q. Mr. Myerberg, you are a Baltimorian?

A. Yes, sir.

Q. What is your position with Theatre Enterprises, Incorporated?

A. I am president of Theatre Enterprises, Incorporated.

Q. When was that corporation formed?

[fol. 41] A. 1948.

Q. In what State was it incorporated?

A. The State of Maryland.

Q. You have had earlier experience in the motion picture industry?

A. Yes, sir.

Q. What has been that experience?

A. I started as an usher at the New York Paramount Theater, either the latter part of 1927 or '28, and worked my way up to Chief of Service in the Paramount Theater in New York. Then I moved to Philadelphia, in the employ of Warner Bros., in 1929 and 1930.

From there, I spent a short period of time as assistant at the Hippodrome Theater here, with Mr. Barry, and when Mr. Barry left the theater, I left, and I took a position with Warner Bros. again, in Hoboken, New Jersey, at the United States Theater, where I was manager.

From there, I moved to the Lincoln Theater, in Union City, where I was again manager, in complete charge of the theater; and from there I moved into the Oritana Theater, in Hackensack, New Jersey.

That brings it up to about 1936, at which time I resigned my position and came back to Baltimore.

In about 1939, I was the manager of the Lexway Theater, on Lexington Street, and also at that time of the Lord [fol. 42] Calvert Theater, located on Washington Boulevard. From approximately 1941 to the time of the opening of the Crest Theater, although I was interested in the busi-

ness and kept up with it, I was not employed in the theater business.

Q. What were your duties as Chief of Service in the Paramount Theater in New York?

A. To train and handle the personnel in front of the house, such as ushers, and so forth.

Q. What were your duties when you went to Warner Bros. in Philadelphia?

A. At that time, as I recall, Warner Bros. had just bought the Stanley Mastbaum Corporation, of Philadelphia, and wanted to place a type of service that was used in the Paramount organization at that time, in their organization. In Philadelphia, at that time, they had usherettes, and they wanted to change that to the type of operation that was prevalent in New York in the Paramount and Roxy and other large theaters in Chicago and throughout the country; and I was one of two or three persons hired to do this job.

Q. What were your capacities as manager of these theatres in New Jersey, that you have mentioned?

A. I was the manager of the United States Theater in Hoboken, in full charge of the theater.

Q. How large a theater was the United States Theater?

A. As I recall, somewhere around 1100 seats.

[fol. 43] Q. Then you mentioned the Lincoln Theater. What were your duties there?

A. I was manager in complete charge of the Lincoln Theater.

Q. And the other theater was the Oritana?

A. Yes.

Q. What were your duties in connection with that?

A. I was manager of the Oritana Theater.

Q. Did your duties as manager of those theaters include the buying and booking of film?

A. No, sir; it did not include the buying of film, because those were the years of block booking, and the block buying, and that was done by the New York office; but the booking and actual setting-in of the pictures was actually done by the theater manager.

Q. You mentioned the fact that you ran two theaters in Baltimore. Were those successful operations?

A. No, sir.

Q. What happened there?

A. Well, it was again during the period of block booking, and it was very difficult for us to get the proper picture to run, and we just couldn't make out.

Q. Have you been familiar with the exhibition of motion pictures in the city of Baltimore on first run?

A. Yes, sir.

[fol. 44] Q. What theaters in the city of Baltimore exhibit pictures on first run?

A. There is the Century——

Mr. Raftery: Will you fix the time on this? I do not want to object, but just get some order.

By Mr. Rome:

Q. As of 1948 through to 1950, Mr. Myerberg, what theaters in the city of Baltimore were exhibiting pictures on first run?

A. The Century.

Q. How large a house is that?

A. I would say about 3,000 seats.

Q. Do you know who is the exhibitor or who owns and operates the Century Theater?

A. Yes; I do.

Q. Who is the exhibitor?

A. Loew's Incorporated.

Q. What other first-run theater is there in the city of Baltimore?

A. Keith's.

Q. Who is the exhibitor there?

A. Mr. Schanberger.

Q. How large a theater is that?

A. I would say between 22 and 24 hundred seats.

Q. And another theater?

A. The New Theater.

[fol. 45] Q. The exhibitor there?

A. Mr. Mechanic.

Q. What is its seating capacity?

A. Somewhere around 1300.

Q. Another theater?

A. The Town.

Q. Who is the exhibitor that runs that theater?
A. Mr. Rappaport.
Q. Its seating capacity?
A. Around 1500.
Q. Is there any other first-run theater?
A. Yes; the Hippodrome.
Q. Who is the exhibitor there?
A. Mr. Rappaport, also.
Q. What is the seating capacity of the Hippodrome?
A. I would say between 1800 and 2000 seats.
Q. Any other first-run theater?
A. The Stanley.
Q. Who is the exhibitor that operates that theater?
A. Warner Bros.
Q. What is its seating capacity?
A. As I recall, somewhere around 3200 seats.
Q. Is there any other first-run theater?
A. Yes, sir; there is the Mayfair.
Q. Who is the exhibitor there?
[fol. 46] A. That was owned by the Hicks interests.
Q. What is its seating capacity?
A. I think it is under 800 seats.
Q. Is there any other first-run theater?
A. There is the Valencia.
Q. Who is the exhibitor?
A. Loew's, Incorporated.
Q. And its seating capacity?
A. Somewhere around between 16 and 18 hundred, I think. I am not sure.

Q. You have described these theaters as being first-run theaters in the city of Baltimore during the period 1948 to 1950. Were they also the first-run theaters in the city of Baltimore for a number of years prior to that time?

A. Yes, with the possible exception of the Town Theater, which was the old Palace Theater rebuilt under the name of Town Theater, in 1949.

Q. Taking up the theaters by turn, Mr. Myerberg, what product has been exhibited at the Century Theater during this period 1948 to 1950?

A. Loew's, Metro Pictures, some Universal, and some United Artists.

Q. Has it exhibited the product of any other distributor company?

[fol. 47] A. No.

Q. Has that been true also for the years prior to the period of 1948?

A. Yes, with the exception of—I don't think, in years prior, that they played Universal pictures. They played United Artists and Metro pictures.

Q. For how long, to your knowledge, has the Century Theater played Metro's and United Artists'?

A. At least 20 years.

Q. What about the Valencia?

A. The Valencia plays the move-over from the Century Theater, of the same product. Sometimes they play what we term a "slough" or second-grade picture.

Q. What is meant by a move-over picture?

A. A picture which has no clearance and moves directly on its final day from one theater, and opens the very next day in the next theater.

Q. For how long a period of time has the Valencia played that product, that type of product, to your knowledge?

A. For many years, and particularly, periodically, the Valencia has been closed.

Q. What product plays in the Stanley Theater?

A. Warner Bros. pictures and half of Paramount.

Q. For how long has that theater exhibited that product, to your knowledge?

[fol. 48] A. For quite a long time; but there were pooling arrangements there with Loew's Theaters.

Mr. Raftery: I move to strike out the pooling arrangements.

The Court: Why?

Mr. Raftery: He has no knowledge of that, and there is no such. We are dealing with the period 1948 to 1950, and nothing of that character was in existance at any time during that period.

The Court: Are you speaking from your own knowledge?

The Witness: Yes.

The Court: I will allow the answer. He claims he knows.

The Witness: It was generally known in the business at that time, and from 1930 or '31 to '36, I was with Warner

Bros., and I knew the pooling arrangement between Loew's and Warner Bros. at the Century and Stanley Theaters.

Mr. Raftery: I move to strike out, as having no connection with an alleged conspiracy. We are dealing with the period from 1948 to 1950, and he is testifying to mere hearsay, in 1930 to 1936.

The Court: I don't know that it is hearsay. I will allow it.

The Witness: There was a pooling arrangement be-
[fol. 49] tween——

By Mr. Rome:

Q. Just a minute. What product has been playing at the Hippodrome Theater?

A. RKO and Columbia.

Q. For how long a period of time has the product been playing in that theater, to your knowledge?

A. For at least 20 years.

Q. What about the Town Theater?

A. The Town Theater opened in 1949. It did not get any new product. It split the product that was playing in the Hippodrome Theater. Mr. Rappaport split it between the two theaters and played the same companies, RKO and Columbia, they split between the Town and Hippodrome.

Q. And that product has been playing in the Town Theater since it opened?

A. Yes, to my knowledge.

Q. What product plays in the New Theater?

A. Twentieth Century Fox.

Q. For what period of time, to your knowledge, has Twentieth Century Fox played in the New Theater?

A. I would say, better than 20 years.

Q. What about the Keith's Theater—what product does it play?

A. It plays Universal: that is, part of Universal and half of Paramount, and whatever else it can pick up.

[fol. 50] Q. For what period of time, to your knowledge, has Keith played those products?

A. Quite a long time. I would say, the same period of time—20 years.

Q. You have also mentioned Mayfair Theater. What product does it play?

A. The only company that I know, that the Mayfair has, is Republic, an independent company, and it plays the same type of "slough" picture, that the Valencia plays when it plays not on a move-over policy, but plays a direct first-run picture.

Q. For what period of time had that theater exhibited that type of picture, to your knowledge?

A. I think, since they opened. That was early in the 1940's.

Q. Has there ever been a time, in the city of Baltimore, to your knowledge, Mr. Myerberg, in which first run product has played in any other locality outside of the so-called downtown area?

A. Yes, sir.

Q. Which was that and what theater was that?

A. That was the Metropolitan Theater, located at North Avenue and Pennsylvania.

Q. How far away is that from the downtown center of the city?

[fol. 51] A. I don't know the exact distance, but I would say, 2½ miles.

Q. What product played first run in that theater?

A. Warner Bros.

Q. When was that?

A. I would say, in the middle or late 20's.

Q. Who was the exhibitor or operator of the Metropolitan Theater at that time?

A. Warner Bros.

Q. When was it, Mr. Myerberg, that you first got the idea about the erection of the theater that became known as the Crest Theater?

A. In the latter part of '46 or the early part of '47.

Q. What happened at that time?

A. We had purchased a particular tract located at Reisterstown Road and Rogers Avenue, more than a half of which was zoned commercially. We proceeded to build homes on that portion that was zoned residential, and after completing the homes,—we bought the property originally with the idea of establishing a first-class commercial area in that section, and made numerous surveys of the area and decided that that would be the hub of the entire area in that section of Baltimore.

Mr. Raftery: I move to strike that out as a conclusion, and no statement of fact.

[fol. 52] The Court: I will allow it.

By Mr. Rome:

Q. Excuse me. You have used the word "we". Whom do you mean by that?

A. You see, I am in business with my brothers, and if I use the word "we", it actually means that I did it because we always speak of things collectively. When one of my brothers or myself do something, "we" do it collectively although I may have done it or one of them may have done it. In this case, I meant my brothers and myself.

Q. How large a tract did you purchase?

A. I don't recall the exact size now. I think, between 12 and 15 acres.

Q. What portion of it was devoted to the construction of homes?

A. I would say, about 40 or 50 per cent of it.

Q. How many homes did you build in that area?

A. I would say, between 50 and 65.

Q. Were they all sold?

A. They were sold before they were completed.

Q. Following the erection of the houses and their sale, what did you do with regard to the development of that area?

A. After a survey was made, we decided that this was the spot for the commercial area, commercial center. We built what we considered a very fine commercial center and [fol. 53] had it planned, we had assigned that portion of the area to accommodate a theater.

Q. You have referred here to surveys. What surveys did you make, Mr. Myerberg?

A. We made population surveys within a certain radius of the theater, and made surveys as to the expansion of the city, and we believed the city was expanding from the center at a greater speed and was taking-in population in that area, although it was not as great as in other sections, it was still formidable, and we had a large interest in building operations, residential building operations.

Q. What was the amount of the population that you found to be in that area—I withdraw the question.

Mr. Myerberg, what do you have in mind when you speak of the area of the Crest Theater?

A. We feel the area of the Crest Theater draws from south to Park Circle, and west to approximately Gwynns Falls Parkway, and in the same line east to Roland Avenue, taking that in a line north through Liberty Road to the west, and east through the Green Spring Valley up into Reisterstown.

Q. What is the amount of population you found to be in that area, that you have just described?

A. I could not locate the exact survey made at that time. However, we reconstructed it from the same information that we received at that time, and found from the 1950 [fol. 54] Census of the Health Department of the City of Baltimore, in that area in 1950, that there was approximately 125,000 people.

[fol. 55] Q. What was the source of the statistics you relied upon in reaching that figure?

A. The maps and the information from the Health Department of Baltimore figure, the census figure.

Q. Have you ever at any time testified to a different figure for the population of that area?

A. Yes, I have. During the examination of the defendants.

Q. By the defendants?

A. By the defendants, the question was asked what I thought the population was, and I said around 175,000. I told them then that I did not have the opportunity to look over my records and that was my guess at that particular time. I happened to have been wrong. However, the reconstruction of the population was based on the same method that we used in 1947 to 1950 survey.

Q. So that actually how many people had you found as a result of your investigation to be in that area that you have described as of the period 1947, 1948, Mr. Myerberg?

A. In that area, we found that the population increase was approximately 10,000, as close as we could determine, not an exact figure, from 1947 to 1950.

Q. So that at that time it was something less than 125,000?

A. I would say within 105,000; we will take 20,000 off.

[fol. 56] Q. When was it that you actually constructed the stores and shops constituting the shopping center that has been referred to?

A. 1947.

Q. That was before the construction of the theatre?

A. Yes, sir.

Q. And when was it that you were prepared to carry through your idea for the construction of the theatre itself?

A. We had planned the theatre in 1947 and then begun construction of it in the early part of 1948.

Q. At what time did you first get in touch with the distributors with regard to product for your theatre?

A. I would say it was in January of 1948.

Q. When is that time with relation to the actual construction of the theatre?

A. That was before the construction of the theatre.

Q Before ground had been broken?

A. Yes, sir.

Q. What did you then do in January of 1948?

A. I visited Washington and I saw each of the major distributors over there, the big eight, and told them that we had plans and were about to begin the construction of this theatre, and each one of them told me that they could not discuss—I asked them at that time and told them what we [fol. 57] wanted, that we were going to build the type of theatre that would require first-run pictures, it would be of such size and appointments that we would need first run for the economic life of the theatre, and uniformly each one told me that they could not discuss it. It was a national policy of theirs, their home office was in New York, they were not to discuss the film for that theatre until the theatre was built, to come back after the theatre was near completion and they would consider film for the theatre.

Q. You have said that you saw the big eight of the companies. Whom do you specifically mean that you saw at that time in January, 1948.

A. Warner Brothers, Paramount, Loew's Incorporated, Metro, Loew's Incorporated distributes Metro pictures. Universal, R.K.O., United Artists, Columbia, and I don't know whether I said Paramount or not.

Q. You did mention Paramount. You mentioned War-

ner's Paramount, Loew's, Universal, RKO, United Artists and Columbia. That's seven companies. The other was Fox, was it not?

A. Fox, that is correct.

Q. Following these conversations in January of 1948 what did you then do, Mr. Myerberg?

A. We proceeded with the construction of the theatre.

Q. When next did you get in touch with the distributors?

A. Sometime in the latter part of September, the first of [fol. 58] October, 1948.

Q. And where was it that you got in touch with them?

A. I went to Washington to see them.

Q. Washington is the exchange area that serves Baltimore, is it?

A. Yes, sir.

Q. And whom did you go to see first in that connection, if you remember?

A. I went to see Mr. Bob Smeltzer first. I had known Mr. Smeltzer for quite a long time and knew he was probably in seniority the oldest person and probably one of the most capable in the film industry in Washington, and I wanted to talk to him first.

Q. What was his position?

A. Mr. Smeltzer told me——

Q. What was his position with what company?

A. He was with Warner Brothers.

Q. What was his official capacity with Warner Brothers, if you remember?

A. He was District Manager.

Q. What conversation, if any, did you have with Mr. Smeltzer?

A. I told Mr. Smeltzer of the theatre, but he seemed to know of it. He did know of it. I had talked to him earlier in the year and he knew of the theatre, and he had followed [fol. 59] the construction of it either himself or through the men in his office, and he said: "You can't expect any first-run pictures from Warner Brothers because we have our own theatre in Baltimore. It is our policy throughout the country to play our pictures in our own theatres, in first-run situations, and it is our understanding that that is permitted to us by the courts." He said, "However, I

cannot see why any company that does not have a theatre in Baltimore would not like the opportunity of selling to your theatre."

Q. Did you have any other conversation with him at that time?

A. We probably had some other talk of other things as well as the theatre and the business in Baltimore and Washington, and then I left Mr. Smeltzer.

Q. Was there any arrangement or indication that you were to get in touch with him in any way?

A. Well, he said that New York passes on these things, he couldn't pass on it, to write him a letter, that he thought he could get word from New York, although he thought he knew what it was going to be.

Mr. Rome: Would you please mark this carbon copy of a letter dated October 12, 1948, addressed to Warner's Film Inc., 901 New Jersey Avenue, N.W., Washington, D. C., attention Mr. Robert Smeltzer from Mr. Harry Myerburg, president?

[fol. 60] The Clerk: Plaintiff's exhibit No. 1.

(Letter dated October 12, 1948 from Harry Myerberg to Robert Smeltzer was marked Plaintiff's exhibit No. 1.)

By Mr. Rome:

Q. I hand you, Mr. Myerberg, a document which has been marked for identification as plaintiff's exhibit No. 1 and ask you if you can tell the Court and jury what that document is?

A. This is a letter that I sent to Mr. Smeltzer after my visit in October to him requesting first-run pictures in the City of Baltimore.

Mr. Rome: Will you mark this letter dated October 14, 1948 on the letterhead of Warner Brothers Pictures Distributing Corporation, from Robert Smeltzer to Harry Myerberg as the next exhibit, please?

The Clerk: That will be plaintiff's exhibit No. 2.

(Letter dated October 14, 1948, Smeltzer to Myerberg, was marked Plaintiff's exhibit No. 2.)

By Mr. Rome:

Q. I hand you a document which has been marked plaintiff's exhibit No. 2 and ask you if you will describe to the Court and jury what that is?

A. This is a letter from Mr. Smeltzer. When I was in his office I asked if it would be possible for the opening of the Crest Theatre not ony to get us a first-run picture from his company, but to try to arrange to get some movie stars there to enhance the opening. This letter was to tell me that [fol. 61] it would be impossible to get the movie star and also to tell me that he thought he had made his position quite clear that we could not get Warner Brothers pictures first-run in Baltimore.

Mr. Rome: If the Court please, I offer these two documents in evidence.

The Court: Do you want to read them?

Mr. Rome: Not at this moment, sir.

Mr. Raftery: I think they ought to be read.

Mr. Rome: If you would prefer, sir, I would be happy to read them.

This, members of the jury, is a letter signed by Mr. Myerberg, addressed to Warner's Film Company, attention Mr. Robert Smeltzer and it reads:

"Gentlemen:

"On October 5, 1948, I had an occasion to talk to you at your office and explain in considerable detail about the new theatre with which I am connected. So that you may have all this information readily accessible for both yourself and for the other officials of your company, I am taking this opportunity to formally present all the facts.

"It is expected that on November 15, 1948, this theatre, located at 5521-29 Reisterstown Road, Baltimore, Maryland will be completed and ready to exhibit motion pictures. Advantageously located from a population and transporta- [fol. 62] tion viewpoint, the theare has all the conveniences necessary to insure first-run motion picture success.

"This theatre can truly be said to be the most modern and exquisite in Baltimore. Its architectural design and interior decoration, quality of equipment, and comforts to

patrons, make it a unique and different theatre for this area. Having approximately sixteen hundred luxurious seats on the first floor, in addition to superb private accommodations for another hundred in the loges, this theatre undoubtedly offers the finest showcase for films in the State of Maryland.

"Free to patrons of the theatre is a specially built parking area, accommodating about 400 cars. In addition, there is ample space available on uncrowded streets directly adjacent to the theatre for the parking of automobiles.

"This magnificent motion picture theatre, designed and planned to exhibit first-run pictures in Baltimore, presents itself to your company as an outlet for your highest quality first-run product. To open the theatre, the finest picture available from your company, a first-run film which has received more than the usual pre-exhibition publicity—preferably one which is waited for by the movie-going public with anticipation; one already causing excitement and creating discussion—is required. The splendor of the theatre must be complemented by the quality of a top-notch [fol. 63] production. A world premiere is desirable.

"Plans are being formulated to make the opening of the theatre one of the greatest affairs of this year in the industry. Radio and television broadcasts and personal appearances of all political, local and society leaders are to be arranged.

"It is hoped that your company can furnish the final element to complete what promises to be one of the most important and exciting premieres in the history of the motion picture industry in Baltimore—personal appearances of some of your leading actors and actresses. As you so well know, the glamour these Hollywood personalities add can provide the final touch necessary to crown the brilliant opening of the newest first-run film outlet in this area.

"I am at the present time in a position to tender my bid herewith for your first-run pictures — Baltimore, which will be available for exhibition at this theatre. I am prepared to offer you any reasonable guarantee against a percentage of the gross. I can further offer the highest type of exploitation and management, both of which will at all times be under the supervision of the most experienced theatrical

people, and which will insure your company greater returns than you have heretofore enjoyed in this area. I am in a highly favorable position to offer these advantageous terms because this theatre's fixed charges are relatively negligible [fol. 64] in comparison with those expenses which must be met by other first-run theatres in this city. The maximum playing time for your pictures shown in this theatre is assured because our policy is to thoroughly exhaust each picture's potentialities without indiscriminate 'pulling' to make room for any accumulated backlog of other company's pictures waiting to be exhibited before your pictures have completed their proper run.

"I agree to set a minimum gross figure that would control the completion of each picture's engagement. This policy will guarantee you the fullest playing time possible in Baltimore and will substantially increase your prior earnings for similar showings in this area.

"It would be greatly appreciated if this matter would be given your prompt attention so that the final plans necessary for the grand opening can be formulated.

"With kindest personal regards, I am,

"Very truly yours, (Sgd.) Harry Myerberg, President."

Plaintiff's exhibit No. 2, members of the jury, is a letter signed "Robert Smeltzer," on the stationery of Warner Brothers Pictures Distributing Corporation, 901 New Jersey Avenue, Northwest, Washington 1, D. C. and dated October 14, 1948, which reads:

"Dear Harry:

[fol. 65] "Enjoyed our chat when you were in the office last week, and the contents of your letter of October 12 regarding personal appearances of Stars for the opening of your Hilltop Theatre, will be taken up with the proper executives and you advised accordingly, however, I thought I thoroughly explained to you regarding Warner Products in our own Stanley Theatre, Baltimore, Md., which I thought at the time was quite explicit.

"Kindest personal regards.

"Sincerely yours, (Signed) Robert Smeltzer."

By Mr. Rome:

Q. Mr. Myerberg, the name of the theatre in this communication is referred to as the "Hilltop Theatre."

A. Yes, sir.

Q. Can you describe what happened with regard to the name?

A. We had anticipated calling the theatre the "Hilltop Theatre" but found that Don Swann's theatre was in existence as a summer theatre, and we did not want to have any confusion, so we changed the name to the "Crest Theatre." It is the same.

Q. Who else did you get in touch with in Washington in October, 1948, Mr. Myerberg?

A. We went to Metro.

Q. Whom did you see at the Metro office?

A. I saw Mr. Adams, the branch manager.

[fol. 66] Q. What happened when you saw him?

Mr. Raftery: Well, if you please, fix the time and place.

Mr. Rome: I thought it had already been fixed, Mr. Raftery, as October, 1948.

Mr. Raftery: I thought it fixed it with dates in the other one.

By Mr. Rome:

Q. Do you recall the specific or approximate date of your visit?

A. No, sir, I think it was in the early part of October, 1948. I don't recall the exact date of the visit.

Q. What happened when you saw people at Metro?

A. Mr. Adams told me almost the identical thing that Mr. Smeltzer had told me.

Mr. Raftery: I object to that and move he tell us what Mr. Adams said, and not what was almost identical.

The Court: I suppose the witness is trying to save time, which we all ought to try to do. But if you want the exact words, if you remember them, Mr. Myerberg, go ahead.

The Witness: Yes, sir. Mr. Adams said that Loew's Incorporated owned two first-run theatres in the City of Baltimore and that it was their understanding from their legal department that they could play their own pictures in their

own theatre and did not have to submit them to competition bidding or competitive negotiations in other theatres. [fol. 67] Therefore, he could not offer me first-run pictures in the City of Baltimore. However, those decisions were made in New York and for me to kindly write him a letter and then he would in turn take that letter up with his New York office and get their answer in the matter.

By Mr. Rome:

Q. Was there any other conversation with Mr. Adams at that time?

A. At this time I don't recall any others.

Q. Did you write such a letter to Metro, Mr. Myerberg?

A. Yes, sir, I wrote a letter to Mr. Adams.

Mr. Rome: Will you kindly mark this letter dated October 12, 1948 from Harry Myerberg to Metro-Goldwyn-Mayer Corporation, as the next exhibit number?

The Clerk: That will be plaintiff's exhibit No. 3.

(Letter dated October 12, 1948, Myerberg to Metro-Goldwyn-Mayer, was marked Plaintiff's Exhibit No. 3.)

By Mr. Rome:

Q. Mr. Myerberg, I hand you a letter which has been marked plaintiff's exhibit No. 3 and ask you if you can identify that?

A. Yes, sir, that is the letter I sent to Mr. Adams.

Mr. Rome: Mark this, please, letter dated October 15, 1948 on the stationery of Metro-Goldwyn-Mayer Pictures, Loew's Incorporated, 1009 New Jersey Avenue, Northwest, Washington 1, D. C., from J. A. Adams, Resident Manager to Mr. Harry Myerberg.

[fol. 68] The Clerk: That will be marked plaintiff's exhibit No. 4.

(Letter dated October 15, 1948, Adams to Myerberg, was marked Plaintiff's Exhibit No. 4.)

By Mr. Rome:

Q. I hand you plaintiff's exhibit No. 4 and ask you if you can identify that?

A. This is an answer from Mr. Adams notifying me that he had received the letter and would at a future date communicate with me and furnish us with the information he got.

Mr. Rome: Your Honor, I offer plaintiff's exhibits 3 and 4 in evidence, and have discussed with counsel on the other side the fact that we need not read exhibit 3, sir, since it is the same kind of a letter which Mr. Myerberg sent to Warner Brothers which has been marked plaintiff's exhibit 1.

The Court: Well, if it is in evidence the jury can read it if you do not want to read it all.

Mr. Raftery: Your Honor, it is the identical letter which was read about the world premiere, and so forth, written on the same day that letter was written to Warner Brothers. In other words, Metro got the same request in the same language that Warner Brothers got.

The Court: I shouldn't think you need read it, then. Do you want to read the answer?

Mr. Rome: I thought Mr. Myerberg had already read it. [fols. 69-70] This is dated October 15, 1948 on the letterhead of Loew's Incorporated and it is from J. A. Adams to Mr. Harry Myerberg, and it reads: "Your letter of October 12, 1948 addressed to this office, with reference to the new theatre located at 5521-29 Reisterstown Road, Baltimore, Maryland, has been received.

"The matter is being investigated and upon receipt of the necessary information, we will communicate with you again. Very truly yours, J. A. Adams, Resident Manager."

The Court: We will take a recess, members of the jury and counsel, until 2:00 o'clock.

(Thereupon, at 12:50 o'clock p. m. a recess was taken until 2:00 o'clock p. m.)

[fol. 71] AFTERNOON SESSION

(Met, pursuant to the taking of the recess, at 2:00 o'clock p. m.)

The Court: Very well, Mr. Rome.

Mr. Rome: If the Court please, I would like to offer in evidence as plaintiff's exhibit No. 4 a letter from Loew's

Incorporated, signed by J. A. Adams, Resident Manager, under date of October 15, 1948, addressed to Mr. Myerberg, which letter has already been read to the jury.

The Court: I thought it had already been offered.

Mr. Rome: The Reporter tells me that it has not actually been offered.

If the Court please, I should like to offer in evidence as plaintiff's exhibit No. 5 a letter from Loew's Incorporated, signed by J. A. Adams, Resident Manager, under date of October 19, 1948, addressed to Mr. A. M. Eisenberg, New York City. Mr. Eisenberg is a member of the legal department of Loew's Incorporated.

(Letter dated October 19, 1948, Adams to Eisenberg, was marked Plaintiff's exhibit No. 5.)

Mr. Rome: If the Court please, I would like permission to read this letter to the jury.

"Dear Mr. Eisenberg:

"We are attaching a copy of a request and our reply thereto for a first-run in the City of Baltimore, Maryland, made by Mr. Harry Myerberg of the newly constructed the-[fol. 72] atre on Reisterstown Road, temporarily called the 'Hilltop Theatre'.

"We are also attaching a freehand drawing of the area showing the proximity of this house to other established houses in the area. Obviously we cannot entertain this proposal, but it is suggested and recommended that in the event we are able to place our product here on other than a first-run basis, it be set up to play as a first subsequent run on an equal basis with the Uptown, Ambassador and Forest Theatres.

"Awaiting your advice in the matter, and with kindest regards,

"Sincerely, J. A. Adams, Resident Manager."

And there is marked down in the corner, members of the jury, carbon copies being sent to Mr. Berger, Mr. Allen and Mr. Hirsch.

Q. (By Mr. Rome) Mr. Myerberg, before we adjourned for lunch, you were testifying concerning your conversation

in October of 1948 with Mr. Adams as a result of which you sent the letters that have already been referred to. Now, did you have any conversations at or about that same time with any other company?

A. Yes, sir.

Q. Did you have conversations with RKO?

A. Yes, sir.

Q. Whom did you see in RKO?

[fol. 73] A. Mr. Brecheen, the branch manager.

Q. When was this?

A. About the same time, in October.

Q. 1948?

A. Yes, sir.

Q. What conversation did you have with Mr. Brecheen at that time?

A. I saw Mr. Brecheen and recalled our conversation that we wanted first-run pictures in the Crest Theatre we are now nearing completion. It was necessary, however, to have first-run pictures in there. We wanted first-run pictures from his company for our theatre. Mr. Brecheen tried to discourage me and he said he could not possibly see how I could get first-run pictures there since RKO has a national policy which had not permitted first-run pictures except with a few exceptions, to any theatre located outside of a down-town area of a city, that they had a very satisfactory customer over here in the Hippodrome Theatre, in Mr. Rappaport, and as far as he was concerned he had no intention of changing. However, if I wanted him to, he could refer the matter to New York, which he had to do for final authority on it, that if I would write a letter outlining what I wanted to do, he would forward it to New York.

Q. Was there any other conversation with him at that time?

[fol. 74] A. At the same time I asked him the same thing I asked the other branch managers I had seen.

Q. What, specifically, Mr. Myerberg?

A. To the effect that we wanted a first-run picture to open the theatre, and we would like to get some motion picture stars there to enhance the opening, and that I was willing—at that time "Joan of Arc" was just being readied for release, and I think I asked Mr. Brecheen about that, and

it is my recollection that Mr. Brecheen said that no selling policy had been furnished for the picture as yet. Therefore, he could not talk about it. And that is all I remember at this time about the conversation.

Q. Following that conversation with Mr. Brecheen, did you write such a letter to RKO?

A. Yes, sir, I wrote a similar letter to RKO that I wrote to the other companies.

Mr. Raftery: The witness has referred to this world premiere letter of October 14, 1948, and it has been suggested that some stipulation be made so as to not burden the record with these letters. I am willing to stipulate. I think other counsel are willing to stipulate that a letter identical in form to the letter that the jury have over there now, that is, the October 12th letter about a world premiere, was sent to RKO by Mr. Myerberg on October 14, 1948, the only difference in the letters being the first two that were introduced in evi- [fol. 75] dence were dated October 12, 1948, and this letter, the photostat of which I have, was dated October 14th, and we will save burdening the jury with another reading of the same world premiere letter.

The Court: Very well.

Mr. Rome: If it please the Court, I should like to offer in evidence as plaintiff's exhibit No. 6 a letter under date of October 15, 1948 on the stationery of RKO Radio Pictures, Inc., 203 Eye Street, Northwest, Washington 1, D. C., signed by J. B. Brecheen, Branch Manager, addressed to Mr. William Zimmerman, and I think that we may stipulate Mr. Zimmerman is General Counsel and Assistant Sales Manager.

Mr. Raftery: No. He is assistant to Mr. Depinet or Mr. Mochrie, the General Sales Manager. He is also a lawyer, but he is in the distribution end of the business.

Mr. Rome: He is the gentleman to whom this letter was sent. Subject "Hilltop Theatre, Baltimore, Maryland."

"Dear Bill:

"Theatre Enterprises, Inc., of Baltimore, Maryland, headed by Harry Myerberg, will soon be ready to open their 'Hilltop Theatre' located at 5521-29 Reisterstown Road, Baltimore, Maryland.

"This is a neighborhood location one and two-tenths miles from the Uptown Theatre, Baltimore. Mr. Myerberg made an appointment with me Monday of this week to discuss product, and I expected him to ask for first neigh- [fol. 76] borhood run either day and date with the Uptown Theatre or perhaps against the Uptown Theatre, instead he wanted first-run Baltimore, Maryland. I did everything to discourage such an idea because we have in our first-run account in Baltimore one of the finest, most cooperative accounts I have ever seen and whom in the course of a year pays us a lot of film rental. I then went to Baltimore to make a survey of this theatre. No doubt but what it will be a very beautiful house when completed, approximately 45 to 60 days from now. I think that it will compare very favorably with I. M. Rappaport's New Town Theatre in Baltimore. Of course it is a suburban house. Mr. Myerberg, upon returning to Baltimore, wrote me a letter, and I have acknowledged receipt of it. This file is herewith enclosed and is self-explanatory.

"It, therefore, will be necessary for you to instruct me what to do about it. I certainly do not want competitive bidding in this situation because I do not believe a neighborhood theatre can compare with a downtown house in a city the size of Baltimore.

"Form B is also hereto attached.

"Sincerely yours, J. B. Brecheen, Branch Manager."

Down in the corner there is marked "enclosures," with copy going to J. R. Folliard. The Form B which is attached states: "Exchange, Washington, D. C.

[fol. 77] "Requesting theatre: Hilltop City, Baltimore.

"Population, 859,100; State, Maryland.

"Run or availability requested: First-run.

"Is any picture asked for already licensed on the run requested: No.

"Is there any picture asked for not yet licensed on the run requested which you intend to license to an RKO theatre? Answer blank.

"Name of picture: Blank."

Then there appears: "Requesting theatre: Hilltop.

"Location: Suburban exhibitor, Harry Myerberg.

"Seating capacity, 1700.

"Current admission price policy not established.

"Competing theatres operating on the run or availability requested: Town.

"Location: Downtown.

"Exhibitor: I. M. Rappaport.

"Seating capacity: 1515.

"Current admission price policy: 65 cents, including U. S. tax."

There also appears: "Competing theatre: Hippodrome.

"Downtown location.

"Exhibitor: I. M. Rappaport.

"Seating capacity: 2250.

"Current admission price policy: 70 cents, including U. S. [fol. 78] tax.

"RKO clearance that the prior run has over the run requested: 21 days.

"RKO clearance that the requested run has over the next subsequent run: None.

"Distance between the theatres listed under four or five: Both approximately five miles.

"Mailing address of all exhibitors or agent involved listed: I. M. Rappaport, Fayette Street, Baltimore, Maryland.

"Harry Myerberg, Theatre Enterprises, Inc., 302 Park Avenue, Baltimore, Maryland.

There is an asterisk regarding the suburban location of the Hilltop Theatre with this statement: "Hilltop located at 5521-29 Reisterstown Road, Baltimore, Maryland."

The Clerk: Plaintiff's exhibit No. 6.

(Letter dated October 15, 1948, Brecheen to William Zimmerman, was marked Plaintiff's Exhibit No. 6.)

[fol. 79] Q. (By Mr. Rome) Did you get in touch with any other distributor company at that time, Mr. Myerberg?

A. Yes, sir.

Q. What other company?

A. Twentieth Century Fox.

Q. When was this?

A. About the same time, in October.

Q. Whom did you see at Fox?

A. I saw Mr. Norris.

Q. Who is Mr. Norris?

A. Mr. Norris then was the branch manager of the Washington Office of 20th Century Fox.

Q. What conversation did you have with him?

A. I said to Mr. Norris, or spoke to Mr. Norris about our wanting the availability of first-run pictures made available to the Crest Theatre; that we were going to open. Mr. Norris told me that he knew, of course, of the theatre, and he was, as I recall it now, in a meeting with, a meeting I called him out of, with his New York executives, or executives from out of town; that he would take it up and write them a letter, telling them what I wanted; that this thing probably could not be done, but to write him a letter and he would take it up. It was a very short conversation with Mr. Norris at that time, but I had more meetings after that.

[fol. 80] Q. Did he say with whom it would be taken up?

A. He said, with the New York office. I don't recall anything more than that, at this time.

Q. Pursuant to that conversation, you then wrote a letter similar to those that already have been referred to here, to Fox?

A. Yes.

Mr. Raftery: Now, what is the date of that letter, so that we can make the same stipulation?

Mr. Rome: October 12.

Mr. Raftery: We stipulate that on October 12th, the same date as the Metro and Warner Bros. letters, a similar World Premier letter, the identical World Premier letter, was sent to Mr. Norris, of 20th Century Fox Film.

Q. (By Mr. Rome) Did you have any conversation with anyone at the Paramount Corporation?

A. Yes, sir; I saw Mr. Benson at Paramount. He was the branch manager of Paramount.

Q. What conversation did you have with him? First, when was that conversation with Mr. Benson?

A. Within the same period of time, the early part of October, '48, and I reminded Mr. Benson of my earlier request, that the theatre was now completed and we required pictures, and we wanted them either on an exclusive basis in the city of Baltimore, or on a day and date basis with

[fol. 81] downtown. He said it was his company's policy throughout the country to exhibit pictures in the downtown areas of cities, and not in suburban houses. I called his attention to the Kansas City situation, I knew about that, and he said that was an exception which he would not understand.

I also called to his attention the fact that they were doing at that time, at that particular time in Washington, between the Warner and Ambassador Theaters, the same thing, and he said that was something there, an exhibitor owned both theaters, the exhibitor being Warner Bros., and because of that, he thought it was the policy for many years, and his only reason to refuse that was that we could not do it in Baltimore. I said, "Is this final?" And he said, "We will refer this to New York. They make final decisions on these matters, and you, like the others, send me a letter and I will forward the letter." And I wrote the same letter requesting, or setting forth the theater, setting forth the fact of the World Premiere, as I did in the other case.

Mr. Raftery: We will stipulate that on October 14th the same letter was written by Harry Myerberg, President, to Paramount Pictures, Inc., Attention of Mr. Benson, the same World Premier letter.

Q. (By Mr. Rome) Did you see anyone at Universal?

A. Yes, sir; I saw the then branch manager, Mr. Martin.

[fol. 82] Q. When was this, Mr. Myerberg?

A. About the same time I had been in Washington; I had been in Washington for several days, seeing people.

Q. And you had a conversation with Mr. Martin?

A. Yes. The conversation went along the line of the other conversations I have related; and Mr. Martin told me specifically or substantially what the other branch managers had told me.

Mr. Raftery: If Your Honor please, I think we ought to know what Mr. Martin is supposed to have said. Unfortunately, Mr. Martin has died since this conversation, and instead of saying "substantially," I think, in fairness to us, we should get his best recollection of the conversation that took place.

The Court: Do you remember it more specifically?

The Witness: I saw Mr. Martin, as I recall, the Baltimore salesman was with him, and I went into this matter of the opening of the theater, in my conversation with him, the early part of that year, pertaining to the new theater I was going to open, which turned out to be the Crest Theater, instead of the Hill Top Theater, and Mr. Martin told me that it was Universal's policy throughout the country to exhibit pictures in downtown areas of cities, and that they would not distribute them in suburban areas; and I talked to Mr. Martin about that, and he said, "Well, I can't make [fol. 83] any decision on this thing. It has to be referred to someone higher than me, and I have to take it up with New York." And I suggested I would go to New York; and he said, "You send me a letter, and I will forward it to New York." He said that would start it—which I did, and I sent him the same letter I sent to the other distributors, a letter setting forth the type of theater it was, so that the New York people, who had not seen the theater, and the letter was primarily fitted for that purpose, so that the people in New York, whom he had to refer this to, and who had not seen the theater, might at least have a word picture of what we were putting there, and the run that we were requesting, and what we wanted to do.

Q. And you sent such a letter?

A. Yes.

Mr. Raftery: We will stipulate that on October 14th, 1948, he sent the same World Premier letter to Universal; International Film Corporation, care of Mr. H. Martin.

Mr. Rome: I call upon you, Mr. Raftery, for a copy of the letter from Mr. Martin to Mr. Fred Myers, dated October 20, 1948.

Mr. Raftery: Here is the letter.

Mr. Rome: I should like to offer in evidence, as Plaintiff's Exhibit 7, a letter from Mr. H. J. Martin, Branch Manager of the Universal Company, addressed to Mr. Fred Myers, [fol. 84] Home Office, with carbon copies marked for Messrs. J. J. Scully, A. J. O'Keefe, W. A. Scully, and E. T. Comersal, this letter being dated October 20, 1948:

"Dear Mr. Myers:

"I am attaching hereto copy of letter received from Mr. Harry Myerberg requesting product first run Baltimore for

a theater at present under construction and temporarily referred to as the Hill Top Theatre.

"I have seen this theatre and it is all that the gentleman claims from the standpoint of appointments, capacity, et cetera. It is located eight miles from downtown Baltimore and a mile and a half from the Uptown Theatre. Your suggestions as to procedure are solicited.

"Very truly yours,

"H. J. Martin, Branch Manager."

There is attached a copy of the letter from Mr. Myerberg to Universal, which has already been referred to.

(Letter dated October 20, 1948, from H. J. Martin, Branch Manager of Universal, to Mr. Fred Myers, marked Plaintiff's Exhibit 7.)

By Mr. Rome:

Q. Who is Mr. Fred Myers, Mr. Myerberg?

A. At that time, I think he was the Eastern Divisional Manager for Universal Pictures.

Q. Having to do with sales and licensing?

A. And distribution; yes.

[fol. 85] Q. Did you have a conversation with anyone in United Artists?

A. Yes, sir.

Q. This was also——

A. This was the second conversation I had with each of these exchanges. The first was around January, and this was the first part of October. I saw Mr. Price, of United Artists, and with him, I think, were Mr. Rose, the Baltimore salesman, was also in the room at the time. It was either Mr. Rose or Mr. Young, which, I don't recall, who was the salesman at that time, they change them so quickly and frequently—and I told Mr. Price, I recall that conversation during the early part of the year, and told him that we were now under roof, finished the theater, and we needed pictures, and wanted them as first run Baltimore. He told me that all the pictures that his company had for release at that time had been sold out through January first; that he had nothing to offer.

I said, "Does that mean that as to those that you can release after January 1st, you will offer pictures to me?"

He said, "No; that doesn't." He said, at the present time, he is going to offer—they have nothing to offer. And we went into the same information, just practically the same thing, to write him a letter and he would take it up with New York. And I sent Mr. Price the same letter that I sent [fol. 86] to the other distributors, again setting forth the same things.

Mr. Raftery: I will stipulate that on October 12, 1948, the same World Premier letter was addressed by Mr. Myerberg, President, to United Artists, Attention of Mr. J. Price.

By Mr. Rome:

Q. Mr. Myerberg, did you ever get any reply from United Artists?

A. No, sir.

Q. Did you ever have any further correspondence of any kind with United Artists?

A. I made numerous phone calls from that time on, up to just before the opening of the theater, and immediately thereafter I was in Washington, and I sent telegrams and didn't even get the courtesy of a reply to them.

Mr. Raftery: I call on the plaintiff to produce copies of letters and many telegrams that were sent to United Artists.

The Court: I don't know that we need to read all of them.

Mr. Raftery: I don't want to read them, but just inspect them.

Mr. Rome: I show Mr. Raftery the file of letters and telegrams.

Mr. Raftery: May I reserve the right to comment on these, later in the plaintiff's case, or during our case?

[fol. 87] The Court: You can put them all in as an exhibit. There is a batch, but if you had no new matter in them, I think it is just a waste of time and a burden, unnecessarily.

Mr. Raftery: I just wanted to comment on them at a later date. I did not want to interrupt Mr. Rome's examination.

The Court: If you want to comment on them, they should be in evidence.

Mr. Rome: I have no wish to offer them. In line with Your Honor's thinking, it would only encumber the record

to put in letters to the same effect as those already testified to. They are always available for Mr. Raftery to examine.

The Court: If he is going to comment on them, they should be in evidence, if they are admissible. Anything that is discussed before the jury should be in evidence. The jury decides the case on the evidence, and nothing else.

Mr. Raftery: My comment will not be on the contents of the letters at all, which happen to be some carbons, and it looks like a large file, with two or three pairs of each of the documents in there. I will reserve it for later. I don't want to interrupt Mr. Rome.

Mr. Rome: So there will not be any further discussion about it, Mr. Myerberg, I hand you a letter and ask if you can identify it?

[fols. 88-89] The Court: Can't you let him look at the whole batch together, and put them in under one number?

Mr. Raftery: Why don't you pick out the duplicates and save the witness the trouble, and also pick out your letters.

The Witness: Yes. There are some registered letters that I sent to Mr. Price, and also some letters that I requested your office, Mr. Rome, to send, after I retained you in November, 1949.

Mr. Rome: Some of the material in here is carbon copies of similar letters? Is that correct?

The Witness: Yes.

Mr. Rome: I offer in evidence, as plaintiff's Exhibit No. 8, a file, clipped together, of letters and correspondence, including a telegram from or on behalf of the plaintiff, to Universal Artists Company.

(File of letters and correspondence was marked plaintiff's exhibit No. 8.)

Mr. Raftery: I have no objection to anything being used. I think it would be simpler if we picked out the duplicates of the same letters that are in there.

The Court: Do you mean there are duplicates right in this batch?

Mr. Raftery: Yes.

[fol. 90] The Court: Take those out. You don't need to go into that now.

By Mr. Rome:

Q. In any event, you got no reply of any kind from United Artists?

A. No, sir.

Q. Did you have any conversations with Columbia?

A. I have no recollection of the Columbia meeting, with Columbia at all, and I have no recollection of sending them a letter. I did, earlier in the year, but not in October. Was that the particular time—I don't recall talking to Columbia.

Q. Did you get in touch with Columbia at any time thereafter?

A. Yes; at a later date, I got in touch with Columbia, and offered substantial bids on several pictures which apparently were not even acknowledged, to my recollection.

Q. Were you ever able to license for your Crest Theater pictures for first-run exhibition in the city of Baltimore, either on an exclusive basis or a day-and-date basis, from United Artists?

A. No, sir.

Q. Were you ever able to license such pictures from Columbia?

A. No, sir.

Q. Were you ever able to license such pictures from any [fol. 91] company that is a defendant in this case?

A. No, sir, I haven't.

Q. Were you ever able to see any executive other than those persons in the Washington office of United Artists?

A. Yes; Mr. Fred Meyers, the Eastern Divisional Manager of Universal, visited my theatre just before it opened.

Q. Do you recall when that was?

A. That was in either November or December, sometime, around that time, 1948, and he stated that he should not grant our theatre either a day-and-date policy with downtown or an exclusive first-run in the city of Baltimore, as it was their policy throughout the country to show their pictures in the downtown areas, first-run.

I reminded, as I recall at that time, Mr. Meyers, that the picture "Hamlet" was being released, and my theatre was very suitable for showing that picture, and that I would like to offer a bid for "Hamlet" to play our theatre as first-run in the city of Baltimore. Mr. Meyers said he would consider

it. And that was the extent of the conversation with Mr. Meyers.

I think, as I recall now, that I wrote a letter to Mr. Meyers the day after his visit, recalling his visit and asking him for a decision on the matters we discussed.

Q. Mr. Myerberg, I hand you a letter dated December 15, [fol. 92] 1948, and ask if you can identify that?

A. That is a letter I sent to Mr. Martin, of Universal Pictures.

Mr. Rome: If the Court please, I offer it in evidence as Plaintiff's Exhibit 9. It is a letter from Mr. Myerberg, dated December 15, 1948, to Universal, Attention Mr. H. Martin:

"Gentlemen:

"It is our understanding that your company has taken the position that the Crest Theatre will not be permitted to competitively bid for your pictures first run, City of Baltimore either on an exclusive or day and date basis. As you know, it is imperative that we open the Crest Theatre without further delay.

"We are, at this time accepting your offer permitting us the right to bid on your pictures first neighborhood run in this area.

"Please understand that our acceptance of your offer relative to neighborhood run pictures for the Crest Theatre is not a withdrawal of our original request for first-run pictures, City of Baltimore, contained in our letter of October 12, 1948.

"Kindly send, as soon as practicable, all the information necessary regarding pictures available for the Crest Theatre on a first neighborhood run basis.

[fol. 93] "Very truly yours, Theatre Enterprises, Inc., by Harry D. Myerberg."

(Copy of letter dated December 15, 1948, from Harry D. Myerberg to Universal-International Film Corp., was marked Plaintiff's Exhibit No. 9.)

By Mr. Rome:

Q. I hand you two letters, dated December 31, 1948, and one dated January 6, 1949, and ask if you can identify those?

A. A letter I wrote to Mr. Meyers after his visit to the theatre, and his answer to me.

Mr. Rome: If the Court please, I offer in evidence, as Plaintiff's Exhibit 10, two letters clipped together—a letter dated December 31, 1948, on the stationery of Universal Film Exchanges Inc. to Mr. Harry D. Myerberg:

"Dear Mr. Myerberg:

"With reference to your letter of December 15th addressed to Mr. H. J. Martin at our Washington office.

"I note your statement—'accepting our offer permitting (you) the right to bid on (our) pictures first neighborhood run.'

"So that the record may be straight, this is to advise you that we never made any offers to you whatsoever of the nature referred to by you.

[fol. 94] "Kind regards,

"Sincerely, (Sgd) Fred Meyers."

Then there is a copy of a letter, dated January 6, 1949, from Mr. Myerberg to Mr. Fred Meyers:

"Dear Mr. Meyers:—

"It was my understanding that during your visit to our Crest Theatre in company with your Mr. Scully and Mr. Martin, you refused us the right to competitively bid for your pictures first run, City of Baltimore, either on exclusive or day and date basis. At that time it was also my understanding that you granted us the right to bid on your pictures first neighborhood run in this area.

"It is apparent from your letter of December 31 that my understanding with regard to first neighborhood run pictures is not correct. If the above is a fact, what run are you prepared to offer our Crest Theatre. We have tried continually, through numerous letters, telegrams and phone calls, since October 12, 1948 to have your company set forth the run you will grant our Crest Theatre.

"It is imperative that we receive word from you immediately as further delay in negotiating for films would cause us great financial loss.

"Very truly yours, Theatre Enterprises, Inc., By: (Sgd) Harry D. Myerberg."

[fol. 95] (Letter dated December 31, 1948, from Universal Film Exchanges, Inc. to Harry D. Myerberg, and copy of letter dated January 6, 1949, from Harry D. Myerberg, to Mr. Fred Meyers, were marked Plaintiff's Exhibit No. 10.)

Mr. Rome: If the Court please, I offer in evidence, as Plaintiff's Exhibit 11, a letter on the stationery of Universal Film Exchanges Inc., Washington Office, dated January 18, 1949, addressed to Mr. Myerberg, signed "H. J. Martin, Branch Manager."

"Dear Mr. Myerberg:

"In reply to your letter of December 15th, be advised that is is our intention to offer you the opportunity to negotiate for our pictures for use in the Crest Theatre, and to be available at the same time as they are to other first neighborhood runs.

"At such time as our next picture is made available to the neighborhood runs, we will have our Sales Representative call upon you for the purpose of negotiating such sale.

"Universally yours, (Sgd) H. J. Martin, Branch Manager."

(Letter dated January 18, 1949, from H. J. Martin, Universal Film Exchanges Inc., to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 11.)

[fol. 96] By Mr. Rome:

Q. So that ultimately you licensed pictures from Universal on a first neighborhood availability, is that correct, Mr. Myerberg?

A. Yes, sir.

Q. Have you ever seen any other executive of any other company, with the exception of those people assigned to the Washington offices?

A. Yes; I saw Mr. Moon, who to my knowledge then was Eastern Division Manager of Twentieth Century-Fox Film Distributing Company.

Q. Do you recall when it was that you saw Mr. Moon?

A. To the best of my recollection, in November or December of that year, 1948.

Q. What happened on that occasion?

A. I had been asking Mr. Norris for the right to go to New York to see some of his executives and personally talk to them about the situation, and was not getting any answer from him as to what I could do; and at that time Mr. Contee, who was the sales manager of the Washington Branch, called me and said Mr. Moon would be in town, and whether I would talk to him; and I told him I would be very happy to talk to him. And Mr. Moon came to my office with Mr. Contee and Mr. Norris. Mr. Norris was the branch manager. Mr. Contee was the sales manager at that time, and we again renewed the discussion of the first run pictures, [fol. 97] either on a day and date basis or an exclusive basis, in the city of Baltimore, for the Crest Theatre. Mr. Moon told me flatly, it was against his company's policy to do it, and he would not do it; that they don't do it except in a few locations, where they own their own theatres in the country, and that he would not do it here in Baltimore; that he had a satisfactory customer in Mr. Mechanic at the New Theater, and he would not permit us to play those pictures.

I asked Mr. Moon, as I recall, whether that also held true for a day and date policy with the New Theater, would he permit the Crest Theater to play the pictures day and date with the New Theatre. He said he would take that under advisement and let me know at a later date.

I invited Mr. Moon to see the theatre, being he was in town, and none of the top executives of Fox who were making the visit had seen the theatre, and I told him I would be very happy to take them out and show them the theatre, and its location, and so forth. He said he had several appointments, that he could not go at that time. I think it was sometime in the morning when he was there, as I recall it, but that he would see it later in the day, and would certainly see it before he left Baltimore.

I asked Mr. Moon, when he left his last appointment, to please call me and I would make myself available, regard-[fol. 98] less of the time, to show him the theatre. I did not hear from Mr. Moon, as I recall, up to the latter part of the afternoon, and I went to the Crest Theatre to see if he had gone there without me. The theatre was not open yet, and whether he had just gone out, and I asked the watchman if anyone had been in it, or asked for me, or came to see the

theatre, and he said "No". And I stayed there for quite a long time, and left, and came back at 10 or 11 o'clock that night, and no one had seen the theatre. So I don't think Mr. Moon saw the theatre.

Q. Mr. Myerberg, I hand you a letter dated November 8, 1948, and ask if you can identify what that is?

A. A letter I wrote to Mr. Moon, immediately after his visiting my office, requesting information on the decision of his company.

Mr. Rome: If the Court please, I offer in evidence as Plaintiff's Exhibit 12, a letter on the stationery of Theatre Enterprises, dated November 8, 1948, addressed to Mr. Moon, of the Twentieth Century-Fox Company:

"Dr. Mr. Moon:

"I was delighted to have the opportunity of speaking with you and your Mr. Contoe and Mr. Norris on November 4, 1948 in my office and have been able to supplement verbally the facts sent to your company in my letter of October 12, 1948.

[fol. 99] "It is my understanding that you, on behalf of 20th Century Fox, have taken the position that our Crest Theatre, 5125-27 Reisterstown Road, Baltimore, Maryland cannot have the opportunity to competitively and openly bid for pictures first run Baltimore City.

"However, there are several matters which were discussed which are in need of clarification.

"Has your company refused our Crest Theatre the right to open a competitive bidding for your product on a day and date run with first run Baltimore?

"Am I right in understanding that your company would permit our Crest Theatre to bid only on your pictures first subsequent run Baltimore?

"We have delayed the opening of the Crest Theatre until December 27, 1948.

"It is imperative that your company's position in the above matters be clarified immediately so that pictures can be obtained for the theatre. Any delay in negotiating pictures would cause us great financial loss since it would be necessary to postpone the opening of the Crest.

"Very truly yours, Theatre Enterprises, Inc., By:
(Sgd) Harry D. Myerberg."

[fol. 100] (Copy of letter dated November 8, 1948, from Harry D. Myerberg to Mr. Moon, of Twentieth Century-Fox, was marked Plaintiff's Exhibit No. 12.)

By Mr. Rome:

Q. Who is Mr. Andrew Smith?

A. At that time he was the general sales manager of Twentieth Century-Fox in New York.

Q. And Mr. Norris was what?

A. The Washington Branch Manager.

Mr. Rome: I offer in evidence, as Plaintiff's Exhibit 13, a letter on the stationery of Twentieth Century-Fox Film Corporation, dated November 9, 1948, Office of R. E. Moon, Eastern Sales Manager, addressed to Mr. Myerberg.

"Dear Mr. Myerberg:

"This is in reply to your registered letter, dated November 8th.

"Our company's position with regard to first run City of Baltimore is as follows:

"We have a satisfactory customer operating what we consider the best first run outlet in the City of Baltimore and it is our intention to continue to serve our pictures first run to the New Theatre.

"You are correct in your understanding that we would permit your Crest Theatre to negotiate competitively with the Senator Theatre for first subsequent run in Baltimore.

"Very truly yours, (Sgd) R. E. Moon."

[fol. 101] (Letter dated November 9, 1948, from R. E. Moon to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 13.)

By Mr. Rome:

Q. Mr. Myerberg, I hand you a copy of a letter dated November 11, 1948, and ask you if you can identify that, first.

A. This is my reply in answer to Mr. Moon's letter of November 9th.

Mr. Rome: If the Court please, I offer in evidence, as Plaintiff's Exhibit 14, copy of a letter dated November 11,

1948, addressed to Mr. R. E. Moon, Eastern Sales Manager, 20th Century Fox Film Co.

"Dear Mr. Moon:

"Your letter of November 9, 1948 received and contents noted.

"You make your Company's position clear in so far as you will not permit our Crest Theatre to competitively bid on exclusive first run pictures in the City of Baltimore. However, the following needs clarification:

"Does this refusal also include our request for a day and date run with first run City of Baltimore as noted in my registered letter of November 8, 1948?

"In your last paragraph you mentioned the Senator Theatre. I have never requested information regarding this theatre. Will you kindly clarify what is meant by [fol. 102] this?

"Very truly yours, Theatre Enterprises, Inc., By: (Sgd.) Harry D. Myerberg."

(Copy of letter dated November 11, 1948, from Harry D. Myerberg to R. E. Moon, was marked Plaintiff's Exhibit No. 14.)

Mr. Rome: If the Court please, I offer as Plaintiff's Exhibit 15 a letter on the stationery of Twentieth Century-Fox Film Corporation, Office of R. E. Moon, Eastern Sales Manager, addressed to Harry D. Myerberg.

"Dear Mr. Myerberg:

"This is in reply to your registered letter of November 11th, and I will try to give you the requested clarification.

"First, we do not wish to play the Crest Theatre day and date with first run City of Baltimore.

"Second, regarding the Senator Theatre, this theatre is located in your competitive area and is currently playing our product first run in this area. If you desire to play pictures in that position, you would naturally have to compete with the Senator for the run.

"Very truly yours, (Sgd) R. E. Moon."

(Letter dated November 12, 1948, from R. E. Moon to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 15.)

[fol. 103] By Mr. Rome:

Q. Mr. Myerberg, where is the Senator Theatre in relation to your own theatre?

A. It is on York Road and Belvedere Avenue, about 6½ miles from our theatre.

Q. At any time have you considered the Senator Theatre to be in a competitive situation with the Crest Theatre?

A. No, sir.

Q. At any time did you make any request of Fox Film Company, or any company, regarding the Senator Theatre?

A. No, sir.

Q. What kind of product were you finally able to license from Twentieth Century-Fox, Mr. Myerberg?

A. The first subsequent-run; that is, second-run pictures, 21 days after downtown.

Q. Have you ever seen or talked with any other executive of any other company, apart from those you have mentioned, other than the personnel attached to the Washington office?

A. I had correspondence with Mr. Lichtman, of Twentieth Century-Fox, but I have never seen or talked to him.

Q. Who is Mr. Lichtman?

A. Mr. Lichtman was just then appointed as assistant to the president, Mr. Skouras, of Twentieth Century-Fox.

Q. What led you to get in touch with him?

[fol. 104] A. I read in a trade magazine that Mr. Lichtman was reported in a speech, by the trade papers, before a group of exhibitors in Philadelphia, in company with Mr. Andy Smith, who was the general sales manager, and with Mr. Einfeld, the newly-appointed general publicity director of Twentieth Century-Fox, this exact same idea. It was not mine. I had nothing to do with the authorship of it, the multiple first runs in cities. He set forth the facts——

Mr. Raftery: I object. He is testifying to what he read in a trade paper. The question asked was what caused him to get in touch with Mr. Lichtman, and he said he read an article in a trade paper; and from that point on, I submit it has nothing to do and is hearsay.

Mr. Rome: He is entitled to bring out what he read in the trade paper that led him——

The Court: I think that is dragging it out a little bit. He has given his reasons.

Mr. Rome: It goes right to the heart of the problem with regard to obtaining first-run pictures in the theatre.

The Court: Have you the trade paper here? I think it is unnecessary, isn't it? What I understand you are trying to show is that there was this uniformity of refusal for the first run. Where it is cumulative, I do not think you should spend so much time on all the details.

Mr. Rome: The problem with regard to Mr. Lichtman [fol. 105] is to show that, contrary to the remarks made by Mr. Raftery in his opening statement to the jury, that this was something invented by Mr. Myerberg, that this idea was advanced by Mr. Myerberg in these cases, so that when that was exhibited to Mr. Lichtman, one of the top executives of Fox——

The Court: Do you want to put the trade paper in? I suppose you can do it. I don't know whether you need burden the jury by reading a long article in the trade journal.

Mr. Rome: No; I don't intend to do so.

Mr. Raftery: I submit this is going to be hearsay, a trade paper. I had never seen that article before, but I do not think it is the way to prove what he is trying to prove. He asked the witness, "Why did you get in touch with Mr. Lichtman, and who was Mr. Lichtman?" He said, "He is assistant to the president." I assumed he was laying a foundation for some letters or telegrams he wanted to offer in evidence, correspondence with Lichtman. The fact that a trade paper carries an article, we do not publish the trade paper, we do not vouch for it, and we object to the introduction.

Mr. Rome: Mr. Raftery is correct in believing that I intend to introduce letters on this point, but I am also attempting to establish the fact that there did appear in the trade press at this time a speech of Mr. Lichtman with re- [fol. 106] gard to the idea of the advisability of multiple first-runs in cities.

The Court: I will allow it.

Mr. Rome: I offer, as Plaintiff's Exhibit 16, the Film Bulletin dated April 11, 1949, on page 7 of which there

appears a story under the caption, "Fox Meetings Forecast Changes in Old Patterns", and there appears this report under the subheading "Multiple First Runs":

"Lichtman expounded on the theory of multiple first-runs and elimination of excessive clearance first advanced by him in the Philadelphia meeting with exhibitors. Instances where pictures played simultaneous first runs in non-conflicting areas has proven a 'boon to the box office,' he said.

"Urging that this plan be explored, he argued that the public, the distributor and the exhibitor might best be served by playing a picture first run in a number of theatres simultaneously and reducing the clearance for subsequent runs.

"We launch a picture with a large expenditure of money for advertising, and we tell the public that they can only see it in one theatre. They have to come great distances at great inconvenience to transportation and other matters. [fol. 107] "Ad Value Lost

"After the run in that one theatre, we place the picture in moth balls for a considerable period of time, before that picture reaches the fine theatres in the residential sections of these large cities. By that time the advertising is forgotten and other pictures are being announced with the result that we are losing a great portion of the patronage which of course means a great many dollars to all of 'us.'

"Under the plan, Lichtman added, all subsequent run theatres would be moved up with the result that a much larger theatre audience is developed 'because people see pictures when they want to see them.'"

("Film Bulletin" dated April 11, 1949, was marked Plaintiff's Exhibit No. 16.)

By Mr. Rome:

Q. Did the report of the speech of Mr. Lichtman, just referred to, appear elsewhere in the trade press than in the Film Bulletin?

A. Yes, sir; it did.

Q. Mr. Myerberg, I hand you a copy of a letter dated April 13, 1949, and ask if you can identify what that is?

A. That is a letter I sent to Mr. Lichtman, after reading the statement reported in the last document referred to.

Mr. Rome: I offer in evidence letter dated April 13, 1949, [fol. 108] from Harry D. Myerberg, to Mr. Al Lichtman, Vice President, Twentieth Century-Fox Film Corp.

"Dear Mr. Lichtman:—

"After reading your statement in the Motion Picture Herald of April 2, 1949, made at a meeting with exhibitors in Philadelphia and noting your complete accordance with our request to play your company's pictures simultaneously with first run, City of Baltimore, I wish at this time to review the case of our new Crest Theatre, located at Reisterstown Road and Rogers Avenue, in Baltimore, Maryland.

"It is evident from your statement that you have not been consulted in your company's unjustifiable refusal to grant our Crest Theatre this run. So that you may have a complete picture of what transpired, I am enclosing copies of all correspondence between your company and Theatre Enterprises, Inc. and after reviewing this correspondence and satisfying yourself as to the outstanding quality and location of our Crest Theatre, I have no doubt that you will grant us the right to play your pictures simultaneously with downtown Baltimore.

"This theatre was built to accommodate simultaneous run policy with first run, City of Baltimore and therefore is suffering a great financial loss being forced by your company to run pictures 21 days after first run, City of Baltimore.

[fol. 109] "Your immediate action in this matter will be greatly appreciated.

"Very truly yours, Theatre Enterprises, Inc., by
(Sgd.) Harry D. Myerberg."

(Copy of letter dated April 13, 1949, Harry D. Myerberg to Al Lichtman, was marked Plaintiff's Exhibit No. 17.)

Mr. Rome: I offer in evidence, as Plaintiff's Exhibit 18, a letter from Twentieth Century-Fox Film Corporation, on the stationery of Al Lichtman, Vice President, dated April 25, 1949, addressed to Mr. Myerberg.

"Dear Mr. Myerberg:

"I have just returned from my trip throughout the country. Among other things, I spoke with our Washington Manager.

"We discussed constructive plans for the improvement of conditions in the city of Baltimore for all concerned, and I am sure that in the near future, our Mr. Norris will discuss these plans with you.

"With kindest regards and thanking you for writing me, I am

"Sincerely, (Sgd.) Al Lichtman."

(Letter dated April 25, 1949, Al Lichtman to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 18.)

By Mr. Rome:

Q. Mr. Myerberg, Mr. Lichtman's letter refers to the [fol. 110] fact that Mr. Norris would be in touch with you. Did you ever hear from Mr. Norris?

A. Not pertaining to my letter to Mr. Lichtman, no.

Q. Was anything ever done, to your knowledge, to better the situation in Baltimore, as referred to by Mr. Lichtman?

A. The only other thing that I know of was, I think, in the late spring or early fall of that year,—the theatre had been open 7 or 8 months by that time,—Mr. Contee, then the sales manager of Twentieth Century-Fox office in Washington, contacted me and wanted to know whether I would play any multiple first-run in Baltimore, first day and date with downtown, and that they were contemplating such a run.

I said, "Oh, yes, we would, that is the thing I wanted all along." And he said they were getting the information together; and I spoke to Mr. Contee on several occasions about it. In fact, I got in touch, about that time, with Mr. Contee—I don't know whether Mr. Norris was there, but the then manager for Fox came in and discussed the situation with me, and, as I recall, thinking of a certain number —the number I don't recall at this time—to start the policy. [fol. 111] Well, after that meeting I never heard anything further from Mr. Contee, and when I inquired they told me New York had vetoed it and it was thrown out.

Q. What specifically was the policy that was being talked about at that time?

A. Playing multiple first-run day and date with downtown, and I think there was something else at that time, about getting in line with what Mr. Lichtman had said was the cutting of clearances.

Q. You mean by "multiple first-run," having a first-run picture exhibited in more than one theatre at the same time?

A. Yes, sir.

Q. Did there come a time when you communicated again with Mr. Lichtman?

A. Yes, I recall about a year later Mr. Lichtman took over the position of General Sales Manager of 20th Century Fox, replacing Mr. Smith. I took the occasion to write him a letter reminding him of our letter of a year before.

Q. I hand you a copy of a letter dated May 24, 1951 and ask you if you can identify it?

A. This is a copy of a letter I sent to Mr. Lichtman at that time.

Mr. Rome: If the Court please, I offer in evidence as plaintiff's exhibit No. 19 a copy of a letter dated May 24, [fol. 112] 1951, addressed to Mr. Lichtman.

"Dear Mr. Lichtman:

"I note in the trade papers that you have become the General Sales Manager of Twentieth Century Fox Film Corporation. This fact brought to mind a letter I wrote to you on April 13, 1949, after reading in the Motion Picture Herald of April 2, 1949 a statement you had made at a meeting with exhibitors in Philadelphia, Pa. I am enclosing a copy of my letter and of your reply to it on April 25, 1949.

"Your statement at that time, as reported by the Motion Picture Herald, outlining methods whereby revenue could be increased for both distributors and exhibitors is even more pertinent to the situation in the industry today when we are confronted with the problem of television cutting deeply into grosses. I assume that you must still retain the opinions you expressed two years ago, and, therefore, I wish to invite your attention again to the situation in Baltimore.

"In your letter of April 25, 1949 you wrote as follows:

" 'We discussed constructive plans for the improvement of conditions in the City of Baltimore for all concerned, and

I am sure that in the near future our Mr. Norris will discuss these plans with you.'

"Although more than two years have elapsed since you wrote to me I have received no information either from you [fol. 113] or Mr. Norris as to the plans you discussed and, I may add, there has been no improvement in conditions in Baltimore.

"Having in mind what you have said as well as the known fact that Fox as well as other distributors does exhibit its pictures in numerous cities throughout the country in theatres located out of the so-called downtown area on a first run basis day and date with the downtown theatres, I cannot understand why a different course of action is followed in Baltimore.

"I would be glad to meet with you at your convenience to discuss this matter with you further.

"Yours very truly, Theatre Enterprises, Inc., by Harry D. Myerberg."

(Copy of letter 5-24-51, Myerberg to Lichtman, marked Plaintiff's Exhibit No. 19.)

By Mr. Rome:

Q. Did you receive a reply to that letter that you had sent to Mr. Lichtman?

A. No, sir.

Q. Did you have any acknowledgment of it at all?

A. No, sir.

Q. Reference is contained in that letter, Mr. Myerberg, to the effect that Fox in some situation in other areas of the country does pursue this policy of multiple runs. Do you, of your own knowledge, know of such situations?

A. Yes, sir, I know of some situations.

[fol. 114] Q. What situation do you know of?

A. I know of Los Angeles where Fox owns the theatres in which they have that policy. They play three or four theatres with a downtown theatre. I think they pursue it at Cincinnati, Ohio, Washington, D. C., but mostly in cases where they own the theatres themselves. I think Denver, Colorado is another one, but I am not too sure of that.

Q. You mean, your statement is that Fox pursues this pol-

icy of a multiple first-run in areas or cities where it owns the theatre downtown as well as in the area outside of downtown?

A. Yes, and there are a few instances where they do not own the theatres and they pursue the policy also.

Q. Did you see any other executives or any other company with the exception of these persons normally assigned to the Washington branch offices?

A. I saw Mr. Zimmerman in New York.

Q. Do you recall when that was?

A. Well, that was the latter part of 1948, but I would say around November or December, sometime in there.

Q. How did that visit come about?

A. I continuously had asked Mr. Brecheen for some word as to the positions of their company and whether I could go to New York to see Mr. Jules Levy, who I think was either the Divisional Manager or General Sales Manager, I don't know which. I think it was Eastern Manager, Mr. Jules [fol. 116] Levy. And Mr. Brecheen kept stalling me and kept telling me he would get some information for me, and finally one time he told me to go to Mr. Zimmerman of RKO's legal department in New York.

I told him that I did not want to see attorneys, I wanted to see the sales personnel. I wanted to see Mr. Levy. He said: "Well, I don't understand. Mr. Zimmerman was not only a lawyer but he was also the General Sales Manager of the company and in seeing him, you will be seeing the sales personnel." He said that he would make the appointment, and he made the appointment, and I saw Mr. Zimmerman.

Q. What happened when you saw Mr. Zimmerman?

A. Mr. Zimmerman tried to persuade me from first-run policy in the City of Baltimore, telling me he did not do that anywhere in the country, that their general policy throughout the country was to play their pictures in large neighborhood theatres downtown, and he did not want to and did not see where they could deviate from that policy. I told Mr. Zimmerman that he had a fine picture coming up that would become available for national release at the same time to show at the Crest Theatre, and that picture was "Joan of Arc," and I offered him a substantial guarantee on the picture. I don't recollect whether or not I offered him a

substantial guarantee at that time, but I told him I would [fol. 116] post a substantial guarantee on the picture to open my Crest Theatre if he would consider it, and he said: "Well, we haven't formulated a sales policy yet," but that he would contact me and let me know?

Q. Was there anything more to your conversation with him at that time?

A. Well, he said something to the effect: "You should go home now and be a good boy and take 21-day pictures," or something to that effect. I think that ended the conversation.

Q. I hand you, Mr. Myerberg, a copy of a letter dated November 23, 1948, and ask you if you can identify that?

A. Yes. This was a copy of the letter that I sent to Mr. Zimmerman after my meeting with him in New York, and it contains an offer that I made for "Joan of Arc."

Mr. Rome: If the Court please, I offer in evidence as plaintiff's exhibit No. 20 a copy of a letter dated November 23, 1948 addressed to William Zimmerman, RKO Pictures, Inc.

"Dear Mr. Zimmerman:

"I was delighted to have had the opportunity of speaking with you at your office on November 18th, 1948 and to have been able to supplement verbally the facts sent to your company in my letter of October 12, 1948.

"I would like at this time to confirm the oral bid which I made for your picture 'Joan of Arc' to play our Crest [fol. 117] Theatre, first run City of Baltimore.

"Theatre Enterprises, Inc. agrees to pay 55% of the first $8000 gross box office receipts and 65% of all over $8000. We will also place any reasonable guarantee, the figure to be mutually agreed upon.

"It would be greatly appreciated since time is most important, if you would reply at once to the above.

"Again thanking you for your courtesies while visiting you in New York, I am

"Very truly yours, Theatre Enterprises, Inc., by Harry D. Myerberg"

(Letter dated November 23, 1948, Myerberg to Zimmerman, was marked Plaintiff's Exhibit No. 20.)

Mr. Rome: If the Court please, I offer in evidence as plaintiff's exhibit No. 21 a letter on the stationery of RKO Radio Pictures, Inc., Rockefeller Center, New York, dated December 2, 1948, signed William Zimmerman, addressed to Harry D. Myerberg, Theatre Enterprises, Inc., Baltimore.

"Dear Mr. Myerberg:

"You have suggested that I confirm in writing our decision communicated to you by telephone Monday, November 29th. You have requested that your Crest Theatre be permitted to exhibit our pictures first-run in Baltimore either on an [fol. 118] exclusive or day and date basis. In considering your request we have made a thorough review of the matter, including discussions with Mr. Folliard, our District Manager, and Mr. Beecheen, our Branch Manager. We have concluded that the Crest Theatre is essentially a neighborhood theatre and as such would not be an appropriate outlet for the exhibition of our pictures first-run in the City of Baltimore.

"However, we are willing to afford you a competitive opportunity to obtain our pictures for exhibition in the Crest Theatre on first neighborhood run in its area. If you are interested in obtaining pictures on this run, will you kindly advise us to this effect.

"During our telephone conversation on Monday I advised you that we would further consider your specific offer of October 23rd to exhibit Joan of Arc first-run. After such further consideration we have decided that our conclusion that the Crest Theatre is not an appropriate theatre for the exhibition of our pictures first-run in the City of Baltimore applies with equal, if not greater, force to Joan of Arc. Accordingly, we regret to advise you that we cannot accept your proposal.

"Sincerely, (Signed) William Zimmerman."

(Letter dated December 2, 1948, Zimmerman to Myerberg, was marked Plaintiff's Exhibit No. 21.)

By Mr. Rome:

[fol. 119] Q. Mr. Myerberg, I hand you a copy of a letter dated December 23, 1948 and ask you if you can identify that?

A. Yes. This is in answer to the letter Mr. Zimmerman sent me.

Mr. Rome: If the Court please, I offer in evidence as plaintiff's exhibit No. 22, copy of a letter dated December 23, 1948, addressed to Mr. William Zimmerman, RKO Radio Pictures, Inc.

"Dear Mr. Zimmerman:

"It is our understanding that your company has taken the position that the Crest Theatre will not be permitted to competitively bid for your pictures first run, City of Baltimore, either on an exclusive or day and date basis. As you know, it is imperative that we open the Crest Theatre without further delay.

"We are, at this time, accepting your offer permitting us the right to bid on your pictures first neighborhood run in this area.

"Please understand that our acceptance of your offer relative to neighborhood run pictures for the Crest Theatre is not a withdrawal of our original request for first-run pictures, City of Baltimore, contained in our letter of October 12, 1948.

"Kindly send, as soon as practicable, all the information [fol. 120] necessary regarding pictures available for the Crest Theatre on a first neighborhood run basis.

"Very truly yours, Theatre Enterprises, Inc. By: Harry D. Myerberg"

(Letter dated December 23, 1948, Myerberg to Zimmerman, was marked Plaintiff's Exhibit No. 22.)

Mr. Rome: If the Court please, I offer in evidence as Plaintiff's exhibit No. 23, a copy of a letter on the stationery of RKO Radio Pictures, Inc., the Washington office, dated October 3, 1948, to Mr. Wm. Zimmerman, New York, New York.

"Dear Bill:

"I wrote you under date of October 15 concerning the Hilltop Theatre, Baltimore which will soon be ready for opening under the management of Mr. Harry Myerberg.

"You will recall Mr. Myerberg is asking for first run Baltimore, and which I did not recommend personally.

"In the meantime, Mr. Myerberg has called me three times insisting on an answer to his letter. His latest request this week was that I make him appointment and let him *go to New York* and talk to our people there concerning this situation. I stalled him on this request, but did tell him I would write once more to see about getting an answer to his [fol. 121] correspondence.

"Will you, therefore, please advise me immediately just what can be done about this situation.

"With kindest regards. I am,

"Sincerely yours, J. B. Brecheen, Branch Manager."

(Letter dated October 3, 1948, Brecheen to Zimmerman, was marked Plaintiff's exhibit No. 23.)

Mr. Rome: That letter has a notation at the bottom "cc: R. J. Folliard."

If the Court please, I offer in evidence as Plaintiff's exhibit No. 24 a copy of a letter on the stationery of RKO Pictures, Inc., again Washington, D. C., dated November 9, 1948, addressed to Mr. Wm. Zimmerman in New York, subject: Hilltop Theatre, Baltimore—Crest Theatre, Baltimore. The letter reads:

"Dear Bill:

"Under date of October 15 I sent you Form B, together with explanation of the Hilltop Theatre, Baltimore having requested first run product for that theatre. On October 30 I wrote you again advising you of the numerous telephone calls we had received from Mr. Harry Myerberg concerning his request for product.

"In the meantime the name of the theatre will be the Crest [fol. 122] Theatre and not the Hilltop.

"Hereto attached is a letter dated November 8, which came to me via registered mail from Mr. Myerberg insisting on an answer to his correspondence and telephone calls.

You will note that he has moved back the opening of his theatre to December 27, 1948.

"The time has come when we can no longer stall this matter with telephone calls. We are going to have to give him some kind of an answer. He wants to go to New York and see you or Mr. Levy and talk it over with you.

"Please advise immediately upon receipt of this letter just what you want me to do about it or just what you intend to do about it.

"Sincerely yours, J. B. Brecheen, Branch Manager."

(Letter dated November 9, 1948, Brecheen to Zimmerman, was marked Plaintiff's Exhibit No. 24.)

By Mr. Rome:

Q. What kind of product were you ultimately able to license from RKO Radio Pictures, Mr. Myerberg?

A. First neighborhood run.

Q. And how long after downtown first-run exhibition of the picture in the City of Baltimore was that?

A. Well, it was supposed to have been 21 days.

[fol. 123] Q. You say "supposed to have been." What was it, in fact?

A. Well, quite frequently it was much longer than that.

Q. Did you ever see any other official of any one of the distributor companies with the exception of Mr. Zimmerman, Mr. Meyers, Mr. Moon, Mr. Minsky you have named?

A. I saw Mr. Scully, who was Divisional Manager, but that was in the company of Mr. Meyers, and at the same time I saw Mr. Meyers. The conversation was with Mr. Myers and not with Mr. Scully at that time.

Q. Did you see anyone else?

A. No, sir.

Q. Was there ever a time when any official from New York came to examine or see your theatre?

A. Only Mr. Meyers.

Q. He is the only official from any company who saw your theatre other than the Washington personnel?

A. At this time, yes.

Q. So that ultimately you were able to license product only on the first-run subsequent availability at the Crest Theatre; is that correct?

A. Yes, sir, from each company.

Q. When actually was the Crest Theatre opened?

A. February 26, 1949.

Q. Your letters that are in evidence have referred to [fol. 124] an earlier projected opening for the theatre. What happened to delay that?

A. There were delays in getting some of the material and equipment necessary to open the theatre, which delayed the opening.

Q. You finally opened the theatre on February 26, 1949?

A. Yes, sir

Q. Now, will you describe for the jury, please, some of the features that are incorporated into the Crest Theatre?

A. Well, the Crest Theatre has many innovations, we feel, in the development of motion picture theatres. One of the important ones is what we term the first hidden projection booth whereby the noise and direct small beam light from the projection booth is not seen nor heard.

We have what we thought to be at that time the first television lounge with a television projection set, a set that projected a picture six by nine feet. That was in 1949 at the opening of the theatre. We had this in the lounge of the theatre, what we called the "television lounge," accessible by two stairways from the lobby and we could seat with additional chairs placed there when we needed them—and we needed them frequently—about 100 people.

We had loges located off of this same lounge that were placed there for persons who wished to smoke during the [fol. 125] performance and could use those if they so desired.

We had a parking area, free parking for our patrons. The decorative motif of the theatre was on a very high, artistic plane. In fact, in the front bay of the television lounge, overlooking the marquee of the theatre, being seen readily from the front, was one of the finest examples of carved glass in the country, made by the man who developed that method of art or idea of art, Mr. Lowry, of Washington.

The carpets, the restroom, the ladies' powder room, everything was set up on a basis to accommodate first-run

pictures and to handle large crowds. Our standee area in the rear of the theatre is such that the Fire Department permitted us, although we have only 1600 seats, we originally expected to have close to 1800, but we reseated the house—I mean by reseating it we rearranged the seats, so you would have ample room in front of you so your knees would not hit the seat in front of you, and we staggered our seats, instead of looking over the head of a large person in front of you, you would look over their shoulders, having greater vision to the screen.

Q. What is the extent of the parking area, Mr. Myerberg?

A. We can park between 350 to 400 cars on our own lots. They are in the front of the theatre, the side of the theatre, and the rear of the theatre, and we have reserved another [fol. 126] area which we have never paved because we felt we never needed it. We would have paved it immediately if we had gotten first-run pictures, or if we felt the need of it. That would hold an additional 150 cars. We felt we would have from 500 to 550 spaces, be able to park that number of cars on our own lots. And on the streets surrounding the theatre, which are not congested, cars can park as well.

Q. What was the total cost for the Crest Theatre?

A. The total cost without profit, the actual cost, was 460—some thousand dollars.

Q. I hand you a photograph, Mr. Myerberg, and ask you if you can identify this photograph, on both sides, please.

A. Yes, sir.

Q. What is the photograph?

A. This is the front of the Crest Theatre showing the marquee, the box office, and that carved glass that I spoke of before, above the marquee.

Q. And on the other side?

A. Shows a view of the auditorium looking from the stage to the standee area, shows a section of the television lounge with the television screen, and it shows the standee area, the area at the rear of the auditorium of the theatre.

Mr. Rome: If the Court please, I offer in evidence as plaintiff's exhibit No. 25 the photograph so described of [fol. 127] the Crest Theatre.

(Photograph of Crest Theatre was marked Plaintiff's Exhibit No. 25.)

By Mr. Rome:

Q. I hand you another photograph, Mr. Myerberg, and ask you if you can identify that, on both sides, please.

A. Yes, sir. This side is the Crest Theatre and the Hilltop Shopping Center, the rest of the stores together with the Crest Theatre that makes up the shopping center.

Q. And what appears on the other side?

A. On the other side is a plot plan showing the different store locations and some of the parking area.

Mr. Rome: If the Court please, I offer in evidence as plaintiff's exhibit No. 26 a photograph of the Hilltop Shopping Center and the Crest Theatre and a map or plan of the shopping center and theatre.

(Photograph of Crest Theatre and Hilltop Shopping Center was marked Plaintiff's Exhibit No. 26.)

By Mr. Rome:

Q. Mr. Myerberg, do you know when approximately these photographs were taken?

A. I think sometime during 1949. I don't remember the exact date, after the theatre had opened.

Q. Was there any recognition accorded the Crest Theatre by virtue of its qualifications as a theatre?

A. I think the recognition of every branch manager in [fol. 128] Washington of the different distributors, and there was one special recognition that we received. We received the International Award of the "Exhibitor Magazine" for being one of the most outstanding theatres constructed in the year of 1949 in Canada, the United States and South America. That placque now hangs in the lobby of our theatre.

Q. What is the "Exhibitor Magazine"?

A. It is a trade paper.

Q. Mr. Myerberg, I hand you a copy of a letter dated November 8, 1950 and ask you if you can identify what that is.

A. This is a letter from the "Exhibitor" telling us that

we had been awarded the "Oscar" for one of the best-of-the-year theatres.

Mr. Rome: If the Court please, I offer in evidence as plaintiff's exhibit No. 27 a copy of a letter dated November 8, 1950 from the "Exhibitor Magazine", signed Paul J. Greenhaigh, Business Manager——

Mr. Raftery: Is there any necessity for reading this big, long letter? He has gotten an award from some trade paper magazine that his theatre got the "Oscar" for the year. I will stipulate he got the "Oscar."

The Court: I think you could stipulate that.

Mr. Raftery: Sure. It is a couple of pages. I think his theatre got it one year, the Edmondson Village got it the [fol. 129] next, Northwood the next year. Baltimore has been singularly honored.

Mr. Rome: I have no wish to burden the record, Your Honor, but because this goes to the suitability and qualifications of the theatre, I would ask Your Honor to permit me to read this letter.

The Court: How long is it?

Mr. Rome: One page and a paragraph.

The Court: Go ahead.

Mr. Rome (Reading): "Gentlemen:

"Here is an announcement I think you will like!

"With the publication last April of our 8th Annual (1949-50) Edition, it was decided that the hand-picked group of fine, modern theatres, that received complete pictorial presentations in it, actually merit some additional physical evidence of their greatness,—and of their selection as the *"Best-of-the-Year"*.

"The attached is the result of our careful planning!

"Your 'Oscar' for the above theatre is now finished and awaiting your instructions relative to shipment or presentation. Slightly larger than here pictured, I am quite sure you will be proud to have it implanted into the wall of your facade or lobby as a further evidence of the Theatre Industry's regard for the theatre you have given to the people of this community. It is extended with our com-[fol. 130] plete congratulations on a 'job well done'!

"In the future we are going to try to have annual Merit Awards ready in sufficient time for any planned Anniversary

Week celebrations. This year we know we are late for most recipients; but feel that, properly handled, the presentation of this award by the mayor or some local dignitary can still be accomplished with considerable local fanfare and newspaper publicity to the benefit of the particular theatre. We are willing to cooperate to the best of our ability, and suggest one of the following:

"1. We can ship your 'Oscar' directly to you via insured parcel post for any disposition you decide.

"2. We can ship it to the name and address of any local 'name' you set up, complete with credentials for making the presentation in our behalf on your stage or at some other gathering.

"Or 3, we can try to arrange for our nearest staff representative to come to your theatre at some convenient date and personally make the presentation on your stage. Just let me know how you want to handle it!

"For the benefit of our editorial files,—and for a story on these 'Oscars' in the next 9th Annual (1950-51) Edition,—I would like to have a complete set of clippings and photographs of any activities attendant to the actual presentation ceremonies. But that is all we expect,—or [fol. 131] want!

"Awaiting your early advice, and again congratulating you on an exceptionally fine theatre.

"Sincerely, Paul J. Greenhaigh, Business Manager."

(Letter November 8, 1950, Greenhaigh to Myerberg Brothers, was marked Plaintiff's Exhibit No. 27.)

By Mr. Rome:

Q. That Oscar Award was actually presented to your theatre by whom, Mr. Myerberg? Who was it who made the actual presentation?

A. The actual presentation was made on the television show that we were invited on because of the award, and the presentation was made by Gov. McKeldin.

Q. How many shops or stores are there in the Hilltop Shopping Center?

A. I would say there are about 15 or 16 tenants there.

Q. And do you know what the monthly rental is from those stores, tenants?

A. I would say it would be around $5,000 a month. This does not include the theatre.

Q. Are all of the stores rented?

A. Yes, sir.

Q. Has there been any turnover in the tenancy of the stores?

[fol. 132] A. One store. There was a cleaning and dyeing store in there that after a year or so vacated the store. This store was re-rented, and there has been no vacancy since then.

Q. Has the shopping center been a successful venture?

A. Yes, sir.

Q. You have mentioned, Mr. Myerberg, that the cost of the theatre was approximately 460-odd thousand dollars; is that correct?

A. Yes, sir.

Q. How was that financed?

A. Through the first mortgage of approximately $307,000. The balance between the $307,000 and the cost of the theatre was made up by my brothers and myself personally or from companies we completely controlled.

Q. What is the Pem Construction Company which has been mentioned here?

A. That is a building company that builds homes, commercial buildings or any type of construction.

Q. That is the organization which actually constructed the Hilltop Shopping Center and the Crest Theatre?

A. Yes, sir.

Q. And when did Theatre Enterprises, Inc., become the owner of the Crest Theatre?

A. It was in 1951.

[fol. 133] Q. Prior to that time had it operated under a lease?

A. Yes, under a lease.

Q. What was the rental, if you know?

A. As I recall, the rental was $600 a week, which was about $30,000 a year, or thereabouts.

Q. When the Theatre Enterprises Company took over the actual ownership of the Crest Theatre from the Pem Construction Company, how was that financed?

A. Well, the Theatre Enterprises and the Pem Construc-

tion Company are both owned by my brothers and myself, and when they were transferred, a first mortgage in the amount of $307,000 was made, and the balance was taken back by the Penn Construction Company which was, I say, owned by my brothers and myself, in a second mortgage, I think, of $35,000—these figures may not be exact, but I think they are close enough—and in a chattel mortgage on the equipment of $75,000. Penn Construction Company holds them both.

The Court: What is that you have on the easel there, an area map?

Mr. Rome: This is a map, sir, of the area of the Crest Theatre showing the other theatres in that vicinity, showing also the population according to statistics, and also showing the city boundary and the county.

The Court: Now, the time for adjournment is here. Suppose we start on Monday morning at 10:00 o'clock.

[fol. 134] You may step down, Mr. Myerberg.

(Witness excused.)

Colloquy Between Court and Counsel

The Court: Members of the jury, we will take a recess now until Monday morning, Friday being a motion calendar and arraignment for the Court. We won't sit tomorrow except I think counsel wanted to be heard on some law points. If you will wait until after the jury retires, I will tell you what I expect to do.

So, you are excused, members of the jury, until 10:00 o'clock Monday morning.

I think it is scarcely necessary to remind you, of course, that you should not speak to anyone about the case meanwhile.

(The jury then retired from the courtroom.)

The Court: I would like to suggest now to counsel that I can hear this matter of putting in evidence, the decree or decrees in the Paramount case. I can hear that tomorrow at about 12:00 o'clock, I think. I do not want to disturb initially my motion calendar, but going over it, it looks like the matters there can be disposed of in a couple of

hours. While this is a guess, I think certainly around 12:00 o'clock I can reach the matter you have to bring up, and I will have gone over the briefs again. I have read them once on this point in issue and I will read the cases, particularly the Supreme Court decisions, so I shouldn't think [fol. 135] you would require a great deal of time. If you do want time to run into the afternoon after lunch I can give it to you.

(Whereupon, at 4:10 o'clock p.m., an adjournment was taken until Friday, May 9, 1952, at 12:00 o'clock noon.)

[fols. 135a-136] Reporters Certificate to foregoing transcript omitted in printing.

[fol. 137] TRANSCRIPT OF PROCEEDINGS—May 9, 1952, 12:30 o'clock p.m.

[fol. 138] The Court: Very well, gentlemen, we are ready to proceed with the matter that is specially assigned.

ARGUMENT ON BEHALF OF DEFENDANTS

Mr. Watkins: May it please the Court, during the course of the trial yesterday, the plaintiff tendered in evidence certain decrees in the litigation known as United States against Paramount, to which the defendants offered objections, and Your Honor very graciously suggested that, instead of interrupting the trial of the case, we argue the question of admissibility today.

In my outline of argument, as originally prepared, I had the note that this is a simple clearance and run case. I wish to revise that to say that I do not know that it is quite as simple as I thought it was at the start. I think this is important now, and I will ultimately analyze this with respect to Paramount.

What I mean, specifically, is this: it is not clear to me, after one day's trial just exactly what the plaintiff claims he sought that was denied to him. In the complaint he said he was denied first-run pictures. That, ordinarily, carries with it the meaning of exclusive first-run.

We examined the plaintiff's president in pretrial depositions, and he started off by saying he asked for either [fol. 139] exclusive first-run or for day and date first run.

After the luncheon recess, when he returned to the examination, he said he had never asked for exclusive first run, but had always asked only for day and date first run.

On the stand yesterday, his oral testimony was that he asked alternatively for exclusive first run or day and date first run.

However, the correspondence shows that he started out asking for exclusive first run, and ultimately wanted a day and date first run.

The Court: What do you understand by "day and date"?

Mr. Watkins: Day and date means that a picture plays simultaneously at two or more theatres. Now, ordinarily, exclusive first run means exactly that; that a picture plays at one theatre only, and that upon completion of the exhibition at that theatre, it goes to one or more theatres. If two or more theatres play simultaneously, that is a day and date first run.

Now, as applied to this particular case, I think it is quite clear that when day and date was used——

The Court: You say "day and date, d-a-t-e"?

Mr. Watkins: Day and date, yes; "d-a-t-e". When that term is used, the plaintiff is referring to an exhibition at a [fol. 140] downtown theatre and the simultaneous showing of the same picture at his theatre.

Now, regardless of what the specific thing that he asked for is, it is important as to what he asked for; there is, I believe, no question in this case as to the propriety of the general method of distribution of pictures by which they initially have a first run, and then, after a period of time elapsing at the expiration of the exhibition, known as clearance, they are then shown at another theatre, or other theatres.

That was gone into very thoroughly by Judge Chesnut in the Westway case, back in 1940, and he reconsidered it in the Windsor case in 1950; and he referred to the established practice in Baltimore City of running pictures initially downtown at a single theatre and then, after a lapse of a period of time, they would be shown in the neighborhood houses; and he went into the economics of the industry and explained that the downtown first run was the place where the advertising was had, and where the publicity was obtained, and where a very substantial portion of revenue

was derived, and that, if it were not for the large receipts from the downtown theatres, it would be impossible to show the pictures at theatres which often did not produce as much by way of rental as the cost of a motion picture print.

[fol. 141] There has been no criticism of the existence of reasonable clearance; that is, the lapse of time which is reasonable between one exhibition and another exhibition, and that was expressly recognized throughout the Paramount case.

The Statutory Court expressed or made findings that, granted you have an exhibition, it is a reasonable protection to the owner of the copyright and to the licensee to have an interval of time elapse between the completion of the exhibition and the subsequent exhibition; and it is so short, that I can just read it to Your Honor, the final statement made by the Statutory Court after the case had been up to the Supreme Court and come down again.

The Court: What reference is that? I have read the Supreme Court opinion.

Mr. Watkins: In the Supreme Court opinion, the Court pointed out that the Statutory Court had found that clearances, if reasonable in length, were proper.

In the Supreme Court, the Government did not contest that, and, therefore, in United States v. Paramount, in the Supreme Court, that question was not before the Court. No appeal was taken.

The Court: There is nothing in the opinion, I believe.

Mr. Watkins: It mentions only the fact of reasonable [fol. 142] clearance was found to be proper by the Statutory Court, and that, as the Government had not appealed from that adjudication before the Supreme Court——

The Court: I remember that; yes.

Mr. Watkins: —then the case came back to the Statutory Court, and the Court said, with reference to clearance, in 85 Fed. Supp. 881, at page 897:

"A grant of clearance, when not accompanied by a fixing of minimum admission prices or not unduly extended as to area or duration affords a fair protection of the interest of the licensee in the run granted without unreasonably interfering with the interest of the public."

Now, the plaintiff's complaint then is not to the fact that there are first-run showings and that there is a lapse of time before a subsequent showing. His sole objection is to his place in that method of distribution.

He does not object to the system of clearances and runs. He objects to his position in the hierarchy, and in his pretrial examination the question was asked: "Mr. Myerberg, suppose you were able to get first run, either an exclusive first run, or a run which was simultaneous with a downtown theatre, would you expect clearance over a succeeding run?" His answer was "Yes". The question then was: "How much clearance would you expect under those circumstances over a succeeding run"? And his answer was: [fol. 143] "Exactly that which is presently enjoyed by the downtown theatres, namely, 21 days".

So that his quarrel is not with respect to the manner in which pictures are licensed and distributed in Baltimore, but his position in the run as to which pictures are licensed to him.

Now, he claims that he was excluded from the runs that he wants, because of a conspiracy between and among the eight defendants. Of those eight, only two own motion picture theatres in which pictures are exhibited in Baltimore. They are Loew's or Metro-Goldwyn-Mayer and Warner's, which operates the Stanley Theatre, so that you have five of the seven theatres in Baltimore operated by four independents; that is, people who do not produce and do not distribute motion pictures.

Further, in Baltimore, none of the sub-runs, that is, none of the neighborhood houses or second, third or fourth run theatres, are operated by any of these defendants with the exception of the Parkway Theatre; so that you do not have the type of situation, which I will come to in a moment, which was found so largely in the Paramount case.

There is, further, no claim in this case of any exhibitor who is a part of this conspiracy. It is not a case in which you have Mr. Garman, owner of the Uptown Theatre, which [fol. 144] is in competition with the Crest Theatre, who is conspiring with these defendants to get a better run or subordinate the plaintiff's run. That is not involved.

The conspiracy in question is limited to these defendants

who are either producers of pictures or the two companies in Baltimore which are operators of motion picture theatres, or who exhibit either their own or pictures of other companies.

The Court: Now, cannot we eliminate, for the purposes of this question, a good deal of that?

Mr. Watkins: That was the end of it.

The Court: If I understand it, if the testimony, if the basic question, as I gather from as little of the case as I have heard, is simply this: that this case, these companies, these big companies, if they have entered into an illegal arrangement whereby they deny to this plaintiff theatre priorities which are given to other places in Baltimore City, particularly the priority known as first run, the question to be considered here, as I understand it, is whether what the Supreme Court did in the Paramount case sufficiently touches on that question as to make it appropriate or permissible to have the decree or decrees which followed that decision, formed a part of this case under the statutory provision that has been referred to?

[fol. 145] Now, that would seem to me to be a pretty simple proposition. If you go into a whole lot of refinement behind the matter, you may be confusing.

I have read all of the briefs pretty carefully, and I have read your brief with the same care, and you raise three or four points. You say, not one of the decrees entered in United States v. Paramount meets all of the tests required by Section 5, and you very properly set up what those five are; one, the final decree; two, that the defendant has violated the law; third, it shall be prima facie evidence against the defendant; fourth, matters against which a decree would be an estoppel; and, five, provided * * * shall not apply to consent * * * decrees entered before any testimony has been taken; and then, if I understand it, your first point is that the RKO consent decree of November 8th is not admissible in any private litigation; second, that the Paramount consent decree of March 3rd, 1949, is likewise not admissible; third, that the February 8, 1950 decrees are not admissible in this action, as they do not constitute an estoppel on any matter involved in this action. And you base that, as I understand it, on the fact that (1) the times involved

are totally different; and (2) those decrees are not prima facie evidence of any violation of law in connection with the exhibition of pictures in Baltimore. I think those are your [fol. 146] main points?

Mr. Watkins: That is right, sir.

The Court: If that is what you really still stand on, cannot we consider the case from those angles?

Mr. Watkins: Yes; I was right at that. What I was trying to do, perhaps unnecessarily long, was to exclude, to show what was not involved in those; but I will get down to the first point.

There is a distinct difference between the three decrees. It is our position that none of the decrees are admissible against either of the defendants.

There are additional grounds with respect to RKO and Paramount, and as to RKO, you have an entry of decree on November 8, 1948, which was before the final decrees and final findings of fact and conclusions of law; and those are set out on page 4 of the memorandum.

The essential part quoted there is that this decree was entered before the taking of any testimony upon the issues and matters upon which the remand of this case was made, without any findings of fact upon such issues and matters made after said remand, and without admission by the Paramount defendants, and upon conditions that neither such consent, nor this decree, nor the entry of this decree, nor any statement, provision or requirement contained in this decree, shall be or shall be construed as being an ad- [fol. 147] mission or adjudication or evidence that the allegations of the petition or of the amended and supplemental complaint, or any of them, are or is true insofar as they relate to the issues and matters so open, or that the RKO defendants, or anyone or more of them, have or has violated, or are or is violating, any statute or law with respect to the issues and matter so open.

Now the Paramount decree entered March 3, 1949, and which is to the extent necessary quoted at the bottom of page 7, is exactly the same, except that contains the additional clause that——

The Court: Well, now, I am a little confused about where these decrees are to be found. These different decrees you

talk about,—RKO decree of November 8, 1948, what did that flow from?

Mr. Watkins: That flowed out of the U. S. v. Paramount litigation, and after the case had been remanded by the Supreme Court to the Statutory Court for further consideration, the Court saying, in that remand, that the Statutory Court was at liberty to consider all issues. The consent decree was entered, approved by the Government and by counsel for RKO. That, if you ask where it is found, is found as part of the record in the case in the District Court of the United States for the Southern District of New York.

[fol. 148] The Court: You have only quoted part of it?

Mr. Watkins: That is correct, sir; that is the limitation part, that none of it is to have any effect with respect to——

The Court: You say that is all we need to consider for the purposes of this point?

Mr. Watkins: For the purposes of this particular point, yes, Your Honor; and the part which is quoted at the bottom of page 7 is all that need be considered on this point in connection with the Paramount decree.

The only difference between the two being, that in the Paramount decree, some evidence had been taken after the case had been remanded to the Statutory Court.

In the RKO case, after the remand had taken place but before any evidence was taken, after the remand, this consent decree was entered.

The Paramount consent decree was entered after remand, but after some additional testimony had been taken. Then, following that, decrees were entered against the Big Three and against the Little Three, but that was a good bit later; that was in 1950.

The Court: Well, I am not sure that I understand that distinction. You say, in the RKO, this decree, part of which you have quoted, was entered before they took any testimony?

[fol. 149] Mr. Watkins: Yes, sir.

The Court: How could that be sent back for determination? Why did they enter a decree? You mean a decree just defining what should be the effect of an ultimate decree?

Mr. Watkins: No, sir; there had been litigation back to the beginning, in 1940, there had been a consent decree

before any testimony had been taken and, as I understand, the Government agreed to enter a consent decree without going through a trial and testimony; and, as an inducement to do that, the proviso was put in the section, which is on page 2, which is Section 16 of Title 15, on the right to use the issues in evidence later on, shall not apply to a consent judgment or decrees entered before any testimony had been taken; and the point here is that on remand, the Statutory Court was given express authority to consider any and all questions, and this decree was entered before any testimony had been taken after the remand was made.

The Court: I still do not understand—it is not your fault, it is mine—but I do not understand what the decree was entered for. What did it do or decide?

Mr. Watkins: The decree said, "We exonerate you from any conspiracy in the production of pictures. We say you shall not do certain things—"——

[fol. 150] The Court: You are talking now about the RKO?

Mr. Watkins: Yes, sir; only the RKO. And then, the Paramount.

The Court: Let's take one at a time. This is very confusing to me. I want to understand it. The case went up to the Supreme Court, and was sent back for certain purposes?

Mr. Watkins: Yes.

The Court: Now, you are talking about when it came back?

Mr. Watkins: After it came back.

The Court: In November, November 8, 1948, as to RKO?

Mr. Watkins: Yes. After the case came back to the Statutory Court, and before any testimony had been taken, the Government and RKO agreed upon a decree, and that decree was entered by the Statutory Court, and that decree contained the recital which is quoted.

The Court: Before any testimony was taken as to RKO?

Mr. Watkins: Before any testimony of any sort was taken with respect to the issues involved in the entire case, after the remand had taken place.

The Court: This was a decree simply defining the effect of any decree that might be entered after testimony?

[fol. 151] Mr. Watkins: No, sir; this was in lieu of it, and it states that this is expressly a final decree, in and of itself, getting RKO out of litigation, and defining its duties and obligations from that time forth.

The Court: There was not any testimony going to be taken with respect to RKO, then?

Mr. Watkins: Well, sir——

The Court: I don't see why. Of course, I am handicapped because—do you have a copy of the decree? I suppose it is very long.

Mr. Watkins: That was what Mr. Rome was entering, yesterday.

Mr. Rome: This is a copy of the decree as to RKO.

The Court: I might be more confused if I look at it immediately. Let's talk about RKO, separately, now. The case came back for certain things to be further heard, and testimony taken in connection with RKO?

Mr. Watkins: In connection with all the defendants. The remand did not differentiate in any way between the defendants. The remand related to the entire case.

The Court: And then, you say, before anything was done at all, any testimony taken, they entered a decree?

Mr. Watkins: Yes, sir.

The Court: How could they do that, in conformity with what the Supreme Court ordered, if they required them [fol. 152] to go into it further? I don't understand that.

Mr. Watkins: Well, Your Honor, I think the situation is no different than what it would have been with the case de novo. The Court determined what was necessary at that time to be heard. Before a decree or a consent decree—and the consent decree was originally entered in 1940—before any testimony was taken against anybody—and I want to be perfectly fair, so Your Honor will have the picture—after that, some testimony was taken, and the case went to the Supreme Court; and the Supreme Court remanded it to the Statutory Court with authority to reopen the entire case. And that remand related to everybody in the case. And, after that, and without any further testimony being taken, that is, before any testimony of any kind was taken after the remand, an agreement was reached as to a consent decree as to RKO; and this was entered with this express recital in it, which I have set forth. And it is our point

that that brings RKO within the exception of decrees entered before any testimony; and, further, that the decree did not adjudge RKO to have violated any of the laws, and was, therefore, in either or both of these first grounds, it did not fall within the provision under which such decree can be submitted in subsequent cases.

The Court: You say, even though this proviso had not been put in the decree, still the decree would not be admis-[fol. 153] sible in this case because of the fact excepted by the statute? I see what you mean.

Mr. Watkins: Yes; I would say the language in the recital was just, to make it perfectly clear, that it did come within the statutory exception; yes, sir, I would say that, for the purposes of a recital, so as to bring it in before testimony.

The Court: Let's see, you quote on page 2 this provision of Section 5?

Mr. Watkins: That is right.

The Court: I would like to read it again.

"A final judgment or decree hereafter rendered in any criminal prosecution or in any suit or final proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, this section shall not apply to consent judgments or decrees entered before any testimony has been taken . . ."

And you say that, although testimony in the original proceedings—there had testimony been taken before it went [fol. 154] up to the Supreme Court, when the decree was entered, and that decree was carried to the Supreme Court, that the real starting point is not there, but after the case came back, and when no testimony was taken, there was a consent decree entered?

Mr. Watkins: That is right, sir.

The Court: That is your point as to RKO?

Mr. Watkins: That is a separate point as to RKO. The point applicable to all is the last point in the brief. It is

that the Paramount case would not have been applicable as to any of the defendants and is, therefore, inconsequential as to all. This is a special ground as to RKO.

Coupled with that is the fact that the decree does not adjudge RKO to have been in violation of the anti-trust laws, so that we have the three denials as to RKO; first, the Paramount case would not have been an estoppel, anyway, since there is no adjudication of violation; and, third, that this falls within the provision of the consent decree before testimony taken.

The Court: Now, I understand what you have now quoted on the third point. Elaborate a little more on the first two points. Does that run to RKO?

Mr. Watkins: The situation with respect to RKO, if I may take it out-of-order, in the absence of any determination of violation of law, as peculiar to RKO and Para- [fol. 155] mount, Paramount had a consent decree. Paramount differed from RKO, in that some evidence had been taken after the remand. And, therefore, one of the essential elements for estoppel under Section 5 is lacking as to both of those.

The third point, that the matters directly raised and determined in the Paramount case were not of the character to constitute an estoppel, applies to all eight; so, what is the situation? As to RKO, there are three grounds on which we urge the inadmissibility; first, the no testimony; second, as to no adjudication of violation.

The Court: Now, this is as to both Paramount and RKO?

Mr. Watkins: No, sir.

The Court: Only RKO?

Mr. Watkins: Only RKO, as to three; Paramount, as to two.

The Court: Did the Lower Court find that there was no violation as to RKO?

Mr. Watkins: No, sir; it was not expressed that way. It is the negative. The decree did not state that there had been a violation by RKO.

The Court: What was the situation when RKO went to the Supreme Court?

Mr. Watkins: There had been a general decree, in which all of them had been found in violation.

[fol. 156] The Court: What did the Supreme Court say as to RKO?

Mr. Watkins: The Supreme Court did not single out any of the companies and make a different finding with respect to their status, but remanded the entire case, with the right to the Statutory Court to consider the entire case, and the decree entered with respect to RKO was expressly in lieu of and in substitution for the decree which went up to the Supreme Court.

The Court: And they found no violation?

Mr. Watkins: Your Honor, it did not affirmatively say that there was no violation. It did say, negatively—it did not say RKO was found to be in violation of the law, which does appear in the last two decrees that Mr. Rome was offering, and with respect to the Big Three and the so-called Little Three. There are findings of violation.

The Court: And what is the third point?

Mr. Watkins: The third point is that the situation passed upon in the RKO case shows that the matter is distinguished from that here in issue, and primarily determined in the Paramount case, where those which exist in Baltimore——

The Court: You are still talking about RKO?

Mr. Watkins: Yes. That applies to all of the companies. That is the third ground, which is common to all. The first [fol. 157] one is that of no testimony, and is peculiar to RKO.

The second, that there was no adjudication of violation of the anti-trust laws; and then the question of the decree before any testimony was taken.

The Court: The other is common to all of them?

Mr. Watkins: Common to all of them; that is correct, Your Honor.

The Court: I gather, from what you have said, that as far as RKO is concerned, you think either one of the first two grounds is completely conclusive for keeping the decree out, the RKO decree?

Mr. Watkins: Yes; those are special grounds, and I would say either one of the three is, of itself, sufficient to exclude the RKO decree.

The Court: I am trying to understand it. You do feel that either one of the first two is sufficient?

Mr. Watkins: Yes.

The Court: Even if we did not have the third, at all?

Mr. Watkins: Definitely.

The Court: In other words, they relate to the character of the decree—I mean, not so much the character, but the circumstances under which the decree was entered?

[fol. 158] Mr. Watkins: Yes, sir; and the kind of decree it was.

The Court: And the general kind of decree; whereas, the third ground goes into a comparison of what is in the one decree with what is in the other decree?

Mr. Watkins: No, sir; the third goes into a comparison——

The Court: The matters in issue?

Mr. Watkins: That is correct—as distinguished from what is present in this case.

The Court: Wouldn't that have to go into what was in the decree in each case? When you say, "the matters in issue" are different, then the substance of the decree must be different?

Mr. Watkins: That is right, sir; yes.

The Court: You say, for example, as I understand it, that if you cannot spread or stretch the Paramount case, when it went to the Supreme Court originally, or when it came back, and was finally decided by the Lower Court as covering the Baltimore situation—

Mr. Watkins: Exactly.

The Court: And, also, that there is not a question of price-fixing that was involved? That is the main contention?

Mr. Watkins: That the trial before the Statutory Court, [fol. 159] and by a part of the Supreme Court opinion, that it was based upon specific issues relating to matters which were materially different from the situation existing in Baltimore, both at the time of the Paramount case and at the time the Crest offered to play these pictures, and was refused; yes, sir.

The Court: Well, now, we will take a recess for lunch. How much more time do you think you want?

Mr. Watkins: Your Honor, I am sorry, I would like to have approximately a half-hour, if I might.

The Court: Mr. Rome, how much time do you want?

Mr. Rome: I shall try to be as brief as possible, but with

all respect to my friend, this has been placed in such a position of confusion before Your Honor——

The Court: It is not confusion now, as far as we have got. I was confused, but I don't blame counsel for it. As far as we have got, it seems to me what counsel is saying, whether they are right or wrong, is aside from the point, at the moment, that I am confused. I understand clearly now the position which Mr. Watkins takes so far in the argument, and it seems to me they are pretty narrow questions and should not take long for you to give me your views on those. I am not talking about the questions which he has elaborated under this third ground, because that will need some further argument or some further discussion.

[fol. 160] Why do you say it is confused?

Mr. Rome: Because I don't think Mr. Watkins has fully placed before Your Honor the significance of the Paramount case. From what has appeared in his argument, it may well be that I will have to discuss quite further some opinions of the Supreme Court and by the District Court with regard to the matters which are specifically at issue in the present case, as well as in the Paramount case.

The Court: Let's put it this way: when we return from lunch, it seems to me that Mr. Watkins' statement could be a rather brief statement. He says that he is justified in saying that Section 5 was not intended to cover the situation such as we have here, where no testimony was taken when the case came back, before the decree was signed.

Now, I think I have stated that correctly, haven't I?

Mr. Watkins: You have, sir.

The Court: And that is a technical question; but I think it bears upon what was meant by the language employed in Section 5.

Mr. Rome: It does, indeed.

The Court: And the second point, that there was no adjudication as to violation by RKO, now, that is either true or false, by the terms of the decree, so we should not have to spend much time on that.

[fol. 161] Mr. Rome: I do not anticipate so.

The Court: Then, I think the issue there is very clear. Who is right and who is wrong, I am not now deciding, because I haven't heard you yet. The reason I am stressing

the question, when you say Mr. Watkins has confused it, I do not think—unless it is upon the first two issues, I do not think he has confused it at all. He has clarified the issue.

Mr. Rome: He has certainly made his position clear, and I hope that mine will be just as significant. He has confused the significance of the Paramount case.

The Court: It goes more to the third ground.

Mr. Rome: No, sir; it goes to the first two points. As to that, Your Honor, his statement as to where it goes to the question of whether or not there was an adjudication of guilt as against RKO, on the point in issue in the present case against RKO——

The Court: Mr. Watkins, as I understand it, I think, read the decree—I will let you read the language in it—but he says there was not any adjudication of any violation against RKO.

Mr. Watkins: That is certainly the wording of it.

Mr. Rome: That is a point open.

The Court: We will recess now until quarter-past-two. I do not want to unduly limit you, but I think an hour's argu-
[fol. 162] ment probably ought to clarify all of your points, —I am just trying to estimate how long you will need— maybe a little more.

Mr. Watkins: I will certainly try to keep it as tightly encompassed as I can.

The Court: Very well; we will reconvene at quarter-past-two.

(Thereupon, at 1:00 o'clock p. m., a recess was taken until 2:15 o'clock p. m.)

[fol. 163] Afternoon Session

(Met, pursuant to the taking of the recess, at 2:15 o'clock p. m.)

The Court: Mr. Watkins.

Argument on Behalf of Defendants (Resumed).

Mr. Watkins: Your Honor, I would like to take just one moment in connection with Points 1 and 2, simply to point out that on page 6 of our memorandum, we have referred Your Honor to two authorities agreeing with the contention I have made on Points 1 and 2, and that in those two

cases, the Brookside Theatre Corporation v. Twentieth Century Fox Film Corporation case, and the Cinema Amusements, Inc. v. Loew's, Inc. which were jury trial cases, the Court excluded the decrees with respect to Paramount and RKO in the Brookside case, and with respect to RKO in the Cinema case, Paramount not being involved in that case.

Now, in that connection, Your Honor, Mr. Rome raised a point which we should have directed Your Honor's attention to, in the case of De Luxe Theatre Corporation v. Balaban & Katz. This is on page 10 of Mr. Rome's memorandum, De Luxe Theatre Corporation v. Balaban & Katz, 96 Fed. Supp. 983, at 986.

That case, Your Honor, was one involving a motion to strike, not a case in which the questions presented at or dur-
[fol. 164] ing the course of trial. I have had as much difficulty with the question of motion to strike as any problem I have come across, because this same Judge, in an earlier case, 86 Fed. Supp. 311, at 314, excluded the Paramount decree on a motion to strike, saying that Paramount was itself within the proviso of Section 16.

If I may take a moment on the second case, 96 Fed. Supp., which was on a motion to strike, Judge Campbell granted the motion to strike, referring to the Paramount decree; but in the course of his opinion, he said that since some evidence had been offered after the remand of the case, he did not think Paramount fell within that exception. He did not pass upon the adjudication of violation, as I see in the earlier case, where the general question was presented to him on a motion to strike. He said Paramount had brought itself within the exception.

In 1952—I just got this—Judge Long, in Egyptian Theatre Corporation v. Fox, in the District of Illinois—these three cases are in Illinois—followed the earlier decision by Judge Campbell, and struck out the Paramount decrees with respect to Paramount and RKO. There is the situation as far as these motions to strike are concerned.

We have, in the case of two jury trials, we have the same contention, that the Paramount and RKO decrees could not be used.

[fol. 165] Now, I want to come to the last point, the estop-

pel point; and there, I think, perhaps, the best introduction to it would be a very brief consideration of the case of Emich Motors v. General Motors, 340 U. S. 558—I don't know whether Your Honor had a chance to look at that?

The Court: That is in your brief?

Mr. Watkins: Yes. That case is important in several respects. In my opinion, Your Honor, this case shows the reason for the enactment of Section 5, and the circumstances under which its application is appropriate.

In the Emich case, General Motors had been indicted in a criminal proceeding, one of the specific charges of which was that General Motors had been cancelling out the franchises of dealers who refused to finance cars under the General Motors Acceptance Corporation.

Emich, the plaintiff in that case, had been a witness in the trial of the criminal conspiracy case, in which General Motors was convicted; and, subsequently, Emich brought this action for treble damages. In his complaint he alleged that the very conspiracy which had been expressly adjudicated in the criminal case was the conspiracy which put him out of business, and that it was the application of this conspiracy, in which they had been convicted, to him, personally, that resulted in his being put out of business. That was expressly alleged in the complaint, and on that basis [Tol. 166] the Court said here was a case for the application of this provision, where the Government had tried the very facts that Emich, himself, would have to introduce. This section says Emich does not have to go through the same trial again, but the important thing which distinguishes it from this case is that Emich was not merely directly involved in the specific conspiracy upon which the adjudication occurred, but that he pleaded specially that he was put out of business by the very conspiracy, and that he appeared as a Government witness.

The case here is of material difference. The Crest Theatre did not come into existence until 1947 as a corporation and did not apply for these runs until 1948 and 1949; and how can it be said a conspiracy found to exist as of 1945 could have affected that particular person, is something I just cannot understand. It is entirely foreign to the purpose, and this section was never intended to permit a person who gets into a field, after it has been determined that a

preexisting conspiracy had been found, and say that he had been affected by something that had been done before he got into that field.

Now, the second important factor in the Emich case is that the Court said, emphatically, that one of the requirements in order that the decree or the indictment may be admissible is with respect to matters with respect to which [fol. 167] such judgment or decree would be an estoppel as between the parties thereto. And, in defining estoppel, the Supreme Court said, at page 569:

"Such estoppel extends only to questions distinctly put in issue and directly determined in the criminal prosecution."

It was a criminal prosecution in that case, and an equity proceeding in this case.

The Court: What page is that?

Mr. Watkins: Page 569, Your Honor, right before Freeman on Judgments; and that brings us to what was involved, and how does that compare with the situation in Baltimore.

The Court: I might say, in that connection, I think it is of some help, some convenience, is it not, to note that in the Paramount opinion of the Supreme Court, it is divided up into subjects by Mr. Justice Douglas?

Mr. Watkins: Yes, sir; that is very well. I was going to say, Your Honor, I intended to refer you to what Judge Augustus Hand said with respect to the matters relied or left open in the Paramount case, and then read you Judge Chesnut's analysis of the Paramount case, that he gave in the Windsor case. I say that, because Judge Hand says what was left open was so difficult to determine, that—I will read you the exact language—and then Judge Chesnut comes along, because there is a question whether or not his hold- [fol. 168] ing in the Westway case had been overthrown by the Supreme Court in the Paramount case, and because of critical importance; and he made a comment, and what seems to me to be a completely satisfactory analysis of the Paramount case, and in a sense shows there its inapplicability to the Paramount case.

The citation of that is Windsor Theatre Co. v. Walbrook Amusement Co., and that is in the memorandum. That is 94 Fed. Supp. 395, and the particular pages——

The Court: That was affirmed?

Mr. Watkins: Yes; by our Circuit Court of Appeals, or Court of Appeals. Page 395 is the point from which I intend to read to Your Honor, and just to comment.

The Court: Go ahead.

Mr. Watkins: On the question of what was involved in Paramount, and what was left open by the decree—I am sorry—by the Supreme Court. There are two statements, one from a judicial decision and the other from a colloquy presented and participated in by Judge Augustus Hand.

In the case on page 7 of the memorandum, Fifth and Walnut v. Loew's, on page 7, the quoted portion of the opinion is from the Court of Appeals for the 2nd Circuit; and Judge Hand, though not writing the opinion, was one of the Judges who participated in that decision. And the question there was whether or not, at this stage, before [fol. 169] any final decree had been passed, the old Paramount decrees could be offered in evidence.

The Trial Court had excluded them. This is the manner in which the matter remanded was described:

"... While it may be that some cases might arise in which the action of an appellate court had gone so far as clearly to dispose of practically all the issues involved in a suit by the United States against defendants who are later being sued by a private party, and that in such an extreme situation the decree and findings in the latter suit would be admissible, the issues here left open by the Supreme Court seem to us so complex and vague that the District Court was justified in not allowing in evidence the (Expediting Court's) decree or findings (Of 1946) sought to be introduced by the plaintiffs."

As Your Honor will recall, in remanding, the Supreme Court said the whole case could be considered by the Expediting Court.

The colloquy I refer to took place in the argument before the Three-Judge Court, of which Judge Hand was the Senior, and occurred in connection with the question of whether, after the RKO consent decree and the Paramount consent decree, you had six left; should all six be grouped in one decree or should the decree be entered against the

remaining Big Three, and the remaining Little Three; and [fol. 170] in the course of the argument, and before the separate decrees were concerned,—I am quoting from page 921 of the Stenographic Transcript of that hearing——

The Court: Which hearing is this?

Mr. Watkins: This was a hearing before the Statutory Court, after the conclusion of all evidence, and when the question arose as to the entry of final decrees as to the remaining six; and the point was whether or not the Big Three—that is, Warner's and Loews and Fox, should be joined with the so-called Little Three, Universal, United Artists, and Columbia; or whether, as counsel were requesting, separate decrees should be entered against the Big Three and the Little Three. And the significance of it, and the complexity of what was remanded to the Statutory Court, appears from the stenographic transcript at page 921, where the following is quoted:

"Judge Hand: You are fearful you will suffer from the treble damage case, from the offering in evidence of stuff that has very little relation to your products and your conduct?

"Mr. Raftery: That is right. And that is why we want to limit it to what your Honors have said we were wrong in—distribution—and that is why we want a separate decree.

"Judge Hand: I should think there was something very [fol. 171] persuasive in that. This business of using a pretty obscure decree and decisions, as they have tried to do before, to lick somebody in litigation between themselves and other parties is crude judicial stuff, from the point of view of a judge, very, very crude stuff.

"Mr. Marcus: Your Honor, I should think we could rely upon the good sense of the particular judge before whom a treble damage case was brought to limit the particular parts of any judgment or findings of fact to the particular defendant to whom they relate. And I come back——

"The Court: That is all right. We tried to do that in the case that came up in the Circuit Court of Appeals, but I tell you it is very difficult; the reasoning of the practical administration there is very difficult."

So that you have a Judge participating, saying what was sent back was difficult, complex, and obscure; and I am very happy to have somebody tell me just exactly what was involved in the Paramount case.

Judge Chesnut, in the Windsor Theatre case, at page 395, 94 Fed. Supp., said as follows, after saying that this was controlled by his previous decision which was affirmed by the Court of Appeals in a per curiam opinion, unless something happened to change it, and he said—this is the second full sentence on page 395:

". . . An examination of that case in the Supreme Court [fol. 172] will show that it dealt with a factual situation very different indeed from the much simpler and customary business situation involved in the instant cases. Nor do I find any principle announced by the Supreme Court in that case which is in conflict with the view of the applicable law taken in the Westway case. It will appear from the first headnote in the Paramount case that the court was dealing with a suit brought by the United States 'to restrain violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. A. Secs. 1, 2) by (1) five corporations which produce motion pictures and their respective subsidiaries or affiliates which distribute and exhibit films and own or control theatres, (2) two corporations which produce motion pictures and their subsidiaries which distribute films, and (3) one corporation engaged only in the distribution of motion pictures.' The trial court held on the facts that there was a 'horizontal' conspiracy between all defendants and between each distributor defendant and its licensees, which resulted in exhibitors being required to charge substantially uniform admission prices."

There is one thing—there is no claim that anything in this case involved substantially uniform admission prices, not a word anywhere in the complaint or testimony.

"The district court also found that there was a conspiracy to restrain trade by imposing unreasonable [fol. 173] clearances."

There is no claim that the clearance, first run and second run, is unreasonable, in this case. As I told you, Mr. Myerberg, in his deposition, said, if he could get first-run, he

would want the same clearance—21 days over other theatres—so there is no question of unreasonable clearance involved here.

There is, in the second cause of action, some claim about unreasonable clearance with respect to the second-run theatre involved. No testimony has been offered with respect to that, and I do not believe that Paramount in any way involves the question of clearances as between first and second-run theatres.

"The case also involved the practice of distributors in so-called 'block booking'."

That is a case in which you are required to buy several pictures as a group. That is not involved in this case. So that the three things which Judge Chesnut emphasizes there are not present in this case, not even claimed to be present in the case.

"As previously has been pointed out, the evidence in the instant cases does not justify a finding of horizontal or vertical conspiracy. There is no element of price fixing involved nor of block booking; nor, in my opinion, is there any basis in these cases for holding that such clearances as [fol. 174] were involved in the licensing of pictures to the Walbrook over the Windsor, were unreasonable or beyond what was reasonably necessary to protect the licensee. As I understand the Paramount case, clearances which are imposed only for that purpose and to that extent were not disapproved by the Supreme Court.

"In the setting of facts in the Paramount case the trial court required the film producers to put into effect a system of 'competitive bidding'; but the Supreme Court reversed that provision of the decree. Without undertaking to review the Paramount case in greater detail, I think it is sufficient to say that I find nothing in the opinion in the case to sustain the plaintiff's position in the instant cases. The crucial question here is conspiracy vel non. To the extent that clearances are here involved at all, it is clear that they are certainly not less reasonable than in the Westway case. And in this connection it may be noted that on the point of clearances the opinion of the trial court in the Paramount case approved the holding in the Westway case and that view was not disapproved by the Supreme Court."

So there has been excluded from this case, or there is not involved in this case, the particular items specifically condemned by the Supreme Court, which Judge Chesnut mentioned in his opinion. There is nothing in there which [fol. 175] was contrary to his recognition that it was usual to sell first-run to a downtown theatre with a clearance, and then license the picture for exhibition in neighborhood theatres thereafter.

We have in this case, I suppose, the argument is that the defendants were found guilty of a conspiracy that extended across the nation. As I understand the brief, the argument is that this was a national conspiracy. Baltimore is part of the nation. Therefore, the conspiracy, was found as to Baltimore.

Now, I do not so read anything in the decision, or any portion of the Paramount case. The Court nowhere refers to Baltimore as being one of the cities in which the condemned practice existed. It refers to 92 cities of a hundred thousand population or more. Baltimore is not named as being in one extreme or the other extreme, or as being one of the cities specifically to be covered by anything condemned in the Supreme Court or in the Statutory Court, and you have this very definite distinction in Baltimore from the general picture about which they were talking.

Here, you have four independent downtown operators who had five theatres. This is a specific part of the test, and was different from the situation existing so frequently, where the downtown first-run theatres were controlled, or primarily controlled, by these defendants, and where they [fol. 176] often had suburban runs as well. So, you don't have a situation of that sort.

Secondly—and I think this seems to be so important and so emphasized by what was held and done in the Emich case. Coming down to its essence, Your Honor is asked to say this: that because certain persons had been found guilty of practices in 1945, although I don't admit those practices are practices which prevailed in Baltimore in 1945, 1948 or 1950, but because they were found guilty of certain improper practices in 1945, a man who wants to start a business in 1948 can say, "I can use that as evidence of the existence of a conspiracy in 1948, and of its application to me."

Now, I say that does not make sense, and I say, further, as was pointed out in the short memorandum in the case handed down on May 5th of this year, this is a case that involved all of the present defendants except United Artists; but the drive-in started business in 1947, and it complained about inability to get first runs. In a suit that was brought for damages, an effort was made to introduce the Paramount decrees. They were all excluded by Judge Briggle, and the reason is stated in his memorandum here, which is addressed to counsel for plaintiffs and defendants. This is in the case of Springfield Drive-in v. Universal Film Exchanges, Inc., et al., in the United States District Court for the Southern District of Illinois. The question for [fol. 177] consideration——

The Court: Is that a reported case?

Mr. Watkins: It is important solely for the conclusion by the Court. You ask if it is a reported case? Your Honor, it was decided on May 5, 1952.

The Court: There has not been time to get into the West System. You do not have a whole copy of it?

Mr. Watkins: This is the entire communication by the Court. Whether he will write a formal opinion afterwards, I don't know, but this is his communication to counsel on both sides.

The Court: You mean, as far as you know, the case is still in its trial stages?

Mr. Watkins: This was, as I understand, on a motion. It has not reached the trial stage yet. I will read the first paragraph. This refers to a plaintiff who came into being, in 1947, and tried to get pictures, and one that relied upon the Paramount decrees as evidence of conspiracy.

Judge Briggle's communication reads as follows:

"The question for consideration on the motion of defendant to strike paragraph 34 to 37, inclusive, of the amended complaint concerns the application of Section 5 of the Clayton Act. I have very carefully considered the briefs filed herein with particular attention to both the Court of Ap- [fol. 178] peals opinion and the Supreme Court opinion in the Emich case and have concluded that it was never the intention of Congress to make Section 5 applicable to the situation present in our case. To hold Section 5 applicable to our facts would cast grave doubt on its constitutionality."

And I respectfully suggest that that is a very sound conclusion. I think it is amplified, Your Honor, by the original conclusion that where a Court has passed a decree telling people they are not to do a particular thing, I think the assumption is that they obey that decree; and what you are being asked here is to assume that, despite the decree, the defendants have—assuming there are facts here that cannot be denied—but assuming that to be the case, you are asked to assume that, despite the "Thou shall not", that they have done it, and it is contrary to the assumption that a person obeys a law after he has been told to obey it; and another of Judge Chesnut's statements in the Windsor case is quite applicable there.

On page 394 of 94 Fed. Supp., when he is talking about the question of why would there be a conspiracy, what motive is there for it, he says that perhaps the exhibitor might have a motive; that the same thing would not be stopped by the distributors, and then makes what I think is a very significant statement:

[fol. 179] "On the contrary——"——

The Court: Where are you reading from?

Mr. Watkins: From page 394 of 94 Fed. Supp., the Windsor opinion by Judge Chesnut. This is nearly at the bottom of the left-hand column, the last sentence before that paragraph.

"On the contrary, it would seem that the considerable amount of litigation which has prevailed heretofore against them, would have impressed their business judgment with the great desirability of no such entangling alliance, especially with a comparatively small theatre proprietor, like Goldberg."

So that I submit, Your Honor, when you consider, first, the factual situation in Baltimore, as contrasted with the situation being dealt with in the Supreme Court, no block booking, no price fixing, and no question of clearance, or reasonable clearance, and finding that that has been for a long while the customary way of doing business, that while where a person has done the very thing that has been adjudicated by Government action, he should not have to go over the same ground again, after there has been a determina-

tion—that to say that evidence could be used against you as of some later date raises a serious constitutional question.

It seems to me it is very forcefully stated by him, that [fol. 180] with the experience that they had—and I mean that with decrees, I don't see how Your Honor can be asked to assume that those people would continue to be guilty or to be a party to any conspiracy to do exactly the same thing and, accordingly, Your Honor, wherein, here, you have four independents, Judge Chesnut pointed out there have been for a long time the same as was customary in Baltimore, to say that because somebody later comes in and finds that they were convicted of conspiracy, and to say that that thing happened in 1945, and the evidence here points to 1948, that, I say, Your Honor is not in a position to do; and I think these decrees should be excluded in their entirety.

The Court: As I understand, Mr. Watkins, you stress, primarily—or, I won't say you stress primarily, because you have covered the various points—but I will put it this way: the point which you have stressed, and which I think, if you are correct, answers the entire matter, is whether or not, applying the rule as laid down in the Emich Motor case to the situation here, applying that interpretation of Section 5 of the Statute, you say, if I understand you correctly, that apart from everything else, you cannot say that the language of Section 5, which says that a prior decision shall be prima facie evidence against such defendants in any suit or proceedings brought by any other party against such [fol. 181] defendants under said laws, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto, you say, interpreting that portion of Section 5 in the light of what the Court said in the Emich case, on page 569 of 340 U. S., that that estoppel extends only to questions distinctly put in issue and directly determined in the criminal prosecution; that not only those issues that existed in the Paramount case are not here, but you say they could not possibly be here, if I understand you correctly, because those issues were primarily in relation to a state of facts which existed prior to the incorporation, and the very commencement of any operation by the plaintiff in the present case.

Mr. Watkins: Your Honor, if I had said that 25 minutes ago, I would have saved 25 minutes. Yes; it is exactly it.

The Court: It seems to me, if you are right on that—and I must say that I am impressed at the moment with the argument—that is the answer to the whole thing.

Mr. Watkins: Yes, sir.

The Court: Certainly, the Supreme Court, in the Emich case, when it said such estoppel extended only to questions distinctly put in issue and directly determined, you have to read that language in connection with what is meant by estoppel.

Mr. Watkins: Yes.

[fol. 182] The Court: If A and B have litigation, and there is a judgment entered against A on a certain set of facts, of course, that does not mean that that judgment can be an estoppel against C, unless C were in some way bound by it; so we must read this, as I understand it, "such estoppel" meaning the legal definition of "estoppel"; in other words, it does not make any difference whether the same questions for the same purpose were brought out, or not in prior litigation, if the factual situation was such as not to create estoppel with respect to that, as against somebody in later litigation; is that true?

Mr. Watkins: That is right. That is certainly true, on facts which existed in 1945, which could not possibly be considered an estoppel against somebody, with respect to somebody that did not come into existence until 1948.

The Court: Well, now, Mr. Rome, I do not want to curtail this argument, but unless you can convince me that that proposition is wrong, I think that answers the case; and I do not think you need to go into the refinements of what the RKO decree and Paramount decree did or did not do, or go into the refinements of what the Supreme Court, to go back to what the Supreme Court decided or did not decide, what was before it, and what it sent back or did not send back to the lower courts.

[fol. 183] In other words, unless I can be satisfied—that that is what I believe is the basic, the crux of this whole question, and it is a narrow legal point—unless I can be satisfied that Mr. Watkins is wrong in that, I do not care to hear any of the background of the other points.

Just to make myself clear, I will restate, in the Court's own terms and, if I do not make it clear, please let me know and I will try to clarify it:

What I want to hear you on, in the first instance, and only what I want to hear you about in the first instance, is this: As I understand Section 5, as interpreted by the Emich case —and, parenthetically, I might say I do not recall to what extent it was discussed in the Paramount case; was it?

Mr. Rome: The Emich case came later in time.

The Court: So, it is so much the better, from the point of view of my premise. I overlooked the dates of that.

To start over again, the basic proposition that I want to hear you on is simply this: The Supreme Court has said, following the Paramount case, that interpreting Section 5, the estoppel which you must find exists only on questions distinctly put in issue and directly determined in the prior litigation, which was a criminal prosecution in the Emich [fol. 184] case, but broadly speaking, it must apply to either type, civil or criminal, either type of litigation. That is what the Surpeme Court has said; and the question here, as I understand it, is basically this: Even if we assume that it might be reasonable to interpret the Supreme Court in the Paramount case as having left for decision some questions bearing upon the same points, the same species of points that are involved in the case before us, even if we assume that, and assume, further, that the lower courts, when they got the cases back, in their decree made certain pronouncements of the related issues that were in the same categories; assuming all that, the question, as I see it, is, that is not controlling, and the estoppel is not met unless the issues decided were such as to control the parties in the present case on those points or types of points, and how could that be controlling, where here you not only have a different plaintiff but you have this different plaintiff charging the defendants with having done something which is contrary to the antitrust laws, several years after the Supreme Court made its rulings in the Paramount case.

Now, if you leave out what the Paramount case was intended by the Supreme Court to be nation-wide in its effect, then, as I understand, you are contending that is a reasonable interpretation, because all of this moving picture enter-

prise, or most of it, if not all of it, is nationwide, and even [fol. 185] if you assume all that to be true, the question still remains, Low, in a case where A charges B with an unlawful restraint of trade, can that case be an estoppel in another case, where X charges B with practices in restraint of trade, when X was not even in existence at the time A made his charges, apart from the fact that he was not only not in existence but had not been incorporated. I do not know whether I have made myself clear, but it seems to me that is a clear-cut issue. I may not have stated it clearly, but I think that is the question to consider, the question that you have to get over first; and, if you cannot convince me that Mr. Watkins is wrong, there is no point in going into any other of the refinements.

Have I made myself clear?

ARGUMENT ON BEHALF OF PLAINTIFF

Mr. Rome: Your Honor has made yourself very clear, indeed, thank you.

I would like to address myself to these points. May I point out that the purpose of Section 5 of the Clayton Act is designed to bring about the very thing which originally would not be possible, as Your Honor has properly said. [fol. 186] You cannot introduce in a case between B and X a decree that has been entered in another case between A and X, but that has been the purpose of Congress with regard to Section 5 of the Clayton Act, and it constituted as of that time a new departure in the law, because, if Your Honor will direct your attention to the actual language of Section 5, it refers to a final judgment or decree hereafter rendered in any criminal prosecution or in any suit in equity, shall be prima facie evidence against any such defendant in any suit or proceeding brought by any other party. That can be B coming in, instead of A, against such defendants in such cases, as to all matters respecting which said judgment or decree can be an estoppel between the parties thereto.

Therefore, if your thought was correct, as suggested by Mr. Watkins, it would mean that no type of litigant in an antitrust case could ever have a decree from a Government case, because it is always the Government that is a party,

and never a private individual; and that is borne out by the language of the Emich case, itself, quoted on page 2 of my brief, and coming from 340 U. S.,-at page 568, at the end of the quotation:

". . . We think that Congress intended to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit.'

[fol. 187] The Court: Where are you reading from?

Mr. Rome: From page 568 of the Emich case.

So that, we submit, it is here, just as though the Government itself was suing these defendants, again with regard to the situation in Baltimore, and this plaintiff, if the issues in the present case are the same as those adjudicated.

The Court: I see your point, but I do not think that alters the interpretation, the correctness of the interpretation that I have put on it. I can see how you might, without saying that it did not work against some new party, third party, because the statute says it does, but you have got to take the facts into consideration and, certainly, the Emich case is dealing with the effect of a criminal prosecution on a civil prosecution. That is all they are doing there; and, here, you still have got to find out that it is binding. How can you make a prior proceeding controlling? How can you say that it estops the parties, if the party was not in existence? I do not see that there is anything in the Emich case that offsets that.

Mr. Rome: Yes, sir; this early ruling, as I understand.

The Court: How can you say the conditions are the same, if the party was not even in existence at the time?

Mr. Rome: I will address myself to that; but to make sure [fol. 188] that your mind is satisfied with regard to the first point, about the parties being different, may I invite Your Honor's attention to the fact that though it is true, in the Emich case, the Government's case had been a criminal proceeding, the Supreme Court in the Emich case says it makes no difference whether——

The Court: That is the crux of the Emich case, but I don't see that that helps us any here. Let me ask you this: Have you any case on which you rely, where you have a situation comparable to this?

Mr. Rome: Yes, sir.

The Court: Where the plaintiff was not even in existence at the time that the prior litigation was consummated?

Mr. Rome: Yes, sir; I think there are at least three situations which bear exactly on that point.

The Court: I do not want three, immediately. Give me one.

Mr. Rome: Sir, one has to do with the case of Fanchon and Marco v. Paramount, et al., in 100 Fed. Supp., at page 84.

The Court: Where is that, in your brief?

Mr. Rome: Page 11 of my brief. In that case, the theatre which was seeking a first run had not come into existence and had made no attempt to get the first run until [fol. 189] a period in time subsequent to the facts in the Paramount case, and Judge Yankwich, in California, received the evidence in the trial before him, not only the decrees as to RKO and the Paramount, which were referred to here as consent decrees, but the decrees as to the other defendants as well.

That same situation is true in the Milgram v. Loew's case, 94 Fed. Supp. 416, which is also cited on page 11 of my brief. There, a drive-in theatre was involved, which also merely made an attempt to get first-run product for itself.

The Court: That was the same thing? The theatres were in the same place?

Mr. Rome: No, sir. In the Fanchon & Marco case, Los Angeles was involved; and in the Milgram case, the cities of Bethlehem and Allentown, Pennsylvania, were involved. Fanchon & Marco involves a decision of Judge Yankwich, in California, and the Milgram case involves a decision by Judge Kirkpatrick, in Pennsylvania, and affirmed by the Court of Appeals, and certiorari denied by the Supreme Court in April, 1952. And that very fact or point being raised by these defendants, that the facts there arise subsequent to the point of time to the Paramount case, and that the Court had erroneously considered the Paramount case in reaching its conclusion.

[fol. 190] The Court: Perhaps the Court was controlled by the fact that, from what you tell me, in both cases the real issue was the first-run question; whereas, the Supreme Court did not have that in the Paramount case, did it?

Mr. Rome: Indeed, it did. The language of Mr. Justice Douglas says that represents the crux of the issues in the Paramount case.

The Court: Where does it say that?

Mr. Rome: I will direct Your Honor's attention to it. It appears in 344 U. S., at 166 and 167, the bottom of page 166, if I may read that to Your Honor:

"The main contest is over the cream of the exhibition business—that of the first-run theatres. By defining the issue so narrowly we do not intend to belittle its importance. It shows, however, that the question here is not what the public will see or if the public will be permitted to see certain features. It is clear that under the existing system the public will be denied access to none. If the public cannot see the features on the first-run, it may do so on the second, third, fourth, or later run. The central problem presented by these cases is which exhibitors get the highly profitable first-run business. That problem has important aspects under the Sherman Act."

And there was an abundance of language throughout——

The Court: I still do not think that is the issue here. [fol. 191] It is true, my question was a little too broad, but here you have The United States saying it was monopolistic for these various companies to restrict their first-runs the way they did. That is not the question we have involved here. It is a question of whether, with reference to a particular locality and a particular theatre, at a time remote and subsequent to what was decided as a broad question in a suit brought by The United States, whether that is the same question. I do not think it is the same question at all.

Mr. Rome: May I say, first, sir, that it is the very heart of our claim, that we were seeking first-run and were denied access to first-run. There can be no dispute about that, sir. The letters which went into evidence yesterday point out the fact that the plaintiff was seeking access to first-run and was denied that. So, that is one aspect of this crucial issue that has been found by the Supreme Court in the Paramount case.

The Court: Where does the Supreme Court in its opinion, or the lower court in any of the decrees, use such language, that it is that broad, as to say that a person, perhaps, in Baltimore, with respect to first-run is prohibited?

Mr. Rome: To answer that question directly, in the amended complaint filed by the Government, the city of Baltimore is specifically referred to as one of the key cities [fol. 192] having metropolitan theatres; and, consequently, entering into this whole problem with cities of more than 100,000 population, which represents the cream of the business, as was described by the Supreme Court.

In the amended complaint in the Paramount case, there is specific reference to Warner's having a theatre in Baltimore, and it is also listed that Loew's has a theatre in Baltimore. However, may I invite your attention—

The Court: Was suburban discrimination involved in the Paramount case?

Mr. Rome: Not only included, but the general issue was that these defendants had erected a fence around the motion picture industry to preclude exhibitors from entering the first-run exhibition field.

The Court: Where can you show me that—I am asking you that—anywhere in the Supreme Court, or in the decrees following the opinion of the Supreme Court, a statement that is the result of the Paramount decision by the Supreme Court, that these companies discriminate as between locations on the question of first-run pictures?

Mr. Rome: We have never made such a contention. I will say, if any of these defendants had acted independently in their own field, without regard to conspiracy, each neighborhood house was entirely free to book whatever picture they wanted. The crux of the case is that they all, [fol. 193] by conspiracy, all together, conspired together, that no theatre outside of the downtown section would ever show first-run products; and that is borne out by answers of the defendants to interrogatories filed by the plaintiff in this case.

In Loew's answer, it is Interrogatory No. 7 of the plaintiff in this case:

"It is the policy of Loew's Incorporated not to license its motion pictures for first-run exhibition in any city on a day and date basis with a downtown theatre, and in a suburban theatre."

We contend, therefore, there is a policy applicable not only to do that, but that no one could ever enter the field of first-run competition.

That is the exact kind of conspiracy in which these defendants were found in the Milgram case, and there, again, the plaintiff's theatre had never come into existence until after the facts of the Paramount case. And the Court held there was a policy existing among all these defendants not to permit the drive-in theatre, no matter where it was, from getting first-run pictures and, therefore, they said these defendants are guilty of the conspiracy. And that was affirmed by the Circuit Court of Appeals for the Third Circuit, over the vehement protestations of these defendants that the Court had considered the Paramount case. [fol. 194] And, thereafter, they raise that very point in their petition for certiorari, which was denied.

The Court: Which case are you talking about now?

Mr. Rome: The opinion in the Milgram case, in the lower court. That is in 94 Fed. Supp.

The Court: Is that point covered in the affirmance?

Mr. Rome: Yes, sir; specifically covered in 192 Fed. (2d); at 579; certiorari denied April 1, 1952.

Their contention there was not only had the Court considered the Paramount case, but considered it despite the fact that there was no formal offer of it in evidence, and the defendants, therefore, raised the proposition that they were being unreasonably prejudiced by that. That was specifically considered. There was an appeal and, as I say, certiorari was denied.

Very recently, within the last week, that same problem occurred again in the United States District Court for the Western District of New York, in a case which appeared before Chief Judge Knight, of that Court. In that case, once again, the operative facts arose as subsequent in point of time to what my friend referred to as the terminal point of the Paramount conspiracy, 1945. There, the facts extended through 1946 to 1948. These same defendants raised exactly the same argument to the inadmissibility of the decree against RKO, the decree against Paramount, and [fol. 195] the decree against Warner's specifically, on the ground that RKO and Paramount decrees were consent

decrees, and there was no adjudication of fact as to those defendants; and, also, they raised the other questions. And Judge Knight overruled their objections, and alluded to the Paramount case with regard to the three defendants that appeared in that suit. That is the same case which appeared earlier in the Western District of New York, which went up on appeal to the Second Circuit and was affirmed.

The Court: Where in 192 Fed. (2d)—the Milgram case—where is that point discussed in the Court's opinion?

Mr. Rome: I do not have the specific case before me.

The Court: Here, take the volume.

Mr. Rome: Thank you.

On page 584 of Volume 192, if I may read briefly:

"The past proclivity of these defendants to unlawful conduct has been alluded to both by the Supreme Court in the Paramount case, 334 U. S. at page 147, and by this court in Ball v. Paramount Pictures, 169 F. 2d 317, 320. It is true that the facts of the instant case arose subsequent to the time period involved in the Paramount case. They arose soon after the Paramount decision, and before any decree had been entered there against most of the distributor-defendants. We think that the past proclivity of [fol. 196] these defendants to unlawful conduct may be of some significance here, where the conspiracy alleged by plaintiff is identical in scope and nature to one of the conspiracies found in the Paramount case—concerted action to fix a uniform system of runs and clearances. The similarity of the conspiracy found in the case at bar and the nationwide conspiracy considered in the Paramount case is striking. On remand, the district court in the Paramount case observed that in smaller communities there was either a total absence of or slight competition from drive-ins."

The Court: Is that being said in reference to the correctness of alluding to the prior record?

Mr. Rome: There is no question whatever that the distributors raised on appeal the question of the correctness of Judge Kirkpatrick in considering the Paramount case and concluding that the defendants in the Milgram case

were guilty, against the background even of the Paramount case, a conspiracy to maintain a system of runs and clearances whereby independent exhibitors were excluded from the first-runs not only in the small area of Allentown and Bethlehem, Pennsylvania, but throughout the country; and that is the contention we are making with regard to the situation in Baltimore.

This is not a situation which is only applicable to Baltimore, as we view it. This is a situation, as Loew's have [fol. 197] said, that nowhere in this country would a theatre outside of the downtown area be permitted to have first-run pictures; and by reason of that fact, there has been a decision, originally intended, perhaps, to apply to a local situation, extended to create a national policy; and that, sir, is the very kind of thing that was found to exist in the Paramount case.

If I may trouble Your Honor to read briefly with regard to some of the things found in the Paramount case, I think Your Honor will see that the issues in the Paramount case and the issues raised by the present plaintiff are identical.

The Supreme Court said, at pages 146-147, in U. S. 334:

"It (the District Court) reviewed the evidence in light of these standards and concluded that many of the clearances granted by the defendants were unreasonable. We do not stop to retrace those steps. The evidence is ample to show, as the District Court plainly demonstrated, . . . that many clearances had no relation to the competitive factors which alone could justify them. The clearances which were in vogue had, indeed, acquired a fixed and uniform character and were made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade. The evidence is [fol. 198] ample to support the finding of the District Court that the defendants either participated in evolving this uniform system of clearances or acquiesced in it and so furthered its existence. That evidence, like the evidence on the price-fixing phase of the case, is therefore adequate to support the finding of a conspiracy to restrain trade by imposing unreasonable clearances."

On page 148 of the opinion, the Court said:

"Clearances have been used along with price fixing to suppress competition with the theatres of the exhibitor-defendants and with other favored exhibitors."

I would invite Your Honor's attention to that language, because it indicates the Supreme Court and the Lower Court recognized that this had not only to do with the theatres, themselves, but that the possibility existed for other favored exhibitors, where they may enter into the picture with the defendants, quite apart from the fact that the other defendants participated.

The Court: Is there any expression in the Supreme Court opinion, in the Lower Court's decree, with respect to clearances? And, here, I suppose, you will emphasize that that word, as used by the Supreme Court, is expressing first-run?

Mr. Rome: Yes, sir.

The Court: Is there any statement to the effect that [fol. 199] where these defendants work together to prevent or enter concerted action or agreement or conspiracy to prohibit, any of their number changing their rule as to first-run pictures? Is there any statement that that act, in itself, apart from price-fixing, was wrong? We haven't any price-fixing involved in this case.

Mr. Rome: No, sir; the price-fixing was simply one manifestation.

The Court: I know, but my question is, is there anything in Paramount, or in the decree following Paramount, which indicates, expressly or impliedly, that it was a prohibition intended against the thing that your client is here complaining about per se?

Mr. Rome: Yes, sir; I think there is specific language on that, in both the Supreme Court opinion and in the District Court after the case had been remanded to it by the Supreme Court.

The Court: Where is it in the Supreme Court?

Mr. Rome: If I might invite Your Honor's attention to

pages 170-171 of the Supreme Court's opinion, there the Supreme Court said:

"It is clear, so far as the five majors are concerned, that the aim of the conspiracy was exclusionary, i.e. it was designed to strengthen their hold on the exhibition field. In other words, the conspiracy had monopoly in exhibition for [fol. 200] one of its goals, as the District Court held. Price, clearance, and run are interdependent. The clearance and run provisions of the licenses fixed the relative playing positions of all theatres in a certain area; the minimum price provisions were based on playing position—the first-run theatres being required to charge the highest prices, the second-run theatres the next highest, and so on. As the District Court found, 'In effect, the distributor, by the fixing of minimum admission prices attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible.'"

After the case got back to the lower court, specific findings with regard to those problems were made; and in Volume 85 Fed. Supp., page 888, the Court said as follows:

". . . we held that the defendants had set up a system of fixed runs and clearance which prevent any effective competition by outsiders. This system, in the absence of competitive bidding which has now been rejected, gave the defendants a practical control over the run and clearance status of any given theatre and irrespective of the extent of local discriminations violated the Sherman Act. It involved discrimination against persons applying for licenses and seeking runs and clearances for their theatres, because they had no reasonable chance to improve their status by building or [fol. 201] improving theatres while the major defendants possessed superior advantages. . . ."

And then the lower court went on to say that these defendants were guilty of a monopoly in the first-run exhibition field, which was amply directed upon our problem here, because Baltimore, being one of the key cities throughout the country, it has been found by the Court in the Paramount case that the purpose of the defendants was to control the exhibition of pictures on first-run throughout the large cities of the United States having a population of over 100,000 people.

May I say, there was no requirement to prove the location of every specific theatre. It was held in the Emich case that there was no need; and there is another case in which the Court admitted the decrees against these defendants, and these defendants had raised the very problem there, that the city there involved was not one of the cities involved in the Paramount case. And that case is De Luxe v. Balaban & Katz, 95 Fed. Supp. 983.

The Court: Suppose all these major companies owned theatres in every big city, owned and operated them—I don't know to what extent they do, but suppose they did, and then had an agreement that their own pictures would only be shown at their own theatres,—that is not prohibited by the Supreme Court, is it?

[fol. 202] Mr. Rome: The Supreme Court has said that the defendants—and the lower court said in its decree—that there was nothing wrong with the respective defendants licensing their own pictures to their own theatres during the period of time when these defendants who maintain their own theatre holdings; but one of the purposes of the remand by the Supreme Court in the Paramount case had the ultimate effect of requiring these defendants to divest themselves of their theatre holdings and thereafter there would not be any right on the part of any distributor to prefer its own theatre.

The Court: We do not have that question here.

Mr. Rome: It does enter into this case, in this way: the plaintiff here is seeking injunctive relief, and consequently we are asking to have brought to an end the practice whereby Warner's and Loew's prefer their own theatres with their own pictures; but may I also say that in the Milgram case, not one of the defendants in that case owned a first-run theatre in the area under consideration. That was specifically raised by them as one of the grounds for excluding them from any conspiracy.

The Court specifically considered that point and said, even though they had no theatres down there, they could still conspire, because it had to do with the impact of the advantage of the drive-in theatre into the first-run field on their [fol. 203] own theatre holdings in the first-run field.

The Court: I think you have answered my question. I think we are getting a little far afield.

Mr. Rome: There is one other point, with regard to the time element.

Mr. Watkins tried to point out that we never came into existence until a time after the Paramount case. May I remind Your Honor that the operative facts on the part of this plaintiff began in January, 1948, which was before any decree was entered against any of these defendants, and actually began with production in October, 1948, which was before the decree, and were carried out right through until the time of the decrees, themselves, so that it is not, certainly, accurate to say that we came at a point subsequent in time.

With regard to that, the District Court, in the Paramount case, had brought to its attention by these defendants the fact that they had terminated their illegal practices as found to exist, and the District Court was careful to point out the temptation to carry out those practices would be strong and, therefore, despite their contention that they had ended their practices, the Court, nevertheless, went on to enjoin them and require them to divest themselves of their holdings, and to divorce their exhibition business from their production and distribution business; so there is a pattern here. We [fol. 204] are attempting to show our case in Baltimore against the background in the Paramount case, and we do not say there was any conspiracy directed against the plaintiff in Baltimore; we say this was a continuation of the same conspiracy and combination which was found to exist in the Paramount case, in the years back.

These defendants had a policy of limiting first-run exhibitions to themselves, or to their other favored exhibitors, and that policy was then aimed at the plaintiff, when the plaintiff came along. It was never instituted for specific applicability to the plaintiff; but when he came along, they refused him access to the first-run field.

If I may turn to the so-called Paramount and RKO consent decrees, the reason I said, before adjournment, that the situation has not been made entirely clear to Your Honor is the fact that Mr. Watkins has not brought out to you an enormous mass of evidence and testimony taken in

the Paramount case before the case ever got to the Supreme Court. Specific findings on the points in issue in this present case were made against those defendants, and those were the facts and the findings affirmed by the Supreme Court; and that is amply borne-out by the language of the Lower Court and of the Supreme Court.

The Court: Suppose it was; do you mean no effect shall [fol. 205] be given to the stipulation or understanding made by the parties on page 4 of defendants' brief?

Mr. Rome: Yes, sir; I should like to address myself to that.

The Court: Why doesn't effect have to be given to that?

Mr. Rome: Because of this fact——

The Court: That was a consent decree.

Mr. Rome: It was a consent decree,—in quotation-marks,—if I might be permitted the expression, because of this fact: the Court, on remand of the case, pointed out the fact that as to the RKO defendant, the case had gone up to the the Supreme Court and had been affirmed in part, and reversed in part, and the mandate and order of the Supreme Court had been made the mandate and order of the Lower Court upon remand; and those are the things which adjudicated RKO g ilty of creating this conspiracy and combination as to runs, clearances, discriminatory license conditions, and so on, which are the very things of which the plaintiff complains in the very present case. So that that language on page 4 of the defendants' brief must be read in light of the issues that were open on remand from the Supreme Court of the United States. The only thing open on remand was the question of the extent of the decree the Lower Court had set up, the system of competitive bidding. The Supreme [fol. 206] Court said it was not a suitable decree to remedy the conspiracy, in which these defendants had been involved, and therefore remanded the case to the Lower Court, in order that a different kind of remedy could be worked out. That different kind of remedy developed into the problem of divestiture and divestment, but that remand has only to do with the question of the decree as drawn up by the language of the Supreme Court, itself.

The Court: To digress a moment, and go back to Judge Chesnut's decision in the Windsor case, was this question raised there?

Mr. Rome: No, sir, because——

The Court: Why wasn't it?

Mr. Rome: Because the question in the Windsor case involved a different kind of problem. In the first place, none of these defendants here were defendants in that case, so that the question raised by Your Honor earlier would have no immediate bearing there.

The Court: None of these present defendants were in that case?

Mr. Rome: No, sir; and, moreover, the Windsor case had to do with not the first-run situation which the Supreme Court has characterized as representing the cream of the business—that had to do with a subsequent-run situation; so that the problem was very different. It applied to a local [fol. 207] situation in Baltimore, and there was no contention there ever made that that case was the result of a nationwide policy. It is for that reason that the problem did not arise.

If I may return to the problem of the issues upon which remand of the Paramount case was made, the language of the Supreme Court, it had this to say, that there was freedom to the District Court to reconsider the adequacy of decree, and the adequacy of decree does not mean how many of these points were involved.

So, considering what Mr. Watkins said, there was no question on remand, that the District Court was told to do anything. That is borne-out by the District Court, in its opinion following remand, which comes later in time. That is the language referred to by Mr. Watkins in quoting the colloquy of counsel. Judge Hand, in writing the decision of the Three-Judge Court, said:

"In its opinion remanding the case for further consideration in certain respects, the Supreme Court affirmed our findings as to price-fixing, runs, clearances and discriminatory licenses and other practices which were found to be unlawful."

Those are the things as to which the Supreme Court affirmed the Lower Court, and those are the very things, the only things, we rely upon as creating issues which are the [fol. 208] very identical issues in the present case with those raised in the Paramount case.

It is for that reason that we claim that the decrees, all of the decrees, in the Paramount case, are admissible in the present case, within the provisions of Section 5; and that has been borne-out by the Courts, the very case that Mr. Watkins referred to, the Brookside case, and the Cinema Amusement case.

It is perfectly true there were not admitted in evidence there the so-called RKO consent decree, and the Paramount consent decree; but Mr. Watkins has told you that those cases admitted the decrees as to the other defendants. That has also been true as to other litigation that is going along.

As I have mentioned, in a recent case in the Western District of New York, Judge Knight admitted in evidence not only the so-called consent decree as to RKO, but specifically admitted the decree as to Paramount, and the decree as to Warner Bros.

That has been true in the Fanchon & Marco case, where all the decrees were admitted as to all the defendants.

The Brookside case, which was referred to by Mr. Watkins as holding that the RKO was inadmissible, though he has not advised you that the decrees as to the other defendants were admitted, and that was affirmed on appeal to the [fol. 209] Eighth Circuit.

There is abundant authority holding that these decrees are admissible as against all these defendants.

As to the applicability of the proviso of Section 5, that was raised in the Balaban & Katz case, where Judge Campbell had this to say, on page 985, in 95 Fed. Supp. 983:

"It appears that defendants are not entitled to rely upon the protection of Section 5 of the Clayton Act which provides that a final decree rendered in a proceeding brought by the United States shall be prima facie evidence in a suit subsequently brought by any other party, except where a consent decree is entered before any testimony has been taken. In the New York case a trial was had and, upon appeal, the Supreme Court affirmed in part and reversed in part and remanded the cause. . . . However, it should be noted that it was remanded for further proceedings and not for a new trial. In actuality, therefore, there was not a trial de novo, but rather a continuation of the previous trial, where certainly considerable testimony had been heard. The clear

purpose of Section 5 is to induce defendants in actions of that type to submit to prompt capitulation, and it cannot logically be contended here that the consenting defendants promptly capitulated."

The Court: How many decrees are involved here? How many do you want to introduce?

[fol. 210] Mr. Rome: I have offered the decree as to RKO, as to Paramount, the decree as to the remaining major defendants, and the decree as to the remaining minor defendants.

The Court: How many decrees are there?

Mr. Rome: Four, in all.

The Court: Do you have them there?

Mr. Rome: Yes, sir.

The Court: Let me see them.

Mr. Rome: Those are the decrees as to all of the defendants except Paramount. They are certified copies from the Court in New York. I have quoted, in volume form, the decree as to Paramount, itself. I may add, however, that the decree is substantially identical in form as to those portions of which we would seek to have it admitted.

The Court: From a practical standpoint, leaving aside the question of the right to introduce these, what does the jury make out of these with reference to the facts in the present case?

Mr. Rome: As we view it, sir, this would be the situation with regard to it: We believe that under the Emich case, and under the ruling in the Brookside case, we would be entitled to offer in evidence only those specific portions of those decrees that have a bearing on the problem in Baltimore, and [fol. 211] under the ruling in the Emich case, if I might invite Your Honor's attention to it, the Supreme Court said:

"In summary the trial judge should (1) examine the record of the antecedent case to determine the issues decided by the judgment; (2) in his instructions to the jury reconstruct that case in the manner and to the extent he deems necessary to acquaint the jury fully with the issues determined therein; and (3) explain the scope and effect of the former judgment on the case at trial. The Court may, in the interest of clarity, so inform the jury at the time the judgment in the prior action is offered in evidence; or

he may so instruct at a later time if, in his discretion, the ends of justice will be served."

The Court: That was a pretty big order, wasn't it?

Mr. Rome: Yes, sir.

The Court: Wasn't it Judge Hand who said he did not know what the Supreme Court decided?

Mr. Rome: The Judge said that, prior to the time when he wrote this opinion; but, Your Honor, of course, we can submit to you at the appropriate time the form of a charge with regard to this. It actually comes down to narrow compass, although we say that it is a fairly delicate matter—it comes down only to about four specific problems. So, it would not take more than a few moments to pick out from [fol. 212] the decree those portions which are pertinent, and we are only introducing them in the situation in Baltimore.

The Court: I think I understand your position. Do you want to say anything more, Mr. Watkins?

REPLY ARGUMENT ON BEHALF OF DEFENDANTS

Mr. Watkins: I just want, Your Honor, to correct a couple of misstatements, that I do not believe fully relate to the situation as to several of the companies or cases cited by Mr. Rome.

He mentioned, several times, the Milgram case, and particularly referred to the Court of Appeals decision there. Now, Your Honor, in the first place, the Milgram case was a nonjury case.

On the second point, on page 11 of his memorandum, Mr. Rome there frankly points out that the Paramount decrees were not offered in evidence in that case. What happened was, in a nonjury case, the Trial Judge, and the Court on Appeal, in U. S. v. Paramount, in the Supreme Court and in the Statutory Court, there is nothing, no way to stop a Trial Judge, sitting without a jury, from reading anything in the published reports; but the decrees were not offered in that case and were not, as far as can be determined, considered in the case.

Now, in the Brookside case, where he says admission of [fol. 213] the RKO and Paramount decrees were ruled out, there are two things: first, no objection was made in that case to the admission of a decree with respect to the other

companies; secondly, the conspiracy—or, rather, secondly, in that case, the plaintiff had complained to the Department of Justice as early as 1937 and, accordingly, the conspiracy complained of had effect when, during that time, he was in existence and, consequently, in that case, way back in 1937, when the plaintiff was in existence, and involved acts directed toward him, as distinguished from the case here, where he comes into existence later.

The same thing is true in the Bordonaro case. There, the conspiracy went back to 1930 and 1931, and it was claimed that it continued, the effect of it continued, through 1948.

Now, that is not the case we have here. This is an entirely different case. In this case, you have a completely new individual coming into the picture after the effective date of 1945, and those cases, I submit, Your Honor, do not support Mr. Rome's contention.

The Court: Do you want to say anything, Mr. Raftery?

Mr. Raftery: No, thanks.

### Ruling on Admissibility of Certain Decrees

The Court: I feel that at this point, at least, the plaintiff's motion must be denied. In other words, I do not [fol. 214] feel that the prior decrees in the Paramount case should be admitted, for the reasons which I have given in the course of the remarks made during the argument; and I am not going into—I do not think it is necessary to repeat them categorically.

I say this, primarily, for the reason that I am still convinced that there is a great deal of merit in the contention of defendants' counsel that the time element, the place element, and the absence of price-fixing, being one of the issues here, plus other apparent differences in the facts, do not require that the Court allow the admission of these prior decrees under Section 5 of the Statute.

This ruling is made now, however, without prejudice to the plaintiff to renew its motion in the course of the introduction of testimony; that is, in the course of the trial, and at the conclusion of the testimony; and the Court will, if plaintiff's counsel is disposed to do that, the Court will offer opportunity to again press the contention and review the authorities, or any additional authorities this action

would seem to warrant. And, in that connection, I assume counsel will want to take advantage of that, and make a later proffer, it will be of help to the Court in clarifying plaintiff's contention—I do not mean I do not understand it; I do—but I think it would be very helpful to the Court if the decrees, if the portion of the decrees that you insist [fol. 215] should be admitted, Mr. Rome, are marked, so that the Court can have them before it in the light of the testimony in this case. In other words, I am not now precluding you from raising this issue again, and I do not believe you are in any way prejudiced by not having these put in at the start, if you are entitled to put them in at all. In other words, if you are entitled to put them in, I cannot see that you are prejudiced by being prohibited from putting them in at the start, if you are allowed, before the conclusion of the case, to put them in; and, in that connection, as evidence of my desire to give this point the fullest consideration, I would like you, before you make the proffer again, to mark the portions in these decrees which you think clearly bear out your arguments.

Now, of course, I have not examined them carefully but in looking them over very casually, one or two that I have looked at, from a practical question,—I admit this is not conclusive of your client's legal rights, if you have right under Section 5 of the Act to have these decrees in,—but, as a practical question, it seems to me about paramount—I am not trying to play on that word—unless something is shown, such as I have suggested, assuming that you have the right to put them in ultimately, I think you might as well ask the jury to eat some hay, as to get anything out of these decrees evidentiary of what I understand is going [fol. 216] to be the testimony. Do you see what I mean?

Mr. Rome: Yes; I do. I would be happy to furnish Your Honor with a summary of that language from each decree which we rely upon as being admissible.

The Court: If you have extra copies, as I assume you do, mark the portions which you think you should be allowed to put in, and give me a separate summary of them. I won't stop now to illustrate what I mean by reading from the decree, but you can take any one of them, and, in reading them, they are so dependent upon what has been done by

the Supreme Court and by the Lower Court, and there are so many whereases and statements of conditions, and so forth, that they just do not make any sense as a practical matter, from the point of view of evidence in this case, unless they are deleted in the manner I have indicated.

Mr. Rome: I agree with Your Honor that it would be necessary to extract from the decrees——

The Court: You have not done that?

Mr. Rome: We have not reached that point.

The Court: We have reached the point now, that I am excluding them for the reasons given, but without prejudice to you to renew your proffer in the course of the trial, or at the conclusion of the trial, or both, with the understanding that when you do it, and ask for further argument on this point, you will be able to give to the Court marked [fol. 217] portions of the decrees which are the only parts you claim ought to be submitted to the jury.

Very well, we will proceed then with the trial of the case on the merits at 10 o'clock Monday morning.

(Whereupon, at 4 o'clock p.m., an adjournment was taken until Monday, May 12, 1952, at 10 o'clock a.m.)

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[fols. 217a-219] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 220] TRANSCRIPT OF PROCEEDING—May 12, 1952

The Court: Very well, Members of the Jury and counsel, we are ready to proceed with the pending case. Thereupon—

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HARRY D. MYERBERG resumed the witness-stand and, having been previously sworn, testified further on behalf of the plaintiff, as follows:

Direct examination (resumed).

By Mr. Rome:

Q. Mr. Myerberg, I hand you a copy of a letter dated November 26, 1948, and ask you if you can identify it?

A. Yes, I can. This was a bid——

Mr. Raftery: If Your Honor please, I am going to make a suggestion, merely to save time. He has answered the question; he has identified the letter, "Yes". Instead of the witness' describing what the letter is, our friend reads it to the jury, anyway. We are raising no question that the letter was sent.

The Court: I think that will save time.

Mr. Raftery: I think it will save a lot of time.

The Court: Yes.

Mr. Rome: Very well, Your Honor. I offer in evidence as Plaintiff's Exhibit No. 28, copy of a letter on the stationery of Theatre Enterprises, Inc., addressed to Universal-International Film Corporation, Attention Mr. Martin, in Wash-
[fol. 221] ington, D. C.

"Dear Mr. Martin:

"Pursuant to my telephone conversation of November 22, 1948, I submit the following bid for your picture 'Hamlet' to play our Crest Theatre first run, City of Baltimore.

"Theatre Enterprises, Inc. agrees to pay Fifty Percent (50%) of the first Seven Thousand Eight Hundred and Fifty Dollars, ($7,850.00) gross box office receipts, and Sixty-Five percent (65%) of all box office receipts over Seven Thousand Eight Hundred and Fifty Dollars ($7,850.00). We will also place any reasonable guarantee,

the figure to be mutually agreed upon. We will also set a minimum figure determining the completion of the engagement of this picture.

"It would be greatly appreciated, since time is most important, if you would reply at once to the above."

[fol. 222] Mr. Raftery: What is the date of that?

Mr. Rome: November 26, 1948.

(Letter, of November 26, 1948, Theatre Enterprises, Inc., to Universal-International Film Corporation, was marked Plaintiff's Exhibit No. 28.)

By Mr. Rome:

Q. Did you have any response to that submission of a bid, Mr. Myerberg?

A. Not until Mr. Meyers visited my theater sometime in November.

Q. What happened at that time?

A. As I recall now, Mr. Meyers had not received the bid in New York from the Washington office, but he said he would take it under advisement and, as I recall, asked Mr. Martin why he had not forwarded the bid to him. Mr. Meyers told me he would let me know about it.

Q. Did you have any other discussion with him at that time?

A. Only one remark that Mr. Meyers made, and that was that I built the theatre in the wrong place; if I had built it downtown, there would be no doubt about getting first-run pictures.

Mr. Rome: If the Court please, I would like to offer in evidence now the answer of Universal Film Exchanges, Inc., to interrogatories, propounded to it by the plaintiff, Nos. 11 and 12.

[fol. 223] If I may, sir, I will read the questions and answers to the jury.

The Court: Very well.

Mr. Rome: Members of the Jury, Interrogatory No. 11, propounded by the plaintiff to the defendant, Universal, says:

"State the name of the theatre in Baltimore to which each of the following motion picture films was licensed by

you or an affiliated or predecessor company for first-run exhibition."

The picture applicable to Universal is "Hamlet".

No. 12 asks:

"With respect to each of the films named in Interrogatory No. 11 which was licensed by you or an affiliated or predecessor company, state the following:

"(a) the terms of the license agreement dealing with the amount to be paid to the distributor.

"(b) the amount of compensation actually paid to the distributor;

"(c) the amount of any 'Credits', 'Adjustments', or other rebates returned to the exhibitor;

"(d) the terms of the license agreement dealing with playing time to be accorded the film by the exhibitors;

"(e) the dates during which the film was actually exhibited;

[fol. 224] "(f) the terms of the license agreement dealing with the clearance to be imposed upon subsequent-run theatres."

Universal answered by the following:

"12. The following applies to the exhibition referred to in 11 above.

"(a) 'First week—distributor is to receive 50% of the gross receipts. Additional expenses for treasurer, tickets, additional usherettes, pre-opening advertising expenses, together with all other additional advertising and exploitation expenses, including field man, are to be shared 50% by the distributor and 50% by the exhibitor.

"Second and subsequent weeks—same terms as the first week, except that the distributor is to receive 60% of the gross receipts and share 60% of the additional expenses outlined above.

"(b) $7,872.82.

"(c) Alteration dated July 1, 1949 changed agreed playing time from eight weeks to seven weeks. Adjust-

ment dated October 13, 1949 resulted in reduction of film rental by a net amount of $2,790.97.

"(d) Eight weeks starting May 7, 1949.

"(e) May 7 to June 24, 1949.

"(f) No clearance."

[fol. 225] Interrogatory 13.

"With respect to each of the films named in Interrogatory No. 11 which was distributed by you or an affiliated or predecessor corporation, state the total amount of film rental received from subsequent run licenses in Baltimore."

Universal's answer to that interrogatory is as follows:

"The total amount of revenue received from subsequent run exhibitions of 'Hamlet' in Baltimore was $1,669.24. In addition, the total of $2,112.37 was received from two additional runs of the picture at the Little Theatre."

[fol. 226] Mr. Rome: May I call upon you, Mr. Raftery, for a copy of a letter from Mr. Fred Meyers to Mr. Martin, dated January 14, 1949?

Mr. Raftery: If we have it. That is, Meyers to Martin?

Mr. Rome: Meyers to Martin.

If the Court please, I offer in evidence as plaintiff's exhibit 30——

Mr. Raftery: I don't think the proper procedure is to offer interrogatories into evidence after you read them. They are read into the record. They don't get a number, I think.

The Court: I think Mr. Raftery is correct. Just read it.

Mr. Raftery: You misled the Clerk. You offered them in evidence.

The Clerk: This will be plaintiff's exhibit No. 29.

(Letter January 14, 1949, Fred Meyers to H. J. Martin, was marked Plaintiff's Exhibit No. 29.)

Mr. Rome: Plaintiff's exhibit No. 29 is a copy of a letter from Mr. Fred Meyers on the stationery headed "Copy for W. A. Scully," addressed to Mr. H. J. Martin, Washington, D. C., dated January 14, 1949.

"Dear Mr. Martin:

"In reply to yours of the 14th relative to the Crest [fol. 227] Theatre, Baltimore, Maryland, operated by

Harry D. Myerberg, it is our mutual decision to offer this exhibitor a first neighborhood run for same break date as all other neighborhood runs after the completion of the engagement in downtown Baltimore.

"Kind regards. Sincerely, Fred Meyers."

With carbon copies marked to go to Messrs. Scully, Gomersall, O'Keefe, J. Scully, Friedberg and Jordan.

The Clerk: That is plaintiff's exhibit 29.

Mr. Raftery: We would appreciate, Mr. Rome, as all of these documents are put in out of our files, we lose possession of all of them, we lose our continuity. Would you furnish us with carbon copies of them so we could keep our file intact if we need to do so?

Mr. Rome: We would be happy to do so.

Mr. Raftery: Thank you.

We concede that the originals of these two documents were received by Columbia Pictures, Inc., and have no objection to Mr. Rome offering and reading the copies.

The Court: Very well.

Mr. Rome: If the Court please, I offer in evidence as plaintiff's exhibit No. 30 copy of a letter dated December 20, 1949, addressed to Columbia Pictures, New York City.

"Gentlemen:

"We wish to call to your attention our letter of [fol. 228] November 1, 1949 regarding the Crest Theatre in Baltimore, Maryland.

"We have not yet had a reply to this letter, but it is our hope that during this time the proposal that the Crest be given access to first-run pictures in Baltimore has been receiving favorable consideration. In other cities of the country such as Washington, Roanoke, Kansas City, Denver, and Los Angeles theatres located outside the so-called business section are exhibiting pictures on first-run. This is, we believe, an inevitable consequence of the spreading growth of cities, the distance from suburban areas to downtown, the complicated and expensive parking problems downtown and the fact that suburban areas are frequently themselves cities within metropolitan boundaries. Baltimore is an excellent example of this very development and, consequently, offers a magnificent revenue-producing op-

portunity in this connection, and as further evidence of the conviction held by our client that the Crest is entirely suitable for first-run exhibition, we are authorized to submit to you our bid for the exclusive first-run exhibition in Baltimore at regular first-run admission prices of your picture 'Jolson Sings Again.'

"Our client is willing to pay a $10,500 guarantee against 40% of the gross for this picture and will post the guarantee in the form of a certified check if this is deemed desirable. [fol. 229] "It is firmly believed that this bid, as well as the actual play-off of the picture, if the bid is accepted, will conclusively demonstrate what a fine outlet the Crest is for the exhibition of your pictures on first-run in Baltimore.

"Will you please give this letter your early consideration and advise us of your decision?

"Yours very truly, For Gray, Anderson, Schaffer & Rome."

Mr. Raftery: That was sent from your Philadelphia office?

Mr. Rome: Yes, it was.

The Clerk: This will be plaintiff's exhibit No. 30.

(Letter December 20, 1949 to Columbia Pictures from Gray, Anderson, et al., was marked Plaintiff's Exhibit No. 30.)

Mr. Rome: I offer in evidence as plaintiff's exhibit No. 31 a copy of a prepaid, straight telegram, dated January 9, 1950 to Mr. A. Montague, Columbia Pictures, Inc., New York City.

"We request opportunity to negotiate or bid for Crest Theatre, Baltimore, for 'All The King's Men.' Will guarantee $7,000 against 40% of gross for extended first-run. Alternative bid, $4,000 against 40% of gross for extended run day and date with downtown Baltimore." That letter was signed Gray, Anderson, Schaffer & Rome and was sent from our Philadelphia office.

[fol. 230] The Clerk: Plaintiff's exhibit No. 31.

(Letter January 9, 1950 to A. Montague, Columbia Pictures, from Gray, Anderson, et al., was marked Plaintiff's Exhibit No. 31.)

By Mr. Rome:

Q. Mr. Myerberg, were any acknowledgments ever received to your knowledge from Columbia Pictures to these two bids?

A. Not to my knowledge, no.

Q. Were those pictures ever licensed to you for exhibition first-run at the Crest Theatre?

A. No, sir.

Q. Now, the bid on "All The King's Men," Mr. Myerberg, refers to a bid, exclusive run and an alternative bid. What was meant by that?

A. Well, that was——

Mr. Raftery: Wait a minute. This man did not send these letters. They were sent by Mr. Rome and he is asking his witness to explain what Mr. Rome meant when he sent these documents.

Mr. Rome: The letter that has been read, sir, also will explain the fact that we were authorized on behalf of our client, Theatre Enterprises, to submit all bids.

The Court: I will allow the question. Go ahead.

Mr. Raftery: I further object on the ground the documents speak for themselves.

[fol. 231] The Court: I will allow the question.

A. As I recall, that was some time the latter part of 1949, after the theatre had been opened about six or eight months, and we had not been able to license any first-run pictures in Baltimore.

Mr. Raftery: I move to strike out everything so far he has asked. The question was what was meant, and he starts telling about what happened.

The Court: That may be proper introduction. You say the letter speaks for itself, Mr. Raftery. I don't know what it means. I do not suppose the jury does, either. So, I think certainly it needs explanation.

Go ahead, sir.

The Witness: And I had at that time felt it necessary, getting no place with these companies, no license on first-run pictures, to look into the matter through an attorney who was experienced in the picture business, and I engaged Gray, Anderson, Schaffer & Rome, of Philadlephia, for that

purpose and asked them to further submit bids to the different companies, to see if they could not do something relevant to that with these companies. And they submitted the bid that you just heard. And the second bid, when I asked them to submit them, was purely they will play the pictures first-run or play them day and date downtown, and that was the way the bid was submitted, and we felt the same bid on [fol. 232] the "Jolson Story" on day and date on simultaneous run, that meant we would buy at the same price.

The Court: What do you mean by "day and date"?

The Witness: At the same time the downtown theatres would be playing, if we would be playing the picture. "Exclusive," of course, would be exclusive of the City of Baltimore.

Mr. Rome: May I call upon you, Mr. Raftery, for a copy of a letter from Mr. George Josephs to Mr. Galanty, dated November 4, 1949?

If the Court please, I offer in evidence as plaintiff's exhibit No. 32 a letter on the stationery of Columbia Pictures Corporation, 727 Seventh Avenue, New York, dated November 4, 1949, addressed to Mr. S. A. Galanty, Columbia Pictures Corporation, Washington, D. C.

"Dear Sam:

"Attached is a copy of a letter which we received from the attorneys for the Crest Theatre, Baltimore, Maryland. Judging from the description of the theatre as contained in this letter, this seems to be a neighborhood house and it has been our policy not to recognize the requests of neighborhood houses for first-run on our product. We do not intend to reply to this letter and are sending it to you for your information.

"Kindest regards, Sincerely, George." Signed: "George M. Josephs."

[fol. 233] The Clerk: Plaintiff's exhibit No. 32.

(Letter November 4, 1949, Attorneys for Crest Theatre to S. A. Galanty, was marked Plaintiff's Exhibit No. 32.)

Mr. Rome: A letter from Mr. Caplon to Mr. Josephs, dated August 7, 1950 and a letter to Mr. Caplon from Samuel Reice, dated August 25, 1950.

If the Court please, I offer in evidence as plaintiff's exhibit No. 33 a copy of a letter dated August 7, 1950, addressed to Mr. George Josephs, Columbia Pictures Corporation, 729 Seventh Avenue, New York.

"Dear George:

"On June 15th, I wrote you and attached a letter from the Crest Theatre, Baltimore, Maryland, wherein they requested the bidding privilege against the Uptown, Pimlico and Avalon Theatres.

"The exhibitor has asked me several times what disposition we have made of his request, and I would appreciate your further advice in this matter.

"Kindest regards, Sincerely, Ben Caplon, Branch Manager."

The Clerk: That will be plaintiff's exhibit No. 33.

(Copy of letter August 7, 1950 Caplon to Josephs, was marked Plaintiff's Exhibit No. 33.)

Mr. Rome: If the Court please, I offer in evidence as plaintiff's exhibit No. 34 a copy of a letter on the [fol. 234] stationery of Schwartz & Frohlich, 19 East 70th Street, New York 21, New York, dated August 25, 1950, addressed to Mr. Ben Caplon, Columbia Pictures, 928 New Jersey Avenue, Northwest, Washington 1, D. C.

"Dear Ben:

"This is in reply to your several letters addressed to George Josephs regarding the exhibitor's demand for an improved availability.

"As I understand the situation the Crest is playing Columbia product on a first-run availability. Columbia is under no obligation to grant the exhibitor clearance over the Avalon, Uptown and Pimlico and it would seem desirable to retain the status quo. If there are any reasons for treating the situation differently I would appreciate hearing from you.

"It would be preferable, Ben, in further communications relating to this situation and any others dealing with availability, clearance or related subjects be sent directly to Schwartz & Frohlich.

"With all best wishes—
"Sincerely, Samuel Reice."

Mr. Raftery: What was the date of that communication?

Mr. Rome: August 25, 1950.

Mr. Raftery: And that was after this suit was [fol. 235] started?

Mr. Rome: That is correct.

The Clerk: Plaintiff's exhibit No. 34.

(Letter August 25, 1950, Reice to Caplon, was marked Plaintiff's Exhibit No. 34.)

Mr. Rome: With permission of the Court, I would like to read to the jury the answers by Columbia to the same interrogatories addressed earlier relating to the pictures "All The King's Men," and "Jolson Sings Again," asking for the term and the rental and the income received from the exhibitor.

The Court: These are addressed to another company?

Mr. Rome: The same interrogatory that was earlier addressed to Universal, sir, was also addressed to Columbia with regard to its pictures "All The King's Men," and "Jolson Sings Again."

The Court: Very well.

Mr. Rome: As to "All The King's Men," members of the jury, the terms were first week distributor to receive 20% of the gross receipts to $14,000 and 50% of the receipts over $14,000. Second week distributor to receive 20% of the gross receipts to $14,000 and 50% of the receipts over $14,000. The rental received $7,188.52.

Played 14 days from February 2 to 14, 1950, inclusive, with 21 days' clearance over subsequent run. There were no [fol. 236] adjustments made. The total film rental received from exhibition in Baltimore on subsequent runs of All The King's Men was $12,255.70.

As to Jolson Sings Again, played at the Hippodrome, the terms being distributor received 60% of the gross receipts from the first dollar. At the "Little" the distributor to receive 80% of the gross receipts after deduction from the gross of $830 for overhead plus rent and cost of short subjects. Same terms for second week, and rental received by Columbia was $37,047.40. Adjustments at the Hippo-

drome, the terms for the last two weeks' of exhibition changed to 80% of gross receipts over house expenses.

At the Hippodrome the engagement was to start September 1, 1949 for a minimum period of six weeks and to be held over thereafter until such time as the weekly gross is less than $10,000.

At the Little Theatre, 14 days. Played in the Hippodrome from September 1 to October 5, 1949. At the Little, October 6th to October 19, 1949. No clearance was stated. The total film rentals received from exhibition in Baltimore on subsequent runs were as follows: "All The King's Men, $12,255.70; Jolson Sings Again, $11,995.07."

[fol. 237] Mr. Rome: For the purposes of the record, may I state that those answers were to Interrogatories 11, 12 and 13.

Mr. Raftery: We concede, without having them identified by the witness, that he may offer them. We received the originals or the copies. When I say "we", I mean the parties to whom they were addressed, and the answers we concede were sent.

Mr. Rome: If the Court please, I offer as Plaintiff's Exhibit 35 a letter on the stationery of Paramount Pictures, Inc., Washington, D. C., dated November 1, 1948, addressed to Mr. Harry Myerberg, Theatre Enterprises, Inc.

(Reading:)

"November 1, 1948

"Mr. Harry Myerberg,
"Theatre Enterprises, Inc.,
"302 Park Avenue,
"Baltimore 1, Md.

"Dear Mr. Myerberg:

"I have for acknowledgment your letter of October 14, 1948, supplying information relative to the new, but as yet unnamed theatre, with which you are connected, which is expected to open on or about November 15 next and requesting the opportunity to bid for Paramount product for exhibition first run Baltimore in that theatre.

"I beg to advise that it has not been in the past, [fol. 238] and still is not Paramount's policy to engage in

so-called competitive bidding unless it is compelled to do so by some court of competent jurisdiction.

"Upon further consideration of the matters discussed, at our recent meeting, and also of the contents of your letter of the above date, we are still of the opinion that the business and financial interests of Paramount will be served best by the continued exhibition of Paramount pictures first run Baltimore in theatres situated in the downtown business and shopping area of that city rather than in a theatre located in a suburban area. It is to be regretted therefore, that in the exercise of our sound business judgment, your offer to bid competitively for Paramount product for exhibition first run Baltimore in the new theatre, which is located at 5521-29 Reister-town Road, cannot be entertained. However, we shall be pleased to negotiate with you, from time to time, for the exhibition in the new theatre of such Paramount product as may become available, on a picture by picture basis, on some run, on terms to be mutually agreed upon.

"Please accept our best wishes for the success of the new theatre's opening and also for the continued success of its future operation.

"Kindest personal regards.

[fol. 239]

"Very truly yours,
"(Sgd) A. C. Benson
"Branch Manager."

(Letter, November 1, 1948, A. C. Benson, Paramount Pictures Inc., to Mr. Harry Myerberg, was marked Plaintiff's Exhibit No. 35.)

Mr. Raftery: To keep the record straight, in continuity, I had expected this one to be offered last week, when we put in the World Premier letter of October 14. So there will be no question about it, this is Paramount's answer to the World Premier letter.

Mr. Rome: It is Paramount's answer to the letter sent by Mr. Myerberg in response to the suggestion of Mr. Benson that he send information on first run product in Baltimore.

I offer in evidence, as Plaintiff's Exhibit 36, a copy of a letter from Theatre Enterprises, Inc. to Paramount Pictures, Inc., Attention Mr. Benson: (Reading)

"December 15, 1948

"Paramount Pictures, Inc.
"306 H Street, N. W.
"Washington, D. C. Attention: Mr. Benson

"Gentlemen:

"It is our understanding that your company has taken the position that the Crest Theatre will not be permitted to competitively bid for your pictures first run, City of Baltimore either on an exclusive or day and date basis. [fol. 240] As you know, it is imperative that we open the Crest Theatre without further delay.

"We are, at this time, accepting your offer permitting us the right to bid on your pictures first neighborhood run in this area.

"Please understand that our acceptance of your offer relative to neighborhood run pictures for the Crest Theatre is not a withdrawal of our original request for first-run pictures, City of Baltimore, contained in our letter of October 14, 1948.

"Kindly send, as soon as practicable, all the information necessary regarding pictures available for the Crest Theatre on a first neighborhood run basis.

"Very truly yours,
"Theatre Enterprises, Inc.
"By:
"(Sgd) Harry D. Myerberg.

"Registered Mail.
"Return Receipt Requested."

(Copy of letter, December 15, 1948, from Theatre Enterprises, Inc. to Paramount Pictures, Inc., was marked Plaintiff's Exhibit No. 36.)

Mr. Rome: I offer in evidence, as Plaintiff's Exhibit 37, a letter on the stationery of Paramount Pictures Inc., Washington, dated December 17, 1948, addressed to Mr. Myerberg: (Reading)

[fol. 241] Dear Mr. Myerberg:

"I have for acknowledgment your letter of December 15, 1948, the second paramount—" obviously he meant "paragraph—" of which is, as follows:

> "'We are, at this time, accepting your offer permitting us the right to bid on your pictures first run neighborhood run in this area.'

"Please refer to my letter of November 1, 1948, in the second paragraph of which I advised, as follows:

> "'I beg to advise that it has not been in the past, and still is not Paramount's policy to engage in so-called competitive bidding unless it is compelled to do so by some court of competent jurisdiction.'

"While we are not accepting bids, we shall be pleased to negotiate with you from time to time for the exhibition in the new Crest Theatre of such Paramount product as may become available on picture by picture basis on some run on terms to be mutually agreed upon.

"We will be pleased to have our salesman, Mr. Thompson, contact you at an early date and discuss this matter in detail with you.

"I trust that your new enterprise will be a successful one, and I want to congratulate you on a very fine theatre building.

[fol. 242]

"Very truly yours,
"(Sgd) A. C. Benson
"Branch Manager."

(Letter, December 17, 1948, A. C. Benson to Mr. Harry D. Myerberg, was marked Plaintiff's Exhibit No. 37.)

Mr. Rome: May I call on you, Mr Raftery, for a copy of a letter from Mr. Benson to Mr. O'Shea, dated February 9, 1949, and a letter from Mr. Benson to Mr. Thomas P. Gibbons, dated February 15, 1949?

Mr. Raftery: I apologize for the bad typing on here, and if you have any difficulty reading it, I will let you take my glasses.

Mr. Rome: Thank you.

If the Court please, I offer in evidence a picture copy of a letter on the stationery of Paramount Pictures Inc., Washington, D.C., dated February 9, 1949, addressed to Mr. E. K. O'Shea, Home Office, "re: Crest, Baltimore, Md. 5521-29 Reister-town Rd. Baltimore, Md.

"Dear Mr. O'Shea:

"The above mentioned theatre is under construction, and will open in the latter part of February. The theatre is owned by Mr. Harry Myerberg, Theatre Enterprises, Inc., 302 Park Ave., Baltimore, Md., which has approximately 1500 seats.

"Mr. Myerberg has visited this office and written us [fol. 243] several times in an endeavor to secure a first run availability in the City of Baltimore for the above mentioned theatre. This, we have refused to give him (see correspondence file—Mr. Thomas P. Gibbons, Legal Department). Mr. Myerberg has again contacted us and requested that we license pictures for exhibition in the Crest Theatre on a 21 day availability.

"The Crest Theatre is in opposition to the Garman's Uptown and Pimlico Theatres, being located approximately one mile distance from the Uptown, and drawing from the same area. Under normal conditions and to avoid litigation, I believe that if an equal availability is given the Uptown and Crest, it will be acceptable to both operators. We have not committed ourselves, as per the correspondence files, to a run in this situation so far as the Crest Theatre is concerned.

"We have been regularly serving the Uptown and Pimlico Theatres on a 21 day basis, the majority of our pictures playing the Uptown. The Uptown Theatre is probably one of the finest theatres in the country, as you know. The Crest is equally as beautiful and is larger than the Uptown.

"My recommendation is that the Crest Theatre be served on a 21 day availability.

"Please advise.

[fol. 244]

"Very truly yours,
"(Sgd) A. C. Benson
"Branch Manager.

"cc: Mr. E. W. Sweigert."

(Copy of letter, February 9, 1949, A. C. Benson, Paramount Pictures Inc., to Mr. E. K. O'Shea, was marked Plaintiff's Exhibit No. 38.)

Mr. Raftery: We retyped this one, because the other was so bad, you cannot read it.

Mr. Rome: I offer in evidence, as Plaintiff's Exhibit 39, a copy of a letter on the stationery of Paramount Pictures Inc., Washington, dated February 15, 1949, "re: Crest Theatre 5521-29 Reister-town Rd. Baltimore, Md.

"Dear Mr. Gibbons:

"In reply to your letter of February 11, 1949, and in reference to previous correspondence.

"*Page 1, paragraph 2:* Mr. Myerberg submitted various opening dates starting with October 14, 1948 for the opening of the above theatre. The house was not ready and completed at that time, but will be finally and formally opened on February 20, 1949.

"*Page 1, paragraph 3:* In reply to your inquiry as to the door to door mileage between the several theatres involved, we wish to advise that the Pimlico and Uptown Theatres, both owned and operated by Mr. Garman, are both situated on the west side of Park Heights Ave., one block apart.
[fol. 245] "The distance from the Pimlico or Uptown Theatre to the Crest is, as follows:

"Route 1: Uptown—Park Heights Ave. to Rogers Ave. to the Crest Theatre—8/10ths miles;

"Route 2: Uptown—Belvedere Ave. to Reisterstown Road to the Crest—one mile.

"*Page 1, paragraph 4:* The following is the seating capacities of the theatres involved:

| | | |
|---|---|---|
| "Uptown | 1,100 | seats |
| "Pimlico | 1,140 | " |
| "Crest | 1,650 | " * |

"*Page 1, paragraph 5:* There is no doubt that adding the Crest to the 21 day houses in Baltimore will add to the print

*Architect's estimate—seats being installed now.

problem. The problem can be met satisfactorily with the exception of our top flight pictures.

"*Page 1, paragraph 6:* In reply to your inquiry as to the reactions of the exhibitors to (a) competitive negotiation; and (b) division of the product, we wish to advise, as follows:

"(a) Mr. Garman, the operator of the Uptown and Pimlico Theatres, has never bid on a picture from any company, and advises us that he will never enter competitive negotiations, and our experience with him [fol. 246] over a number of years convinces us that he means just that. Mr. Myerberg would enter the competitive negotiations only on top flight pictures, passing all others, or as many as possible.

"(b) The possibility of a division of the product between the Uptown and the Crest could not be satisfactorily handled in this situation. At the present time, as per the attached Forms 2554, you will note that all of our important pictures receive the proper consideration from Mr. Garman, and play the Uptown Theatre. You will further note that they receive the proper preferred time and also note that the lesser pictures also receive proper consideration and play time. I feel that, if the product were divided, this condition would not continue, as Mr. Garman would not have the interest in the lesser pictures that he has under the present conditions.

As to the half of the product which would be licensed to the Crest: The liquidation of this half of the product would be complicated by the fact that Mr. Myerberg has announced a policy of vaudeville 3 days per week. Therefore, with one theatre, he could not absorb 50% [fol. 247] of all product available plus the product he purchases 100%. He would, therefore, be forced to pass many of the lesser pictures. Mr. Myerberg formerly operated other theatres in Baltimore, and experience again has taught us that lesser pictures would not receive fair consideration in his operation.

"*Page 2, paragraph 1:* Other distributors are selling the Crest Theatre on a 21 day availability. The theatre

will open with Words and Music, a Metro top flight picture on a 21 day availability. We know that Don Juan, a Warner picture, has been licensed to the Crest on a 21 day availability. We know that Columbia and Universal are now negotiating on a 21 day availability and we know of no company which has refused to negotiate on that same basis.

"From a distribution angle, it would be to the advantage of Paramount to play on a 21 day availability in the Uptown or Pimlico and have the Crest follow either one of those two theatres, but I am sure that you recognize the position we are in from a legal angle.

"We cannot tell what the practical working out of this problem will be. We will not know until after the policy of the Crest Theatre is definitely set.

"My recommendation is that the Crest be served on a 21 day availability. Our only problem then will be a print problem.

[fol. 248] "Please advise if I can be of any further service.

"Very truly yours,
"(sgd) A. C. Benson,
"Branch Manager.

"Attachments:
"ACT:rhs.
"cc: Mr. E. K. O'Shea, Mr. E. W. Sweigert."

(Copy of letter, February 15, 1949, A. C. Benson, Paramount Pictures Inc., to Mr. Thomas P. Gibbons, was marked Plaintiff's Exhibit No. 39.)

Mr. Raftery: We still have a copy of that, so, in giving them back to us, you may skip that one.

By Mr. Rome:

Q. Mr. Myerberg, the letter from Mr. Benson just read refers to the fact that you had announced the policy of running vaudeville three days a week. Is that a fact? Did you ever announce a vaudeville policy for the Crest Theatre?

A. No, sir.

Q. Was it ever your intention to have vaudeville in that theatre?

A. No, sir. We are not set up to handle vaudeville. We have no dressing-rooms and no fly loft.

Q. Mr. Benson's letter, Mr. Myerberg, also refers to the fact that you had managed other theatres, and their experience indicated you would not play *there* lesser pictures. What is the fact with regard to your having played Paramount pictures during your earlier operations?

[fol. 249] A. It has always been my desire to present to the public the best picture available, whether it was Paramount, Metro, or any of the other companies; and it is true that quite frequently I did pass up pictures I did not think warranted showing in the theatre, and played a better picture.

Mr. Rome: Mr. Raftery, may I call upon you for a letter from Mr. Gibbons to Mr. Isaacs, dated June 25, 1951.

Mr. Raftery: Here it is.

By Mr. Rome:

Q. Mr. Myerberg, are you familiar with the Ontario Theatre in Washington, D.C.?

A. Yes.

Q. Do you know where that theatre is located?

A. It is located on Connecticut Avenue, as I recall, Washington, Northwest.

Mr. Raftery: I will help you out. It is quite a ways from Connecticut Avenue. It is on Columbia Road——

Mr. Rome: 17th and Columbia Road, is it not?

The Witness: That is right. That is right up the street from the Ambassador Theatre.

By Mr. Rome:

Q. Whose theatre is the Ambassador?

A. Warner's.

Q. How far are these theatres located from the downtown section of Washington?

A. I would say, between 2 and 2½ miles.

Q. Do you know when the Ontario Theatre opened in [fol. 250] Washington?

A. I don't know the date, but I think it was about six or seven months ago.

Q. Do you know whether that theatre has had access to Paramount product on first run in the City of Washington?

A. Yes; I do know that they have had access to first-run product of Paramount ir Washington.

Q. Do you know what playing policy the Warner Ambassador Theatre followed?

A. For many years it has played day and date with the downtown Washington theatres.

Q. On what run?

A. First run.

Mr. Raftery: Did I understand you to say theatres, "plural"?

The Witness: Downtown theatres.

Mr. Raftery: Theatres, or "singular"?

The Witness: It may have been "plural". I think, at times, they played both theatres.

Mr. Rome: I offer in evidence, as Plaintiff's Exhibit 40, a copy of a letter dated June 25, 1951, addressed to Mr. Phil Isaacs, Branch Manager of the Paramount Washington Branch office, "Re; Ontario Theatre, Washington, D.C.

"Dear Phil:——"

[fol. 251] Mr. Raftery: Just a minute. What is the date of that?

Mr. Rome: June 25, 1951.

Mr. Raftery: I am not going tc object. Go ahead.

Mr. Rome: (Reading)

"Dear Phil:

"I am in receipt of a copy of your communication of June 21st with which you enclosed copy of a letter dated June 11th addressed to you from Mr. Frank M. Boucher, General Manager of the Kogod-Burka Circuit, owner of the above theatre, which presently is in the course of erection and which you advise will be ready to open around the latter part of October, advising that they are interested in two things, '(1) securing a good picture from you for

the opening which could be either on a day and date basis with down town run, or an exclusive first run in the city, and (2) we are interested in discussing with you the possibility of playing your product day and date with your down town run on the same basis as it is now being played in the Ambassador. In other words, on pictures that do not play the Ambassador, we would be interested in on the same basis.'

"Inasmuch as the theatre is in the course of construction and not ready for operation, no immediate decision need be made. However, the problem exists and necessarily [fol. 252] must be met at some future date, at which time we will have to do one of two things, (a) refuse the request, or (b) grant it.

"I know little of the facts and some time at your convenience, I would appreciate it if you would furnish me with the following information: (a) the location of the Ontario (b) its seating capacity (c) its distance from the downtown area (d) its distance from the Ambassador, etc.

"Of course, an exclusive first run in Washington is out of the question. However, if the Ontario is in substantial competition with the Ambassador, it might be a case, depending upon the facts, for a division of the product between the two theatres or for competitive negotiations between them for a first run on a day and date basis with downtown Washington.

"Please keep me advised.

"Sincerely yours,
"Thomas P. Gibbons.

"cc: Mr. H. G. Minsky."

(Copy of letter, June 25, 1951, Thomas P. Gibbons to Mr. Phil Isaacs, Branch Manager, Washington Branch Office, was marked Plaintiff's Exhibit No. 40.)

[fol. 253] By Mr. Rome:

Q. Mr. Myerberg, if you know whether the Ontario Theatre, in Washington, presently exhibits Paramount pictures on first run, do you know whether or not that is on an exclusive first run or on a day and date first run basis?

A. It is done on an exclusive first run, City of Washington.

Mr. Rome: I offer in evidence as plaintiff's exhibit No. 41 a copy of a letter on the stationery of Paramount Film Distributing Corporation, Washington, D. C., dated June 28th, 1951, re Ontario Theatre, Washington, D. C., addressed to Mr. Thomas P. Gibbons, Legal Department, Home Office.

"Dear Mr. Gibbons:

"With reference to your letter of June 25, 1951, I am herewith outlining all facts pertinent to the request made by Mr. Frank Boucher, General Manager of the Kogod-Burka Circuit, owners of the above theatre, presently in the course of erection.

"The Ontario Theatre located at 17th and Columbia Road, N.W., will have 1301 seats upon completion sometime during the month of October. It is located approximately 2½ miles from the downtown area and two blocks from the Ambassador Theatre.

"At present, we are splitting our product first run [fol. 254] Washington between Loew's Palace, Capitol or Columbia Theatres and Warners' Warner, Ambassador or Metropolitan Theatres. Those pictures which play the Loew situation play one theatre exclusively; whereas, Warners day and date their pictures in the Warner and Ambassador, the Metropolitan playing an exclusive first run.

"The Warner Theatre, located in downtown Washington, contains 2154 seats; the Ambassador Theatre 1344; the Metropolitan, 1484. As regards the Loew situations, the Palace Theatre has 2423 seats; the Capitol, 3133; and the Columbia, 1174 seats.

"With reference to the last paragraph of your letter, I believe that the operators of the Ontario Theatre are primarily interested in setting up in their theatre the same playing arrangement with Loew's first run as now exists in the Ambassador Theatre with regard to the Warner downtown run.

"It is not necessary that action be taken at this time, as the theatre has not yet reached the completion stage. I

will, however, keep you informed of all further developments in this situation.

"Kind regards."

[fol. 255] There is a carbon copy to Mr. Howard Minsky.

(Letter, June 28, 1951, Phil Isaacs to Thomas P. Gibbons, was marked plaintiff's exhibit No. 41.)

Mr. Rome: I offer in evidence, as plaintiff's exhibit No. 42, a copy of a letter dated July 30, 1951, signed "Phil Isaacs," Branch Manager of Paramount, Washington, addressed to Mr. Howard Minsky, Philadelphia Office.

"Dear Howard:

"Kogod-Burka have again written to me, as per the attached letter, requesting first run product for the Ontario Theatre, Washington, D. C.

"I have previously written Tom Gibbons, giving the physical facts pertinent to this theatre, that is, location, appointments, etc. While it is not a problem at this particular moment, you can well see that if the point is pushed, it can result in a real whopper. Warners now take the stand since Frank Boucher has made this request of all major companies that, if we go so far as to permit bidding between the Ambassador and Ontario Theatres (sic), they will ask that the Tivoli Theatre be included in those negotiations. This could lead to one fine mess.

"I would appreciate your advice as to our course in this matter since these things have a habit of sneaking up on you and October is really not too far away. I don't know for sure exactly how far Boucher will want to go with [fol. 256] this Ontario Theatre. Of course, our first offer can be 21 days after downtown and even there we may have some difficulty.

"I would like to discuss this further with you the next time we talk.

"Kind regards."

There is a carbon copy marked to Mr. Thomas P. Gibbons.

The attached letter referred to is on the stationery of K-B Theatres, 4813 Massachusetts Ave., N.W., Washington 16, D.C., dated July 19, 1951, and is addressed to Mr.

Phil Isaacs, Branch Mgr., Paramount Distributing Corporation, Washington, D.C.

"Dear Phil:

"As you know, the Ontario Theatre will be ready the middle of October. We have previously advised you we are interested in first run product, either on a day and date basis with down town, or an exclusive first run basis.

"You have such pictures as Dear Brat, Rhubarb, Here Comes The Groom, My Son John, Detective Story and Peking Express in which we are interested for this theatre. If they have not been sold in Washington we would like very much to have the opportunity of discussing the possibility of having these pictures for the Ontario.

"There is no need for me to tell you the Ontario will be [fol. 257] Washington's finest theatre. No expense has been spared to make it one of the outstanding theatres in the entire section. We feel the house has tremendous possibilities. You should have an accurate knowledge of this, as you have been serving the Ambassador, just a short block away, with first run product.

"May we hear from you in regard to these first run pictures."

(Letter, July 30, 1951, Phil Isaacs to Mr. Howard Minsky, with attached letter of July 19, 1951, Frank M. Boucher to Phil Isaacs, were marked Plaintiff's Exhibit No. 42.)

Mr. Rome: If the Court please, I offer in evidence as Plaintiff's Exhibit No. 43 a copy of a letter on the stationery of Paramount Film Distributing Corporation, Washington, D.C., addressed to Mr. Tom Gibbons, Home Office, dated August 24, 1951.

"Dear Tom:

"I am attaching hereto a copy of a letter from Fred Kogod, owner of the Ontario Theatre, Washington, D.C., about which I have previously written you.

"You have all the physical facts relative to seating capacity and distances between theatres; further than that, this is a rather ticklish situation as you can readily under-

stand. I would appreciate any comments you care to make as soon as convenient.

[fol. 258]

"Yours very truly,
"/s/ Phil Isaacs,
"Branch Manager"

This is a copy marked as going to Mr. Howard G. Minsky. The attached letter, ladies and gentlemen, is on the stationery of K-B Theatres, Washington, D.C., dated August 20, 1951, addressed to Mr. Phil Isaacs, Branch Manager, Paramount Film Distributing Corporation, Washington, D.C.

"Dear Phil:

"Our new Ontario Theatre, located on the corner of 17th and Columbia Road, N.W., just a short distance from the Ambassador at 18th and Columbia Road, will be completed and ready to open shortly after the first of October. As we have previously advised you, this will be a deluxe house of 1400 seats, incorporating the very latest and finest in theatre design and construction. It is located in one of the most thickly populated commercial and residential areas of Washington, and is readily accessible to the residents of the entire Northwest section of the city, and to the other sections of the city as well. We are very proud of this house. We started out with the idea of making it the most attractive and comfortable theatre in the city—and we are confident that we have accomplished that objective. [fol. 259] So far as the District of Columbia theatregoers are concerned, the Ontario will be second to no other theatre in that area.

"From the very beginning it has been our plan to operate the theatre as a first run house—indeed, in view of the cost of the house it will be necessary to operate on that policy and charge first run admission prices in order to have it pay out.

"In view of the fact that the opening date is not too far off, we are anxious to make arrangements for pictures in the very near future. For many years Paramount has split its product between the Warner and Loew's downtown houses in Washington. That part of the split

which plays at the Warner has been exhibited day and date first run at the Ambassador. We are interested in obtaining from your company for day and date first run showing that part of your product which plays first run downtown. In view of the superiority of our theatre, we are confident that such a policy would be even more successful there than at the Ambassador. We are also interested in obtaining from your company for first run exhibition those pictures which will not be shown in the other downtown first run houses.

"If you are in position to discuss this matter with us in further detail, we shall be only too happy to sit down [fol. 260] with you in person in the near future. On the other hand, if this is a matter that should properly be taken up with the home office in New York, we will be very happy to go up there for a conference at some mutually convenient time in the near future.

"Very truly yours,
"/s/ Fred S. Kogod."

There is also an attachment, ladies and gentlemen, of a copy of the reply from Mr. Isaacs to Mr. Kogod, dated August 24, 1951.

"Dear Mr. Kogod:

"Thank you for your letter of August 20, 1951 wherein you outline your request with regard to a run in the Ontario Theatre, Washington, D.C.

"I have forwarded a copy of your letter to our Home Office in New York and immediately upon receipt of advice from them I will be glad to get in touch with you.

"Kind regards.

"Yours very truly,
"(Sgd) Phil Isaacs,
"Branch Manager."

(Letter, August 24, 1951, Phil Isaacs, Branch Manager to Mr. Tom Gibbons; letter, August 24, 1951, Phil Isaacs to Mr. Fred Kogod; and letter, August 20, 1951, Fred S. Kogod to Mr. Phil Isaacs, were marked Plaintiff's Exhibit No. 43.)

Mr. Rome: If the Court please, I will offer in evidence [fol. 261] next, as Plaintiff's Exhibit No. 44, a copy of a letter dated September 10, 1951, from Mr. Thomas P. Gibbons to Mr. Phil Isaacs, Branch Manager, Washington Branch of Paramount, "Re: Ontario Theatre, Washington, D.C."

"Dear Phil:

"Reference is made to your letter of August 24th which was received during my absence on vacation and also to our telephonic interview of September 5th in the above matter.

"I discussed the exhibitor's request with Mr. Phillips, stressed the importance of the matter and conveyed Mr. Minsky's feeling that a conference should be held relative to it.

"I will advise you as soon as I have anything definite to report.

"Kindest personal regards.

"Sincerely yours,

"(Sgd) Thomas P. Gibbons."

And there is a carbon copy marked going to Mr. H. G. Minsky.

(Letter, September 10, 1951, Thomas P. Gibbons to Phil Isaacs, Branch Manager, was marked Plaintiff's Exhibit No. 44.)

By Mr. Rome:

Q. Mr. Myerberg, do you know whether or not the [fol. 262] Ontario Theatre in licensing its first-run pictures from Paramount, is presently doing so on the basis of competitive bidding for those pictures?

A. Yes. It is my understanding that they are competitive bidding for the pictures.

Mr. Raftery: We concede these telegrams were sent back and forth, without proof from the witness.

Mr. Rome: If the Court please, I will offer in evidence Plaintiff's Exhibit No. 45, a copy of a telegram addressed to Ted O'Shea, Paramount Pictures Inc., Paramount Bldg., Broadway.

"Offer 10000 dollar guarantee against forty percent of gross for extended run of your production Sorrowful Jones starring Bob Hope to play our new 1700 seat Crest Theatre first run Baltimore. Immediate answer is requested.

"Theatre Enterprises Inc Harry D Myerberg, President."

This is dated May 12, 1949.

(Copy of telegram, Theatre Enterprises Inc. to Ted O'Shea, Paramount Pictures Inc., May 12, 1949, was marked Plaintiff's Exhibit No. 45.)

Mr. Rome: I offer in evidence as Plaintiff's Exhibit No. 46 an original telegram addressed to Harry D. Myerberg, Crest Theatre, May 13, 1949.

"Full consideration of your request and offer on Sorrowful Jones leads me to conclusion that we would prefer [fol. 263] exhibit our pictures first run in Baltimore in a large downtown Theatre. Regards.

"Ted O'Shea."

(Telegram, May 13, 1949, Ted O'Shea to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 46.)

Mr. Raftery: Have you any more of those Ontario letters, or have you offered all of them?

Mr. Rome: There are additional letters regarding the Ontario Theatre, in Washington, D.C., in which offers were submitted on behalf of Ontario Theatre, resulting ultimately in an acceptance by Paramount as to some of those pictures.

Mr. Raftery: I am only inquiring if you have any more Ontario matters. I thought you had finished offering them. I asked you if you have any more Ontario matters. I am just trying to keep our records straight.

Mr. Rome: Not with regard to Paramount.

Mr. Raftery: You will also stipulate on the record that all of these copies that were offered by you were furnished to you by us?

Mr. Rome: I am willing to so stipulate.

The Court: Now, gentlemen, we will take a recess for ten minutes.

(Whereupon, a short recess was taken, after which the following occurred:)

[fol. 264] The Court: We will now proceed, members of the jury, and counsel, until a quarter of one and then we will take a recess for lunch for three-quarters of an hour and sit this afternoon until 3:00 o'clock.

Mr. Rome: If the Court please, I offer in evidence as plaintiff's exhibit No. 47 a copy of a letter on the stationery of Paramount Pictures, Inc., 306 H Street, Northwest, Washington, D. C., dated November 14, 1949, re: Crest Theatre, Reisterstown Road, Baltimore, Maryland, addressed to Mr. Thomas P. Gibbons, legal department, home office.

"Dear Mr. Gibbons:

"This will acknowledge receipt of your letter of November 7, 1949, in which you enclosed a copy of a letter, dated November 1, 1949, addressed to Paramount Pictures, Inc., Times Square, New York City, from Gray, Anderson, Schaffer & Rome, Philadelphia, Pa., signed Edward P. Rome.

"In the above letter, Mr. Rome advises that he has been retained by Theatre Enterprises, Inc., who operates the Crest Theatre, Reisterstown Rd. and Rogers Ave., Baltimore, and that he is fully acquainted with the efforts that have been made during the past year to obtain first-run Baltimore pictures for the Crest Theatre. Mr. Rome is again renewing that request and calls our attention to the fact that without experimenting with the exhibition of Paramount Pictures first-run in the Crest, it is not possible to deter-[fol. 265] mine that such a policy would be unprofitable for Paramount.

"In my letter to you of February 15, 1949, I gave a detailed report on the Crest Theatre and the theatres surrounding it, and advised you in a letter, dated May 27, 1949, that the Crest Theatre is situated 6-1/10th miles from the nearest downtown theatre in the City of Baltimore playing first-run product.

"Mr. Myerberg, the owner and operator of the Crest Theatre, made several offers with substantial guarantees for first-run product. We elected not to accept these offers.

"The Crest Theatre is now playing Paramount product on a 21-day availability and paying the same terms and playing on the same days as comparable houses in the City of Baltimore, and our relationship with this account is excellent.

"On May 12, 1949, Mr. Myerberg wired Mr. O'Shea, offering the following terms on Sorrowful Jones:

"'$10,000 guarantee against 40% of the gross for an extended run in the Crest Theatre, first-run Baltimore.

"'This picture played at Keith's Theatre, Baltimore, 6/28-7/19/49, inclusive, 22 days, to the following terms:

| | |
|---|---|
| "'First week | 40% |
| "'Second week | 35/50/9,000 |
| "'Third week and one day— | 25% |
| "'Total film rental— | 10,052.' |

"In a letter dated August 12, 1949, Mr. James J. Lind- [fol. 266] say, on behalf of the Theatre Enterprises, Inc., offered $12,500 guarantee against 40% of the gross on Top O' The Morning to play the Crest Theatre, Baltimore, first-run City of Baltimore.

"This picture was licensed to the Stanley Theatre, Baltimore, and played 9/16-29/49, inclusive. The contract terms were as follows:

"'First week 37½% of the gross $9,684—rental $3,632

"'Second week 37½% of the gross $4,713—rental $1,178*

| | |
|---|---|
| $4,810 | $14,397 |

"*Sold 37½% of the gross—will probably be adjusted to 25% because of low gross.

"(The above therefore figured at 25%.)'

"From the above, it is apparent that the offer from Mr. Myerberg is far greater than the rental earned on Top O' The Morning at the Stanley Theatre.

"However, the offer of $10,000 on Sorrowful Jones is approximately the same amount of money as we secured for the film rental of the exhibition of this picture in Keith's Theatre in Baltimore.

"In making a decision to change the first-run on Paramount product from a first-run downtown theatre located in the heart of the shopping center in a big metropolis to a [fol. 267] suburban theatre depending almost entirely on automobile trade, it is necessary that we take into consideration the effect this change would have on the other suburban theatres and also whether or not the suburban theatre playing first-run could profitably carry the enormous guarantee they would post in order to obtain a first-run.

"In view of our experience and in the exercise of our sound business judgment, we feel that the interest of Paramount would be best served by the continued exhibition of our product first-run (Baltimore) in a large theatre situated in the downtown business and shopping area of the City rather than in a theatre located in a suburban area as in the case of the Crest, and I firmly believe that an experiment of playing first-run in the Crest Theatre would prove our judgment to be correct.

"The only condition under which I recommend playing the first-run in the City of Baltimore in the Crest Theatre would be solely for the purpose of avoiding litigation, as my business experience and judgment convince me that the exhibitor and the distributor would lose financially as a result of the change.

"Very truly yours,
"(Sgd) A. C. Benson, Branch Manager."

With carbon copies to A. W. Schwalberg, E. K. O'Shea, and H. A. Goldstein.

[fol. 268] The Clerk: Plaintiff's exhibit No. 47.

(Letter November 14, 1949 Benson to Gibbons, was marked Plaintiff's Exhibit No. 47.)

By Mr. Rome:

Q. Mr. Myerberg, with regard to the bids you submitted on the Top O' The Morning and Sorrowful Jones, would you have been willing to play those pictures in your theatre day and date with a theatre playing them downtown and pay the same rental terms you offered in the bids that you made?

A. Yes, I would have.

Mr. Rome: Mr. Raftery, for purposes of shortening this, will you stipulate with me that the Crest Theatre also submitted bids of $10,500 guarantee against 40% of the gross for an extended first-run of The Heiress at the Crest, and the bid of 35,000 dollars guarantee against 50% of the gross for an extended first-run of Samson and Delilah first-run——

Mr. Raftery: Yes, I would like to see all of those put in, and if I want to cross-examine on them later, which I do, we will have them in.

Mr. Rome: If the Court please, I offer as plaintiff's exhibit No. 48 a copy of a letter dated December 3, 1949, on the stationery of Gray, Anderson, Schaffer & Rome, Philadelphia, Pa., addressed to Mr. Thomas P. Gibbons, Esq., re Crest Theatre, Baltimore, Maryland.

[fol. 269] "Dear Mr. Gibbons:

"May I recall to your attention my letter of November 1, 1949 regarding the Crest Theatre, in Baltimore, Maryland? On November 7th you informed me that after consultation with your Washington branch we would hear further from you but as yet we have not.

"We trust that during this time the proposal that the Crest Theatre be given access to first-run pictures has been receiving favorable consideration. It is our information that in other cities of the country, such as Washington, Roanoke, Kansas City, Denver and Los Angeles, theatres located outside of the downtown business sections are exhibiting pictures on first-run. This is, we believe, an inevitable consequence of the spreading growth of the cities, the distance from suburban areas to downtown, the complicated and expensive parking problems downtown, and the fact that suburban areas are frequently themselves cites

within metropolitan boundaries. Baltimore is an excellent example of this very development.

"In this connection it is our understanding that Paramount has presently available for release two pictures, The Heiress and Samson and Delilah. Both of these pictures are obviously class "attractions" which would be ideally suited for first-run showing at the Crest Theatre, located as it is in a growing shopping area in the very center of 90% [fol. 270] of the better residential area of Baltimore City and County, running from Catonsville on the west to Towson on the east. It is reasonable to expect that the great number of persons who will go to see these pictures will come predominantly from this area. It is the fact that these residents are situated geographically closer to the Crest than they are to downtown Baltimore. It is also the fact that the ample free parking facilities adjacent to the Crest represent an additional attraction.

"Our client is very desirous for the opportunity to exhibit The Heiress and Samson and Delilah. We are, therefore, authorized to communicate to you the following bid:

> "Ten thousand five hundred dollars ($10,500.) guarantee against 40% of the gross for an extended first-run of The Heiress at the Crest Theatre.
>
> "Thirty-five thousand dollars ($35,000.) guarantee against 50% of the gross for an extended first-run of Samson and Delilah at the Crest Theatre.
>
> "Our client will also agree to set a minimum gross figure that would control the completion of the engagement of these pictures.

"We are confident that these bids as well as the actual playoff of the pictures will amply demonstrate the eminent feasibility of exhibiting your pictures first-run [fol. 271] at the Crest.

"May we hear from you at your earliest convenience?

"Yours very truly,
"(Sgd) Edwin P. Rome,
"For Gray, Anderson, Schaffer & Rome."

The Clerk: Plaintiff's exhibit No. 48.

(Letter December 3, 1949 (carbon copy) Rome to Gibbons, was marked Plaintiff's Exhibit No. 48.)

Mr. Rome: If the Court please, I should like to read to the jury the answer of Paramount Pictures to interrogatory numbers 11, 12 and 13, which give the play-off of the particular pictures that have been discussed here in the City of Baltimore, and shows the film rental actually received by Paramount.

Samson and Delilah, a special pre-releasing engagement at the Stanley Theatre and played again in the Stanley Theatre on a first-run regular release. The Heiress and Top O' The Morning also played at the Stanley. Sorrowful Jones played at the Keith's. Paramount received a film rental from the special pre-release engagement of Samson and Delilah of $22,990 and received a further film rental from the first-run general release of Samson and Delilah of $4,105. From The Heiress Paramount received a film rental of $4,074 and from Top O' The Morning received a film rental of $4,32[illegible] with a $242 credit by reason of a reduction in terms of the first week's engagement from 37½% to 35% [fol. 272] again to the exhibitor.

Paramount received from the exhibition first-run Baltimore of Sorrowful Jones, $10,053. Paramount also received as a total amount of film rental received from subsequent run less fees in Baltimore of these pictures as follows:

| | |
|---|---|
| The Heiress | $9,097 |
| Top O' The Morning | 9,961 |
| Sorrowful Jones | 16,890, the figure as to Samson and Delilah not being available at the time of the answer to the interrogatories. |

By Mr. Rome:

Q. Mr. Myerberg, you stated that your theatre opened February 26, 1949; is that correct?

A. Yes, sir.

Q. Did anything happen in connection with the pre-opening of the Crest Theatre?

A. Well, we had two events: The first was a dinner that we served in the television lounge of the theatre in which we invited all of the distributors from Washington and the

general sales managers from New York and the district managers and Eastern division managers, and some newspapermen, and as I recall the then president of the different theatre organizations in the city, to show them the theatre in a completed state.

Q. Excuse me, Mr. Myerberg. Do you recall when that occasion was?

[fol. 273] A. It was either two or three days prior to the opening of the theatre.

Q. What happened on that occasion?

A. Well, the little dinner was given purposely to make more acquainted especially those people from New York if they would come in, and, incidentally, no one came in from New York, and the only ones there were the Washington branch managers and some division managers whose offices were in Washington, and salesmen.

And I at that time, again, after they had seen the theatre, and during the evening, would get one or two together and ask them, after seeing the theatre, after seeing the situation, ask them personally whether they could not in some way help me get the runs the theatre should require, that is, first-run, day and date with downtown Baltimore, on an exclusive basis they had authority to sell.

Q. Who was there according to your recollection, from the various companies?

A. I don't know that I can remember them all, but I will try to remember them company for company.

[fol. 274] From Loew's Incorporated, there was Mr. Adams, the Washington branch manager, and Mr. Prince, the Washington salesman for the Baltimore area.

From Paramount, there was Mr. Benson, the branch manager, and Mr. Thompson, the sales manager or salesman for the Baltimore area. From Twentieth Century-Fox, there was Mr. Contee, who was then the sales manager of Twentieth Century-Fox, Washington Branch Office, and Mr.—I don't recall his name at this moment, was the salesman of the Washington branch office. From Columbia, I think there was Mr. Wingfield, the salesman in this area for Columbia Pictures. From United Artists, it was Mr. Silvers, who was the Eastern or Division Manager for this

area, and Mr. Price, the Branch Manager of Washington, and their salesman—it was either Mr. Young or Mr. Rose.

Q. Was anyone there from RKO?

A. It was Mr. Kahn, who was then the salesman of RKO in this territory; and from Warner Bros., there was Mr. Schmeltzer and Mr. Biersdorf. Mr. Smeltzer was Division Manager, and Mr. Biersdorf was Branch Manager in Washington, and Mr. DeFaizio, who was then the Baltimore salesman.

Q. Was there anyone there from Universal?

A. I don't recall who was there from Universal.

Q. What, if anything, happened on that occasion, Mr. Myerberg?

[fol. 275] A. I remember one time that Mr. Smeltzer and Mr. Adams and Mr. Bierdorf and myself were sitting at Mr. Smeltzer's table, and I again renewed my request, and the conversation, although I don't remember the exact conversation, it was to the effect that, "You know we can't do that. You are not going to get that from any company. You might as well take these pictures on a 21-day basis and make the best of it." And I had a similar conversation with Mr. Price and Mr. Benson, and possibly Mr. Thompson, there at the same time. I asked them the same question, and I got practically the same answer, that nobody was going to do this; that it was an impossible thing to do, and the New York office would not go along with it. "We don't make the decisions; they make them. We submit it to them and these are the answers, and we can't do anything about it."

Q. Is there anything that occurred, anything else that occurred on that occasion?

A. Well, everyone there, I think, without exception, was pleasantly surprised to see the way the theatre had finished, and the beauty of the theatre, its appointments, its equipment, which they had leisure time to inspect, because there was no performance that evening.

Q. With what picture did the theatre actually open?

A. Warner Bros. picture, Don Juan.

[fol. 276] Q. And that you played on a first-subsequent-run availability in the city of Baltimore?

A. Yes.

Q. Had there been anything that occurred with regard to a first showing in your theatre?

A. Well, as I recall, going back to the dinner we had in the television lounge, I had asked Mr. Smeltzer and Mr. Biersdorf, I told them we were opening the theatre in a couple days, and the night before we were opening it, we were having a preopening for the exhibitors and theatre people in the city, which is the usual custom in Baltimore when a new theatre opens. They usually have a preopening with the theatre people reviewing it, and they invite the owners and managers of different theatres in the city; and I asked Mr. Smeltzer at that time if it would not be possible to get a first-run picture, we were not going to charge any admission price—to exhibit in the theatre for that night only; and Mr. Biersdorf spoke up and said they had a musicale coming into the Stanley in a few weeks, and they would be delighted to give it to us; and I thanked him very much for the courtesy.

About two o'clock—in fact, he told me he was sending a print over with Mr. DeFaizio, the then Baltimore salesman, and at two o'clock of the night we were to have the performance, I called Mr. Biersdorf in Washington and [fol. 277] asked him whether the picture was on its way, I was becoming a little worried. He said he either couldn't get the release from New York to show it, but he was still hoping to have it. I said, "This is a good situation. I have these people coming in to see the show." And the phone calls went back and forth until seven o'clock, when Mr. Biersdorf finally arrived at the theatre with a half-dozen cans of short subjects, and no feature. I asked Mr. Biersdorf what happened. I was quite disturbed at the time. And he said the New York office would not give him a release to show it to the exhibitors in my theatre at all. He just couldn't bring it along; and we had to have some kind of picture to show, and he brought these short subjects over.

However, the picture we actually played that night to the exhibitors, the most of whom, some of whom had seen it, was Don Juan, the picture that we were going to open the theatre with the next day.

Mr. Rome: Mr. Raftery, may I call upon you for a copy of a letter from Mr. Glenn Norris to Mr. Moon, dated March 1, 1949?

Mr. Raftery: Here it is.

Mr. Rome: If the Court please, I offer in evidence as Plaintiff's Exhibit 49 a copy on the stationery of Twentieth Century-Fox Film Corporation, Inter-Office Correspondence Only, dated March 1, 1949, to Mr. R. E. Moon, Home Office, [fol. 278] re. "Recommendation—Crest Theatre, Baltimore, Maryland.

"Dear Ray:

"The Crest is a new theatre in the southwest neighborhood area of Baltimore located approximately at the point of a triangle between the Uptown and Ambassador Theatres.

"As you know it was our opinion at the outset that the Crest Theatre would be in direct competition to the Uptown Theatre and we proposed to offer our product competitively between the Uptown and the Crest Theatres, however, upon receipt of advice from the Uptown Theatre to the effect that they would not negotiate competitively with the Crest Theatre because they did not consider it to be subsantial competition, we offered our product on the first sub-run Baltimore availability to the Crest Theatre.

"The Crest Theatre opened last week to a very satisfactory business."

(Letter, March 1, 1949, C. G. Norris to Mr. R. E. Moon, was marked Plaintiff's Exhibit No. 49.)

By Mr. Rome:

Q. Mr. Myerberg, in this note, Mr. Norris refers to the fact that the Crest Theatre is a new theatre in the southwest neighborhood area of Baltimore.

Mr. Raftery: We will concede he was a little off in his direction, and I think he meant northwest. Is that what you have in mind?

[fol. 279] Mr. Rome: Yes.

Mr. Raftery: He is not a good geographer.

Mr. Rome: If the Court please, I offer in evidence, as Plaintiff's Exhibit 50, copy of a letter dated November 2nd,

1949, addressed to Twentieth Century Fox Film Corporation, New York, from me:

"Gentlemen:

"We have been retained by Theatre Enterprises, Inc. of Baltimore, Maryland, which operates the Crest Theatre at Reisterstown Road and Rogers Avenue, Baltimore. As a result of our study we have become fully acquainted with the efforts that have been made during the past year to obtain access for that theatre to your first run pictures, and also with the failure of those efforts.

"The idea of first run pictures at the Crest is in full accord with statements that have been made on behalf of your company and justifies the interest that has been expressed earlier by some of your representatives. It is our thought, therefore, that the situation deserves further attention.

"It occurs to us that, without at least experimenting with the exhibition of your pictures in the Crest on first run, it is not possible to say fairly and with justification that such a policy would be unprofitable for you. On the contrary, it would seem that the extraordinary growth of the area [fol. 280] near the theatre, with its increasing population and expanding business enterprises, coupled with the unique facilities offered by the Crest itself actually present an incomparable outlet for your product and hence a source of revenue far superior to any presently available to you in Baltimore. We are confident that experience would soon prove this to be true.

"We are aware that first run theatres are more usually in the so-called downtown shopping districts but we suggest that there is nothing inherent in the industry or in the law that precludes a theatre not so located from access to first run product so long as other determining factors are duplicated. Thus, when a theatre is of adequate size, unquestionably suitably equipped and properly managed, in a thriving community from which it can draw on a large population, when it can charge the same admission price and pay comparable and potentially even greater film rentals, it is our belief that such a theatre is entitled to access to first run pictures. Certainly it is reasonable to request an opportunity to demonstrate whether or not this

contention will be borne out by experience. In this fashion what has become a longstanding and troublesome difference of view could be readily resolved to the satisfaction of all.

"We urge you most earnestly to consider this suggestion [fol. 281] in a favorable light. To experiment in this way cannot possibly react to your detriment since our client stands ready to bid competitively for your product and, indeed, to offer any reasonable guarantee you deem appropriate. On the other hand, if we are correct your company will have another outlet in the City of Baltimore and one which is generally conceded to be the finest and most modern theatre in the State.

"Your reply at an early date will be appreciated."

(Copy of letter, November 2, 1949, Mr. Rome to Twentieth Century-Fox Film Corporation, was marked Plaintiff's Exhibit No. 50.)

Mr. Rome: If the Court please, I offer in evidence as Plaintiff's Exhibit 51 a letter on the stationery of Twentieth Century-Fox Film Corporation, Office of A. W. Smith, Jr., Vice-President in Charge of Distribution, dated November 4, 1949, addressed to me.

"Dear Mr. Rome:

"This will acknowledge receipt of your letter of November 2 in which you request a first-run showing of our feature pictures in your client's Crest Theatre, Baltimore.

"We have given and are giving considerable thought to the selection of first-run outlets for our pictures in cities like Baltimore and it is our present thinking that permitting our better pictures to play first-run in a suburban [fol. 282] theatre in Baltimore is detrimental to the best interests of our company. We believe in serving as first run in a city like Baltimore a theatre which is in the central zone of a downtown area of the city, in the shopping zone where the stores are located, which is the center of trade and, in our experience, the center of amusement. We find that those people who come into the downtown area of a city come because they have business interests there, to shop, to look around, to go to restaurants and to seek entertainment.

"While your suggestion for experimenting with such a run on one or two pictures may present a certain appearance of reasonableness, an unsuccessful experiment of that type might prove extremely damaging to us. The first-run of an important picture in Baltimore not only may affect the public reaction to the picture in that entire area but the results are often carefully scrutinized by exhibitors in other areas. Each of our pictures represents a substantial investment in a rather fragile product so that an unsuccessful experiment of the type you suggest might well do our company substantial irreparable damage.

"I trust that further consideration of our problems will convince you that we cannot agree that the method of distribution which we have found to be successful for many [fol. 283] years can be suddenly departed from in this city.

'Kindest regards.

"Sincerely,
"(Sgd) A. W. Smith, Jr."

(Letter, November 4, 1949, A. W. Smith, Jr., to Edwin P. Rome, was marked Plaintiff's Exhibit No. 51.)

Mr. Rome: Sir, I offer in evidence as Plaintiff's Exhibit 52 a copy of a letter dated November 9, 1949, from me to Mr. A. W. Smith, Jr., Twentieth Century-Fox Film Corporation:

"Dear Mr. Smith:

"Thank you very much for your letter of November 4th which we have read with great interest.

"While our opinions differ we can understand your view concerning the advisability of serving a downtown theatre with your first run pictures rather than a suburban theatre. There is, however, another approach to this problem which we think is equally valid and, indeed, a necessary result of the logic of your own thought. Even if we assume your view to be correct that the downtown theatre is a more profitable outlet for your company than the suburban theatre in the event one plays a picture first run to the exclusion of the other, we believe that it must necessarily

follow that a day and date policy of the two theatres together can mean only a still greater revenue for the dis- [fol. 284] tributor.

"We have always been impressed by your testimony in the Bordonaro case that, generally speaking, you would rather have two outlets than one. Although the circumstances in Baltimore differ from those in Olean, we firmly believe that the fundamental wisdom of your statement is equally applicable and indisputable. Simply as a matter of business policy it cannot be questioned that your company, or any other distributor, stands to receive a much greater film rental from two first-run houses than from one. This is particularly true when, as in Baltimore, the two theatres are sufficiently far apart not to encroach on each other's patronage.

"This must be the thought behind some of the recent distribution policies of your company in the Philadelphia area. It must be the explanation for the fact that in Washington, Roanoke, Kansas City and other cities, according to our information, theatres located in a so-called suburban area are playing day and date with downtown first run houses. We note too that this issue has arisen in certain pending litigation.

"The spreading growth of cities, the distance from suburban areas to downtown, the complicated and expensive parking problems downtown, the fact that suburban areas are frequently themselves cities within metropolitan [fol. 285] boundaries with their own business and shopping and entertainment centers, all emphasize and substantiate the basic soundness of a day and date policy.

"We can appreciate your disinclination to experiment on an exclusive first run basis because of the possibility of risk outlined in your letter. We suggest, however, that the risk would not be present if you were to experiment with a day and date policy at the Crest.

"We feel that your letter has expressed a genuine interest in the problem involved and we are sure that you will give this new proposal full consideration. We repeat that our client stands ready to negotiate competitively and to offer any reasonable guarantee you deem appropriate."

(Copy of letter, November 9, 1949, Edwin P. Rome to Mr. A. W. Smith, Jr., was marked Plaintiff's Exhibit No. 52.)

Mr. Rome: Sir, I offer in evidence as Plaintiff's Exhibit 53 a letter on the stationery of Twentieth Century-Fox Film Corporation, dated November 14, 1949, Office of A. W. Smith, Jr., Vice-President in Charge of Distribution, addressed to me.

"Dear Mr. Rome:

"This will acknowledge receipt of your letter of November 9 regarding your client's Crest Theatre, Baltimore, Maryland.

[fol. 286] "We have studied the Baltimore area carefully and have come to the conclusion that it is not a practical distribution policy for us to serve the Crest Theatre day and date with our first run showing of a picture in Baltimore and to the exclusion of other equally fine theatres in the city which might also request such a day and date run. I have read carefully your paragraph regarding the spreading growth of cities and feel that your reasoning along these lines may point to something that will develop in the future. However, to answer your question, our study of Baltimore does not indicate the present need for the move on our part that you request.

"While problems like this are usually governed by the circumstances of their particular locality, since people show a tendency, as you did, to say we ought to do in one place what we have done elsewhere this gets us into the practical problem of prints. Our analysis of print costs and returns indicates that we cannot economically buy more than our present number of prints, and we could not go into the kind of operation you suggest generally without the employment of many additional prints.

"Your information regarding situations where suburban theatres play day and date with first runs is incorrect insofar as Washington is concerned. In Roanoke we have from time to time served more than one theatre first run day [fol. 287] and date, but we have considered that a special procedure necessary to protect our first run revenue in that

situation. In Kansas City the theatres are operated by our own subsidiaries, and we have felt that we had greater room for experiment when we were showing our own pictures in our own theatres.

"Answering that paragraph in your letter where you refer to my testimony in the Bordonaro case, it is my recollection that when I said I would rather have two outlets than one, I referred to having two opportunities for a first run in Olean and not to the desirability of serving two theatres day and date.

"With kindest regards,

"Sincerely,
"(Sgd) Andy.
"A. W. Smith, Jr."

(Letter, November 14, 1949, A. W. Smith, Jr., to Mr. Edwin P. Rome, was marked Plaintiff's Exhibit No. 53.)

Mr. Rome: Sir, I offer in evidence as Plaintiff's Exhibit 54 a copy of a letter dated December 13, 1949, addressed to Mr. A. W. Smith, Jr., Twentieth Century-Fox Film Corporation.

"Dear Mr. Smith:

"Please forgive our delay in replying further to your letter of November 14th concerning the Crest Theatre, in Baltimore, but we have been giving the entire situation [fol. 288] further detailed study.

"Your letter would seem to indicate some misunderstanding of our proposal since we are not requesting a day and date run at the Crest 'to the exclusion of other equally fine theatres in the city which might also request such a day and date run'. We do not know that any other theatre has made such a request but, of course, our client would be glad to meet that competition if and when it arises. From the point of view of the distributor, however, such a situation would provide only a still greater revenue and would be in accord with Fox's recent policies as we understand them.

"You mention that our request raises the practical problem of prints. In this connection, we have been much interested in the reports published in the trade papers

concerning your recent speech in New Orleans annouucing that Fox is intending to increase the number of prints available. It was our belief, however, that the matter of prints became a problem only on subsequent runs not on first run since even if our request were to be granted it would mean only a second print for Baltimore. Moreover, are we not correct in believing that the number of prints is not a real problem in Baltimore which plays pictures very early and hence at a time when there are sufficient prints available? And, if we are correct on the profitable [fol. 289] nature of the day and date policy would that not amply compensate any possible increased cost involved for a print?

"You say our information about Washington having a suburban theatre which plays first run pictures is incorrect but that is the information submitted by affidavit in the Meiselman case. Passing that, however, there remain the other cities in the country such as Los Angeles and Denver and Kansas City where, according to our information, our proposal has actually been in operation for some time. It has, undoubtedly, been successful in those cities since otherwise the policy would not be pursued. That being so, there must then be some other reason for refusing to adopt it in Baltimore which is, perhaps, even more suitable for it.

"The ultimate test for the suitability of a theatre is, from the distribution point of view, the ability to produce and pay film rental. The confidence of our client in the grossing potentialities of the Crest is evidenced by the willingness and capacity to pay the most substantial rentals, accompanied by guarantees in the form of certified checks if need be, in order to license your product. Since this is the case how then does Fox run a risk by adopting the day and date policy? In all good faith, we do not see anything in your letters which answers this thought.

"Further in this connection we think that to refuse the [fol. 290] Crest the opportunity to play day and date with the downtown first run theatres and to insist upon a clearance in favor of those theatres is to act counter to the ruling of the United States Supreme Court which enjoins the granting of any clearance between theatres not in sub-

stantial competition. It is our view that the distance between the Crest and the downtown first run houses is such as to preclude their being in substantial competition and to permit their playing day and date.

"Permit us to repeat that the film rentals our client is prepared to pay, with guaranteed minimums, are such as to invite further consideration of our proposal."

(Copy of letter, December 13, 1949, Edwin P. Rome to A. W. Smith, Jr., was marked Plaintiff's Exhibit No. 54.)

By Mr. Rome:

Q. Mr. Myerberg, in the letter read from Mr. Smith, he refers to the fact that a plan of playing pictures first run in the Crest, which you had been seeking to have adopted, would have excluded the playing of similar pictures first run in other equally fine theatres in the area. Was that ever your intention?

A. No, sir.

Q. Did you ever express such a thought in any way to any person representing any one of the distributor companies?

A. No, sir.

Q. What was the thought that you did express to the [fol. 291] companies with regard to the licensing of first-run pictures in the Crest Theatre?

A. That there was a certain competitive area that we considered the Crest to be in. Outside of that area, they could license as many houses as they desired, on first-run. Inside the area, if they felt, if the exhibitors felt they wanted an opportunity to license that picture, they had an equal opportunity that we had, and we would have to enter into competitive negotiations for a picture, and were willing to take our chances on that basis.

Q. Did you discuss with any representative of the distributors what various theatres might enter into such a policy in the city of Baltimore?

A. There was only one detailed discussion about it, and that was with Mr. Contee.

Q. Of what company?

A. Twentieth Century-Fox. He told me he was making an analysis of the first-run situation in the city, and gen-

erally investigating multiple first-runs in the city of Baltimore; that is, pictures playing a downtown area at the same time as other theatres in the outlying sections, and that he had picked out several theatres, of which the Crest was one, to do this thing, and he was thoroughly convinced to a mathematical certainty, as he claimed, that Fox Films could get more money for their product in the city of Balti- [fol. 292] more out of four or five day and date runs of their pictures in the city than they were then enjoying with first-run and subsequent-runs, and that they would still have the subsequent-run business to run throughout the city; and that was the way he intended to present it to his people.

And, pursuant to that, Mr. Minsky, who was then division manager of Twentieth Century-Fox, visited my theatre to go into the matter, and they mentioned several theatres, such as the Edmondson Village, which I think just opened or had been opened a couple months, and the new Northway Theatre, which was being built.

Q. Northway Theatre?

A. The Northwood Theatre. And he mentioned a theatre in Dundalk as a possibility, and a theatre in the Brooklyn area, and the Victory Theatre in Brooklyn as being a possibility. Not Mr. Minsky—Mr. Minsky, in fact, as I recall, at that time had even tentatively selected a picture, the picture I don't recall. That was the only time I think of, where they went into the distributors, the possibility of other theatres playing it in other areas, and on what basis or at what theatres they would play it.

Q. When you say, Mr. Myerberg, that the city would be divided into areas, would you explain that, so the Court and jury may understand just what the thought was that was discussed with Mr. Contee at that time?

[fol. 293] A. Well, the area surrounding Edmondson Village would come east to approximately Gwynns Falls Parkway, and north, west and south, covering Catonsville, and the Edmondson Village area, all over to Frederick Road, and from Gwynns Falls Parkway, taking a line there from Park Circle to Gwynns Falls Parkway, and from Gwynns Falls Parkway north, from Park Circle to the east, toward

Roland Avenue, and to line that north, winding up somewhere around *somewhere* Reisterstown, inasmuch as there were not any first-class theatres, except one small theatre in Reisterstown.

[fol. 294] Q. Was it intended that only theatres in any one of those particular areas would have access to pictures on first-run?

A. Well, it was Mr. Contee who thought that only one theatre would have access to pictures in those areas besides the downtown area. Of course, the downtown area would also play the picture day and date with two or three theatres in different particular areas.

Q. What if it occurred that more than one of the theatres in one of these areas wanted first run?

A. There would have to be negotiations in that area.

Q. Nothing, however, came of the suggestion that had been made to Mr. Contee?

A. No, I had discussed with Mr. Contee several times in Washington and several times in Baltimore, but after I had continuously asked him what happened to the policy he said that finally New York vetoed it and I can't do anything with it, and that ended it there.

Q. Was there any reason given by Mr. Contee why that suggestion was rejected?

A. Mr. Contee said he could not understand why it was rejected, that New York made the decisions, and that was the only thing he had to go by.

Mr. Rome: If the Court please, I offer in evidence as Plaintiff's exhibit No. 55 a copy of a letter dated April [fol. 295] 6, 1951 from Mr. A. W. Smith, Jr., of Fox, addressed to Mr. Al Lichtman, Cincinnati.

"Dear Al:

"We have been having great difficulty in getting our pictures dated first-run City of Cincinnati and greater difficulty making deals with the subsequent run theatres.

"Maurie White is our customer in Cincinnati and he is a motivating influence in an exhibitor group which, apparently, has banded together to keep down film rentals.

"After much discussion, we have taken the following action:

"We have sold a number of pictures to play first-run City of Cincinnati day and date at the following theatres:

"The Twin Drive-In
"The Valley Theatre
"The Theatre in Covedale
"The Theatre in Covington, Kentucky
"The Mariemount Theatre
"The Cox Theatre

"These six theatres, or at least five of them, will play the pictures first-run and with a 21-day clearance over subsequent runs. The owners of these theatres are the leading members of Maurie White's buying and booking group and we have assurance that with the action we have taken we will secure satisfactory subsequent run business. [fol. 296] "The following pictures have been dated:

"April 25th—Follow The Sun.
"May 2nd—I Can Get It For You Wholesale.
"May 9th—Monte Cristo and Nick Cain (Equal billing).
"May 16th—Fourteen Hours.
"May 23rd—You're In The Navy Now.
"May 30th—On The Riviera.
"June 6th—Rawhide.
"June 13th—Half Angel.
"June 20th—Telegraph Hill.
"June 27th—The Guy Who Came Back.

"So as not to eliminate Maurie White entirely and so that he may have a chance to go along with us, our arrangement permits of his playing one of his first-run downtown theatres day and date with those other theatres. He probably will not do so, but he is being given the opportunity.

"Maurie White will probably contact Bill Gehring and perhaps you and Mr. Skouras. Therefore, I am giving you this information so you will know our story.

"(Sgd) A. W. Smith, Jr."

With a carbon copy to Mr. W. C. Gehring.
The Clerk: Plaintiff's exhibit No. 55.

[fol. 297] (Copy of letter April 6, 1951 Smith to Lichtman, was marked Plaintiff's Exhibit No. 55.)

Mr. Rome: Mr. Raftery, may I call upon you for letters from Mr. R. E. Moon to Mr. A. W. Smith, Jr., dated April 6, 1951, regarding Cincinnati?

If the Court please, I offer in evidence as plaintiff's exhibit No. 56 copy of a letter on the stationery of Twentieth Century-Fox Film Corporation, office of R. E. Moon, Central Sales Manager, Chicago, Cincinnati, Cleveland, Detroit, Indianapolis, dated April 6, 1951 to Mr. A. W. Smith, Jr., New York, New York.

"Dear Andy:

"We have arranged to sell our pictures first-run Cincinnati on a non-exclusive basis to the following theatres: Twin Drive-In, Valley, Covedale, Covington. We hope to also include one run in the Oakley or Mariemount section of Cincinnati, one at Keebles Corners, the location of the RKO Paramount Theatre and a run downtown.

"We have sold fourteen pictures to the above four theatres, each to play a 7-day run in each theatre, one a week beginning April 25th. Schedule of the bookings and playdates is attached. We have granted a clearance of 21 days.

"The combined advertising budget of the four theatres listed is $650 per week and we have agreed to split [fol. 298] 50/50 over this budget. Terms are 7 days, 35% to a 66-2/3% split. I understand that the above theatres propose to charge an adult admission price of 70 cents and that the admission at the Twin Drive-In Theatre will be 75 cents.

"I will arrange to have an exploitation man, probably Lee Siegel, cover each engagement, and it would certainly be wonderful if we can secure the services of Eddie Solomon right away to line things up and get it rolling.

"Joe Rosen did a great job in lining up these theatres on a first-run basis and it is his considered opinion that we should receive from $7500 to $9,000 film rental on each

picture played in these four theatres. Of course, if other theatres are added, then this figure will increase.

"Under this arrangements, we are assured of representative terms and will, of course, have a steady flow of releases. We do not anticipate any difficulty marketing our pictures to the balance of the subsequent run possibilities in Cincinnati, with the possible exception of the White Circuit Theatres.

"The sale to the above theatres will include Shorts, News, and March of Time, on a first-run basis.

"Kindest regards.

"Very truly yours,
"(Sgd) Ray
"R. E. Moon."

With a copy to Mr. J. Rosen. There is attached, members [fols. 299-300] of the jury, a list of pictures and their dates.

The Clerk: Plaintiff's exhibit 56.

(Copy of letter, April 6, 1951, Moon to Smith, was marked Plaintiff's Exhibit No. 56.)

The Court: We will take a recess, counsel and members of the jury, until 1:45 p.m.

(Thereupon, at 12:50 o'clock p. m., a recess was taken until 1:45 o'clock p. m.)

[fol. 301] AFTERNOON SESSION

(Met, pursuant to the taking of the recess, at 1:45 o'clock p. m.)

The Court: We are ready to proceed, gentlemen.

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HARRY D. MYERBERG resumed the witness-stand and, having been previously sworn, testified further on behalf of the plaintiff, as follows:

Direct examination (Resumed).

Mr. Rome: If the Court please, I want to offer in evidence, as plaintiff's exhibit No. 57, a copy of an Inter-

Office correspondence or note on the stationery of Twentieth Century-Fox Film Corporation, dated April 13, 1951, to Mr. H. B. Johnson, from W. C. Gehring, reading as follows:

"Note the attached which Andy Smith wrote to Al Lichtman telling him of the decision we have made regarding the distribution of our pictures 1st run Cincinnati.

"Mr. Lichtman has asked me to have you give thought to the subject outlined in Mr. Smith's letter and advise me please if you find a legal problem involved.

"Will you please return the attachment."

Mr. Rome: I think we can stipulate that the attachment indicated was a copy of the letter which has already been offered and read in evidence.

(Letter, April 13, 1951, W. C. Gehring to H. B. Johnson, was marked plaintiff's exhibit No. 57.)

Mr. Raftery: And Johnson is their lawyer.

Mr. Rome: Johnson is a member of the legal staff of Twentieth Century-Fox.

I offer in evidence, as plaintiff's exhibit No. 58, a copy of a memo, dated April 16, 1951, signed "H. B. J.", [fol. 302] presumably Mr. Johnson, to Mr. W. C. Gehring, "Re: Cincinnati.

"As requested, I have examined Mr. Smith's memo to Mr. Lichtman of April 6th, 1951. Speaking generally, I see no legal objection to the playing policy outlined therein. In fact, a departure from established playing arrangements made individually by a single distributor usually appears excellent evidence of absence of conspiracy or combination.

"There are two dangers to a radical change in policy of this type:

"1. Such a change is liable to prove so irritating to some exhibitor who liked the previous system better that he may bring an antitrust suit based upon some alleged past wrong.

"2. The existence of such a policy in Cincinnati will enable people who would like to see a similar policy in some other town to use Cincinnati as a precedent against us.

"There are also at least two legal advantages to the proposed change in policy:

"1. There was considerable danger of litigation from the operator of the Twin Drive-In Theatre if that theatre were not afforded an opportunity to negotiate for first run pictures.

[fol. 303] "2. There was considerable danger of litigation on behalf of some of the subsequent run operators in Cincinnati who were claiming that the previous clearance given to first run was too long.

"It is my opinion, based on the correspondence I have seen relating to Cincinnati, that the change proposed will lessen rather than increase the danger of anti-trust litigation against Twentieth Century-Fox in Cincinnati.

"H. B. J."

(Copy of memo, April 16, 1951, H. B. Johnson to W. C. Gehring, was marked Plaintiff's Exhibit No. 58.)

Mr. Rome: I offer in evidence, sir, as Plaintiff's Exhibit 59, letter on stationery of Twentieth Century-Fox Film Corporation, Cincinnati Office, signed "Joseph B. Rosen, Branch Manager," addressed to Mr. A. W. Smith, Jr., Home Office, dated April 17, 1951.

"April 17, 1951

"Mr. A. W. Smith, Jr.,
"Home Office.

"Dear Andy:

"On Friday, March 30th, I called Maurie White for an appointment to discuss our problems arising from our present releasing method in Cincinnati. As a result of this call, I had a meeting with both Maurie White and Bud Libson on Monday, April 2nd.

During the course of this meeting, I pointed out [fol. 304] that we were having considerable trouble with many suburban run exhibitors in Cincinnati and that the Twin Drive-In and the Valley Theatre were looking for first run product, day-and-date first run product, a move-over run, or an earlier availability.

"I pointed out to Maurie that it was our considered opinion and judgment that we try a releasing plan, namely, a 21-day availability for a limited number of the more important revenue producing theatres in the city.

"Both Maurie White and Bud Libson refused to consider any change or modification in clearance at all. They told me they were satisfied with the clearance as written, and if we were going to change it, they would not buy our product first run. They both were very definite on this point.

"When I ask both Maurie White and Bud Libson for their opinion and appraisal of the problem, they suggested that we take some of the theatres that were now currently playing on 5th Sunday availability and arbitrarily move them back. I asked them if they would be willing to move back his 5th Sunday houses,—the Forest, Hollywood, and Times Theatre,—they became very indignant and told me 'It was a very unfair question and request.'

"After our stormy session in his office, we all went to lunch and before saying 'goodbye' to Maurie in [fol. 305] front of his office building, I told him I would consult with our company officials, etc., and I would notify him definitely one way or the other whether we were going to adopt this 21-day releasing plan in view of his statements he would not buy our product if we went into any new system of releasing.

"On Thursday or Friday, April 5th or 6th, I called Maurie and told him that I had received word from Ray Moon that after several discussions with you, we were definitely going to try to sell our product on the plan we outlined, namely, a 21-day availability.

"Upon advice and instructions from Mr. Moon, I began to solicit the important suburban run theatres to form a group and offer them our product on a first run basis since we had no other outlet for our product.

"On Monday, April 9th, I called Maurie and informed him that we were going to release our product first run to a group of suburban run exhibitors, and extended an opportunity to him to join this group with *any one* of his downtown theatres, and also offered him an opportunity to play first run in Newport, Kentucky, which is a suburban run of Greater Cincinnati. Maurie scoffed at my suggestion and his reply was an emphatic 'no'. When I suggested to Maurie that we arrange a meeting and discuss this new proposal, I received another emphatic 'no'.

[fol. 306] "Under the circumstances, there was nothing

else I could do but to proceed with our plan to release our pictures without him.

"You are also familiar with the fact that recently we tried to release Bird of Paradise on 4th Sunday instead of 5th Sunday. Maurie White refused to buy the picture on that basis. We were prompted in asking to change the clearance on this picture by our exhibitors who pointed out to us that Bird of Paradise would become available on our 5th Sunday releasing plan on May 6th together with the following pictures: Royal Wedding, Mating Season, Lullaby of Broadway, and Lemon Drop Kid, and that the week before, on April 29th, these pictures would be available: Tarzan's Peril, Outrage, and The Redhead and The Cowboy. These independent exhibitors pointed out that they had too much product in the week of May 6th and not enough good product in the week of April 29th, and that it would be to the advantage of both the independent suburban run exhibitors and to us as the distributor, to re-arrange the clearance on one picture. I even went so far with Maurie White as to suggest to him that if he would not agree to releasing Bird of Paradise on 4th Sunday, that he pick any one of the four pictures and make the availability one week earlier.

"Maurie's lack of co-operative has resulted, as both Ray Moon and I predicted to you, that we are going to [fol. 307] take a beating on Bird of Paradise in suburban run Cincinnati, as the split-week houses can only use two pictures instead of the five that are available.

"I might also add to this letter, and make it part of the record, that our Head Booker, Mr. Jim Neff, called Burl Libson for playdates on March of Time and short subjects, and Bud informed Jim Neff that he will henceforth buy his short subjects where he buys his features.

"If there is any more information you want about this matter, please advise me.

"Kindest regards

"Sincerely,
"(Sgd.) Joe
"Joseph B. Rosen,
"Branch Manager

"cc: R. E. Moon"

(Letter, April 17, 1951, Joseph B. Rosen to Mr. A. W. Smith, Jr., was marked Plaintiff's Exhibit No. 59.)

By Mr. Rome:

Q. Mr. Myerberg, do you know who the Joseph Rosen is, who signed that letter?

A. Yes.

Mr. Raftery: We will admit he was the branch manager in Cincinnati at the time he wrote it.

By Mr. Rome:

Q. Have you answered my question?

A. Yes.

Q. Do you know where Mr. Rosen is presently working? [fol. 308] A. He is the branch manager of the Washington Exchange of the Fox Company.

Mr. Rome: If the Court please, I offer in evidence, as Plaintiff's Exhibit 60, a copy of a letter dated April 11, 1951, addressed to Mr. R. E. Moon, Chicago, Illinois, from A. W. Smith, Jr.

"April 11, 1951.

"Mr. R. E. Moon,
"Chicago, Ill.

"Dear Ray:

"The arrangements you have worked out for having our pictures shown first run Cincinnati on a non-exclusive basis in four theatres, with a possibility of one more theatre, looks like it can develop fair terms for our product and a most respectable amount of gross.

"I regret the fact that Maurie White saw fit to stubbornly refuse to agree to a 21 day clearance first run in the city. The study that you and Joe Rosen made and the facts we have examined here indicate that a 21 day clearance is warranted, that it extends an opportunity to the first run theatre to have full protection and, at the same time, it grants to the subsequent run theatres the opportunity to gross.

"I note that the four theatres have a combined advertising budget of $650. and we are to share a co-op ad on a 50/50 basis over this budget.

[fol. 309] "I further note the terms are for 7 days on each picture at 35% and a 2/3rds split for each theatre and that the theatres have decided to charge an admission price of between 70¢ and 75¢.

"I also note that in making your deal the theatres have agreed to buy our shorts, news and March of Time on a first run basis.

"In my telephone conversation with you the other day I told you that we wanted to make the deal for a limited number of pictures. At the time it was my impression that you and I had previously discussed only 8 pictures, but I find on reference to my notes that we agreed on 10 play dates for 11 pictures. The pictures Monte Cristo and Nick Cain are to be played equal billing on the same program. I am listing herewith the pictures and play dates:

"April 25th—Follow the Sun.
"May 2nd—I Can Get It For You Wholesale.
"May 9th—Monte Cristo and Nick Cain (equal billing).
"May 16th—Fourteen Hours.
"May 23rd—You're In The Navy Now.
"May 30th—On The Riviera.
"June 6th—Rawhide.
"June 13th—Half Angel.
"June 20th—Telegraph Hill.
"June 27th—The Guy Who Came Back.

[fol. 310] "For the present we should go no further than these pictures.

"This experiment became necessary due to our failure to get any first run dates in the city through any other means and if the plan works out we can consider continuing with it.

"Kindest regards.

"Sincerely,
"A. W. Smith, Jr."

(Copy of letter, April 11, 1951, A. W. Smith, Jr., to Mr. R. E. Moon, was marked Plaintiff's Exhibit No. 60.)

Mr. Raftery: What is the date of that?

Mr. Rome: It is dated April 11, 1951.

Mr. Rafferty, I call upon you for a copy of letter from Mr. Norris to Mr. Frank M. Boucher, dated August 31, 1951, with regard to Washington.

Mr. Raftery: Here it is.

Mr. Rome: If the Court please, I offer in evidence a copy of letter dated August 31, 1951, addressed to Mr. Frank M. Boucher, K-B Theatres, 4813 Mass. Ave., N.W., Washington, D.C.

"August 31st, 1951

"Mr. Frank M. Boucher,
"K-B Theatres,
"4813 Mass. Ave., N.W.
"Washington, D.C.

"Dear Frank:

[fol. 311] "I am writing in regard to recent correspondence from you and Mr. Kogod and our several conversations regarding your new Ontario Theatre which you advise will be opened in October.

"It is our opinion that the best interests of good distribution would not be served by showing our pictures in a neighborhood theatre day and date with first run downtown.

"We also feel that our best interests would not be served by showing our pictures in a neighborhood theatre day and date with first run downtown.

"We also feel that our best interests would not be served by showing our pictures in neighborhood theatres on the basis of a direct moveover from first run downtown.

"Experience indicates to us that the best pattern of distribution is to show pictures first in a representative downtown theatre, therefore, we feel that our interests will best be served by licensing first runs to downtown theatres.

"Very truly yours,
"Twentieth Century Fox Film Corporation,
"C. G. Norris,
"Branch Manager.

"Copy: A. Silverstone, W. C. Gehring, E. K. Callahan."

[fol. 312] (Copy of letter, August 31, 1951, C. G. Norris to Mr. Frank M. Boucher, was marked Plaintiff's Exhibit No. 61.)

By Mr. Rome:

Q. Mr. Myerberg, do you know whether or not the Ontario Theatre in Washington, D.C., presently is playing pictures from Twentieth Century-Fox on a first-run basis?

A. Yes; I do. They played the last picture, I think, was Song in My Heart.

Q. Do you know whether the Ontario Theatre is playing pictures from Fox on an exclusive first-run basis?

A. On an exclusive first-run basis, city of Washington.

Q. Do you know whether or not the Ontario Theatre is bidding competitively for its pictures?

A. Yes; I understand they are bidding competitively.

Mr. Raftery: Mr. Rome has asked me to stipulate that on November 2, 1949, he sent the same letter to RKO Radio Pictures, that he read to the jury. I think you have read two or three of them, that you wrote all the companies about that time on behalf of Theatre Enterprises, Inc., and with the approval of Theatre Enterprises, Inc., a letter similar to Exhibit 50; and we will waive the necessity of his rereading to the jury the same story that he read several times before.

The Court: Very well.

[fol. 313] Mr. Raftery: You are going to have it marked?

Mr. Rome: Yes. This is a copy of a letter from me to the RKO Radio Pictures, Inc., written on behalf of Theatre Enterprises, Inc.

(Copy of letter, November 2, 1949, Edwin P. Rome to RKO Radio Pictures, Inc., was marked Plaintiff's Exhibit No. 62.)

Mr. Rome: I should like to offer, as Plaintiff's Exhibit 63, a letter from RKO Radio Pictures, Inc., New York City, on stationery of the Legal Department, the letter being dated November 23, 1949, addressed to me, "Re: Crest Theatre, Baltimore."

"Dear Mr. Rome:

"We have your letter of November 2nd. It is our view that in large cities such as Baltimore the most satisfactory method of exploiting and marketing our pictures is achieved by licensing their first-run exhibitions to theatres located in the downtown area.

"Our investigation of the Crest Theatre and its location does not disclose such exceptional circumstances as would make appropriate a modification or variance of our present policy for the benefit of that theatre. In our judgment the Crest Theatre, however glowingly described, is, in the final analysis, a neighborhood theatre. We have been furnishing pictures to the Crest Theatre on first [fol. 314] neighborhood run which is the availability we consider appropriate to that theatre.

Very truly yours,
"(Sgd) William Zimmerman."

(Letter, November 23, 1949, from William Zimmerman, of RKO Radio Pictures, Inc., to Edwin P. Rome, was marked Plaintiff's Exhibit No. 63.)

[fol. 315] Mr. Rome: Mr. Raftery, may I call upon you for a letter from Mr. Zimmerman to Mr. Seymour Simon, re Crest Theatre, Wichita, Kansas, dated April 17, 1950, and also a letter from Mr. Zimmerman to Mr. H. H. Hunt, concerning the Tower Theatre, Wichita, dated April 18, 1950?

Mr. Raftery: I don't know whether we are getting far afield or not. We are across the Mississippi to Wichita, and I do not want to be captious about it. Mind you, this is one lawyer writing another lawyer.

Mr. Rome: This is correspondence coming from the defendants themselves, sir, and designed, we believe, to show the jury and Your Honor, sir, the nationwide pattern of this situation, the intent, motive and knowledge of these defendants with regard to the situation when a theatre located outside of the downtown area calls for access to first-run product.

The Court: Very well.

Mr. Raftery: We have to find them first. What are the dates?

Mr. Rome: April 17 and 18, 1950.

If the Court please, I offer in evidence as Plaintiff's exhibit No. 64 a letter dated April 17, 1950, addressed to Mr. Seymour Simon, 29 South LaSalle Street, Chicago, Illinois, re Crest Theatre, Wichita, Kansas.

[fol. 316] "Dear Mr. Simon:

"As I explained to you, it is our view that in a city the size of Wichita our pictures are best marketed and their exhibition possibilities most fully realized if their first-run exhibition is confined to the theaters in the downtown area. We feel that the present playing position upon which our pictures are being exhibited in the Crest Theatre is appropriate for that neighborhood theatre.

"However, in an effort to avoid litigation between us, we have decided to afford your client's Crest Theatre and the competitive Tower Theatre an opportunity to obtain our pictures on an exclusive first-run in the City of Wichita. This opportunity is being afforded the Crest and Tower Theatres on an experimental basis and these theatres will be competing for our pictures first-run against the theatres in the downtown area.

"We, of course, reserve the right to discontinue this procedure if and when experience has, in our judgment, demonstrated that a discontinuance is desirable.

"Sincerely,

"(Sgd) William Zimmerman."

Carbon copies to Mochrie, Branson, Timberlake, Kolitz, Lewis, Loventhal.

Mr. Raftery: Now, if Your Honor please, I move to strike from the record the remarks made by counsel [fol. 317] before—I did not raise the objection, but when we were discussing this proposition he says "I am showing part of the national" something or other, where it says just the opposite, where they gave the neighborhood theatre the right to bid first-run to avoid litigation.

Mr. Rome: On the contrary, I believe that within the next few minutes I will be able to show the reason it was done in Wichita, Kansas, which is because Fox Theatre

owned a theatre and was discriminating as against the independents in that area.

Mr. Raftery: Oh, no.

Mr. Rome: I submit, sir, that we are entitled to ask the jury to infer from that situation the fact these people do it in situations where they have their own theatres in a suburban area, that they have access to the product.

The Court: Go ahead.

The Clerk: Plaintiff's exhibit No. 64.

(Copy of letter, April 17, 1950, Wm. Zimmerman to Seymour Simon, was marked Plaintiff's Exhibit No. 64.)

Mr. Rome: I offer in evidence as plaintiff's exhibit No. 65 a copy of a letter dated April 18, 1950, copy to Mochrie, Branson, Timberlake, Kolitz, Lewis, and Loventhal, to Mr. H. H. Hunt, Hunt & Chase Theatres, Cincinnati, Ohio, re Tower Theatre, Wichita, Kansas.

[fol. 318] "Dear Sir:

"With regard to your letter of January 4, 1950, it is our view that in a city the size of Wichita our pictures are best marketed and their exhibition possibilities most fully realized if their first-run exhibition is confined to the theatres in the downtown area. We feel that the present playing position upon which our pictures are being exhibited in the Tower Theatre is appropriate for that neighborhood theatre.

"We have decided to afford you and the competitive Crest Theatre an opportunity to obtain our pictures on an exclusive first-run in the city of Wichita. This opportunity is being afforded the Tower and Crest Theatres on an experimental basis and your theatre will be competing for our pictures first run against the Crest Theatre and the theatres in the downtown area. We, of course, reserve the right to discontinue this procedure if and when experience has, in our judgment, demonstrated that discontinuance is desirable.

"Very truly yours,
"RKO Radio Pictures, Inc.,
"(Sgd) William Zimmerman."

The Clerk: Plaintiff's Exhibit No. 65.

(Copy of letter, April 18, 1950, Wm. Zimmerman to H. H. Hunt, was marked Plaintiff's Exhibit No. 65.)

Mr. Rome: Now, sir, I should like to offer in evidence as plaintiff's exhibit No. 66 a copy of a letter——

[fol. 319] Mr. Raftery: Is this the one you say refutes something, or is that the only one you put in?

If Your Honor please, I now move to strike any exhibits —I am perfectly willing they stay in—the remarks made where Your Honor refused to strike the first remark. Now, the letter he puts in reaffirms exactly what is in the other letter. RKO opened its——

The Court: Counsel, they are not marked in evidence.

Mr. Raftery: I know they are not, but he is consistently making statements that are absolutely misleading.

Mr. Rome: On the contrary, sir, I am attempting, in answer to Mr. Raftery's statement, to give to the Court the reasons we are introducing these letters, and I can only say that, sir, as each letter comes along in turn——

The Court: Go ahead.

Mr. Rome: Thank you, sir.

I offer in evidence, sir, as plaintiff's exhibit No. 66 a copy of a letter dated December 13, 1948 addressed to Mr. Harry R. Hamburg, Kansas City branch office.

This, members of the jury, was a Paramount letter.

The letter concerned Tower Theatre, Wichita, Kansas.

"Dear Harry:

"I discussed with Mr. Smith by telephone on December 8, 1948, the request for an opportunity to negotiate for a day and date first-run against the Fox Boulevard Theatre [fol. 320] which was contained in Mr. Hunt's letter of December 4, 1948, a copy of which was received by us here in New York.

"Both Mr. Smith and myself have reached the conclusion that because we have licensed this run in the past from time to time in the Fox Boulevard Theatre, we could be accused of discriminating in favor of Fox, if we do not offer a comparable theatre the same opportunity.

"I am enclosing herewith draft of a letter which I suggest be sent over your signature to Mr. Hunt and which you will list such pictures as have not already been licensed

for exhibition first-run in Wichita and which have been trade-shown.

"You will send a similar letter to Fox Midwest leaving out the introductory matter in the draft of the letter to Mr. Hunt and merely state that a request has been received from the operator of the Tower Theatre to negotiate competitively for this run and that we are offering them an opportunity to submit offers in respect to the same pictures.

"You will also, of course, want to indicate in the letter which you send to both exhibitors the final date which you will set for the receipt of offers in respect to any of the pictures which they may desire to exhibit. You will affix this date also on a self-address envelope to be enclosed with each letter and the answers will be retained after their receipt until the dates given as the final date, at [fol. 321] which time they will be opened and considered.

"Kindest personal regards.

"Very truly yours,

"(Sgd) Richard P. Morgan."

With carbon copies marked going to Messrs. G. A. Smith and H. Wirthwein.

"P.S. Since dictating this letter several days ago, a re-reading of it indicates to me that the first paragraph on page 2 of the draft of the letter to Mr. Hunt should, of course, be left out on the copy which you send to Fox Midwest. As a matter of fact, the paragraph is probably misplaced and should be the concluding paragraph in the letter.

"If you have any questions in regard to the procedure in handling this matter, I suggest you call me."

Will you stipulate, Mr. Raftery, that Richard P. Morgan, who sent this letter, was a member of the legal staff of Paramount?

Mr. Raftery: Yes, he was a lawyer for Paramount at that time, surely.

Mr. Rome: There is attached, members of the jury, to Mr. Morgan's letter to Mr. Hamburg, a draft of a letter being addressed to Mr. Herman H. Hunt, offering him the opportunity to bid for Paramount pictures on an experi- [fol. 322] mental basis.

The Clerk: Plaintiff's exhibit 66.

(Copy of letter, December 13, 1948, Richard P. Morgan to Harry R. Hamburg, was marked Plaintiff's Exhibit No. 66.)

Mr. Rome: With the permission of the Court, I would like to read to the jury, if I may, sir, the answer of Fox to plaintiff's interrogatory No. 7, the interrogatory being a request for the reasons why Fox refuses to license pictures on first-run to the Crest Theatre.

The answer of Twentieth Century-Fox Film Corporation to that question, members of the jury, was as follows:

"For over 20 years Twentieth Century-Fox Film Corporation and its predecessor in name, Fox Film Corporation, has licensed most of its pictures on first run in the City of Baltimore to the New theatre, operated by an independent exhibitor named Morris A. Mechanic. The New theatre is located in downtown Baltimore in the heart of the business and amusement section of the city. Its drawing power is not limited geographically to a definite neighborhood, but extends over the entire city of Baltimore and nearby towns.

"For over 20 years the New theatre has been known as the home of Twentieth Century-Fox pictures. Mr. Mechanic operates only the New theatre as a first run theatre. He is not affiliated with any circuit of theatres or any booking and buying combine.

[fol. 323] "For many years Twentieth Century-Fox Film Corporation has had in the New theatre virtually an exclusive first run show case for its pictures in Baltimore. In fact, Mr. Mechanic operates the New theatre exclusively on Twentieth Century-Fox pictures. In the New theatre, Twentieth Century-Fox Film Corporation has the finest show case for its pictures in Baltimore. Twentieth Century-Fox pictures of high quality are always given preferred playing time at the New theatre and receive long runs. This is possible because of the fact that Mr. Mechanic operates exclusively as an exhibitor of Twentieth Century-Fox pictures. Mr. Mechanic exploits the pictures to the fullest extent.

"Since a substantial part of the revenue of Twentieth Century-Fox Film Corporation in the City of Baltimore is derived from the first run exhibition of its pictures, it is of the utmost importance that first run pictures receive the longest possible playing time with the greatest possible exploitation. A long playing time and proper exploitation not only redounds to the benefit of Twentieth Century-Fox Film Corporation on the first run exhibition but also in the subsequent run exhibitions. Word-of-mouth advertising by those who have seen a first run picture at a downtown theatre is of incalculable value when a picture is shown on subsequent runs.

"A neighborhood theatre such as the Crest, catering [fol. 324] to its own neighborhood and in intense competition with other nearby theatres, could not hope to exhibit a picture as long as the New theatre. Some pictures are exhibited at the New for four or five weeks and most are exhibited for two or three weeks. The revenue to be derived from a first run exhibition at a subsequent run theatre such as the Crest, could not compare with what would be received from exhibition at the New theatre. A neighborhood theatre does not and can not have the matinee patronage that a downtown theatre has.

"Plaintiff's request to license Twentieth Century-Fox pictures on first run was given careful consideration by this defendant. The decision not to license the Crest theatre on first run in Baltimore was based upon the experience of the Company and the experience of its sales personnel. That decision was arrived at independently and without consultation with any other defendant in this action. It is the opinion of Twentieth Century-Fox Film Corporation that the decision is based upon sound business reasons. Plaintiff's allegation that Twentieth Century-Fox Film Corporation refused to license its pictures to the Crest theatre on first run because of a conspiracy among the defendants is not true."

By Mr. Rome:

Q. Now, Mr. Myerberg, in the answer of Twentieth Century-Fox Film Corporation it is stated that the Crest Theatre could not hope to exhibit a picture as long as the

New Theatre, that pictures are exhibited at the New for [fol. 325] four or five weeks and most are exhibited for two or three weeks.

Did you have any discussions with representatives of Fox or any other company with regard to the length of time you would be able to play a picture first-run in the Crest Theatre?

A. Yes, and I think in my letter of October 12, 1948 they requested me to send to them, I outlined the fact that the picture cannot be pulled or taken out until the gross of that picture had reached a gross that would be mutually agreed upon. In plain words, if we set the figure at $7,000 or $8,000 or $6,000, before we could take a picture out, that we should agree with them what that figure should be.

Q. And the picture would play until the gross received at the boxoffice had reached that figure; is that correct?

A. That is correct. As long as it was more than that figure, we continued to play. And we continued to explain to them further that although we had expenses for a second-run theatre that were prohibitive for a second-run theatre, as a first-run theatre our standing expenses were such that we could play a picture for a much longer period than downtown, because we did not need as much gross to break even.

Q. What was the actual operating expense per week of your theatre, Mr. Myerberg?

A. Under a first-run policy we had a projected statement [fol. 326] at that time of around $2400 or $2500 a week without film.

Q. Without having to pay film rental for the pictures as shown in your theatre?

A. Yes, sir.

Q. And what did your operating expenses prove to be when you ran your theatre on the first-sub-run policy?

A. Between $1800 and $1900.

Q. Per week?

A. Per week, without film.

Q. The Fox answer, Mr. Myerberg, also refers to the fact that a neighborhood theatre cannot and does not have

the matinee patronage that a downtown theatre has. What has been the experience of the Crest Theatre with regard to that question of matinee patronage?

A. Well, we do not claim any great matinee patronage for the Crest Theatre. We agree that the matinee downtown patronage would be greater than the Crest patronage. Nighttime patronage of the Crest Theatre would be considerably greater than the downtown theatres, and that is the time when you get the most money out of your box-office. That is when the receipts would be greater.

You go back to drive-in theatres in Cincinnati, and those theatres only operate after it gets dark, they have no matinees at all.

Mr. Raftery: I presume this is being received only as an [fol. 327] opinion of this witness and not as evidence.

The Court: Yes, he is giving evidence. Do you know that to be a fact?

The Witness: Yes, sir.

By Mr. Rome:

Q. Is it known in the industry, Mr. Myerberg, that a drive-in theatre only operates in hours of darkness?

Mr. Raftery: That is a point we all know, whether we are in industry or not.

The Witness: Yes, sir.

By Mr. Rome:

Q. Mr. Myerberg, what is generally considered to be the best movie day of the movie week?

A. Sunday.

Q. And what is the experience in the industry with regard to matinee patronage on Sundays?

A. Very good.

Q. What is generally considered to be the worst week in the movie year?

A. I would say the week before Christmas.

Q. Is there any reason generally accepted in the motion picture business for that?

A. Yes, although there is a tremendous number of people

downtown, they are all, of course, in a buying mood and not many going to theatres.

Q. Mr. Myerberg, can you please identify what this large [fol. 328] map represents?

A. I cannot see it very well from here.

Q. With the Court's permission, I will have you come over here.

A. This map represents the relative position of the Crest Theatre to the downtown first-run theatres in the center of the city. It also represents a one mile radius and the population within this one mile radius. It also represents the areas I described before, from Gwynn's Falls Parkway to Druid Park Drive and Roland Avenue to the county line and out in the county to comprise the section we think the Crest Theatre draws from. And it would be in substance competitive to any theatre in that area.

We have shown those theatres in that area to which we are in substantial competition.

Now, in the downtown area there is located the Stanley, Mayfair, Century, and on top of the Century is the Valencia. We have the Town and Hippodrome and Parkway Theatre on North Avenue. In the first mile of population surrounding those theatres we have 117,311 people. In the second mile radius, but only between the first and the second mile, there is a total of 307,020 people. In the third mile radius between the second and the third mile, there are 228,401 people, giving a total population in the three-mile radius from these downtown theatres of 600 and some odd [fol. 329] thousand, I think it is 622,000 people. It shows the relative position of that 3-mile radius, that that does not come within our area, that we are not in substantial competition.

Q. What theatres are shown to be in the area of the Crest Theatre?

A. Yes. In the area of the Crest Theatre we have the Pimlico, the Uptown, the Avalon, the Gwynn, the Ambassador, the Forest, and on this map we do not have the county, so we do not have the Pike's Theatre in Pikesville.

Q. How far away is the Pimlico Theatre and the Uptown Theatre from the Crest?

A. Approximately one mile.

Q. And the Avalon Theatre from the Crest?

A. Approximately one and one-half miles.

Q. How far is the Crest from the Ambassador?

A. About a mile and three-quarters.

Q. And the Gwynn is directly across the street from the Ambassador?

A. Directly across the street from the Ambassador.

Q. And the Forest Theatre from the Crest is how far?

A. About two and one-quarter miles.

Q. On the first subsequent run of product that you have been playing in the Crest Theatre, Mr. Myerberg, what theatres have been playing day and date?

[fol. 330] A. Playing day and date with the Uptown, with the Avalon, and the Ambassador, and sometimes the Forest.

Q. That was because the distributor companies believed you were not in substantial competition with those theatres; is that correct?

A. Yes, sir; but that will show up better from this map here (indicating).

Q. On the other hand, the companies took the view, did they, that you were in substantial competition with the theatres located downtown?

A. Yes, sir.

Q. How far away are you from the nearest downtown theatre at the Crest?

A. Very close to six miles from the Stanley Theatre to the Crest, the closest theatre.

[fol. 331] The Court: How many people do you estimate, if you have the figures on it, live in the area which you have designated as the Crest Theatre area?

Mr. Rome: If I may use this map, I want to answer your question directly.

Mr. Raftery: I think he answered that on Thursday. He said, 105,000 people, a corrected figure from his deposition. In the deposition, he said 200,000, and last Thursday he said 105,000.

The Court: I recall there was something said, but I forget the figures. That is why I ask it again.

Mr. Rome: We have those figures.

If the Court please, I should like to offer in evidence, as Plaintiff's Exhibit 67, the map to which Mr. Myerberg was just testifying.

(Map was marked Plaintiff's Exhibit No. 67.)

Mr. Raftery: May I be permitted, we have stipulated that all these maps and charts can go in; but I think, in fairness to our stipulation, we should know who made the map and who calculated these figures, just in case we have some question.

By Mr. Rome:

Q. The map which has been referred to as Plaintiff's Exhibit 67, Mr. Myerberg, was drawn by whom?

A. This was drawn in our office.

[fol. 332] Q. The large one?

A. This was drawn in our office by Mr. Germanio, who is our senior draftsman, in conjunction with information furnished him by the Baltimore Health Department, 1950 Census, which is broken down into individual areas in the entire city.

Q. Under whose jurisdiction did Mr. Germanio prepare that map?

A. It was prepared under my supervision and under my brother Julius' supervision.

Q. Mr. Myerberg, on the map which is identified as Plaintiff's Exhibit 67, the theatres that are shown in the downtown area are only the first-run theatres; is that right?

A. Yes. There are many more theatres in this area. There are only the first-run houses shown here.

Q. Will you tell us about the Parkway, in connection with that?

A. The Parkway has a unique position, in that it starts seven days ahead of all the others in Baltimore; it either plays 7 or 14 days after the Century and Valencia Theatres, and ahead on Metro products, Universal, and United Artists, ahead of all the other theatres in the city of Baltimore.

Q. Is that the usual situation in the motion picture industry, that a theatre located nearer the downtown area [fol. 333] than a theatre in the outlying area, plays on an earlier availability than a theatre lying further out?

A. No, sir; a theatre located fairly well from downtown, even a first-run, located in Glen Burnie, plays pictures 14 days after downtown; whereas, other suburban theatres in Baltimore are required to play them 21 days.

Q. How many theatres are there in the city of Baltimore that play pictures on a first subsequent-run availability on the same day?

A. There are sometimes 22, and as many as 30.

Q. Which means that every one of those theatres would have to be supplied with a print of the same motion picture?

A. Yes, sir; on the same day.

The Court: I am not sure that I understood what you said was the unique position of the Parkway.

The Witness: Pardon me?

The Court: What did you say was the unique position of that one theatre?

The Witness: It has an exclusive run in the city of Baltimore after it has been played in the other theatre. It plays pictures exclusively from the three distributors before that picture reaches any other theatre in the city of Baltimore.

By Mr. Rome:

Q. And the Parkway is operated by what company?

[fol. 334] A. Loew's Incorporated.

The Court: And is their exclusive right variable—that is, they will show one picture for so many days after the first run in the downtown theatres, and then another picture they may show a different number of days afterwards—or is there a fixed rule as to that?

The Witness: Yes; a fixed rule pertaining to three distributors, some United Artists, some Universal, and some Metro; but as far as Paramount is concerned, they play as the others in Baltimore, but with those three distributors it is exclusive.

By Mr. Rome:

Q. Mr. Myerberg, what is this smaller map which has been placed on the stand?

A. This is to show the mile radius of the Crest Theatre, using the Crest Theatre as the point of radius, and showing a one-mile radius from the Crest Theatre in our drawing area. It also shows, in the corner, a 3-mile circle from the center of the city relative to the position that has to the outside perimeter of our draw and our area. It shows the new units built in the area from 1949, 1950, and 1951, it shows the approximate increase in the city population during 1950 and 1951, and it shows the county population of 1951 and 1951, and also the increase in the county new housing units built in the county area.

Q. When you refer to new units built in the area, you [fol. 335] mean new housing units?

A. New housing units.

Q. How are they shown on this map?

A. They are shown on the map, in the city, with the blue areas. In the county, this was information from the Bureau of Buildings in Baltimore City, and in the county they did not have the exact locations of the different new developments. They had the number in each district; and we have placed that in the district indiscriminately. We did not have the exact locations.

Q. Each one of these blue marks noted on the map refers to how many units of housing?

A. Twenty or more, 20 up to 3 or 4 or 5 hundred.

Q. And you do not show on this map the number of new housing units that have gone up, in which there are fewer than 20 houses?

A. No, sir; we haven't taken into consideration, at all, single-family units, single houses built by private people, or houses built by any contractor that was under 20 in number.

Q. What does the yellow line indicate on the map?

A. This is the city boundary line.

Q. What is found to be the population in the area drawn upon by the Crest Theatre, as you have described it?

A. About 125,000 people.

[fol. 336] Q. As of what date is that, Mr. Myerberg?

A. That would be as of 1951.

Q. Have you any knowledge of the number of people who lived in that area, at the earlier date, 1948 and 1949, when your theatre was first built and opened?

A. Yes; we have taken the number of new units built in the area in 1949, 1950 and 1951, and taken what is conceded by everyone to be 3.6 people per housing unit in Baltimore, and we have used that in this area of Baltimore and we have used that, multiplying the number of units, and we come to the fact that the population has an increase of about 10,000. That is only supposed to be approximate; that is not supposed to be exact.

Q. What do your figures reveal with regard to the amount of new housing that has gone up in that area; what has been the extent of that new housing?

A. In the city, in 1949, there were 372 new units in the city area, in here.

Q. In the city area encompassed within the area drawn upon by the Crest Theatre?

A. That is right. And in 1950 we had 605 new housing units, and in 1951, 846. Now, in the county, in 1949, we had 947 in the different areas, in the different circles of population drawn on by the Crest Theatre. In 1950, we had 1,765 in this area located outside of the city of [fol. 337] Baltimore, and in 1951, 1,152, giving us a total in population increase, or population in this area here, of 22,604.

Q. And, each time you used the word "units", you are speaking in terms of housing projects of 20 or more houses?

A. Yes, sir.

Q. What theatres are shown on this map, Mr. Myerberg, with reference to the Crest Theatre?

A. We have the Crest Theatre here, and here is the Pimlico, the Uptown, and the Avalon; over here, the Forest, and Ambassador, and Gwynn, and the Pike.

Q. And how far out do you consider that the Crest Theatre draws for its patronage into the county area?

A. We go out into the fourth district, to Reisterstown, to Rejsterstown, located out there, in which there is a small theatre, I think, some three or four hundred seats.

Q. How many miles away is that from the Crest?
A. About 10 miles.
Q. Is there any reason why you consider that the Crest draws from as far away as 10 miles out into the county?
A. Yes. There is no other theatre there, other than at Pikesville, which is in competition with the Uptown or Crest.
Q. You have talked about the Uptown Theatre, Mr. [fol. 338] Myerberg. How does the Uptown Theatre compare with the Crest Theatre in so far as its size and suitability, generally, are concerned?
A. I think it is a very fine theatre. I think the Crest Theatre is much larger, that's all.

Mr. Rome: If the Court please, I should like to offer in evidence, as Plaintiff's Exhibit 68, this map which has been referred to by Mr. Myerberg.

(Map referred to was marked Plaintiff's Exhibit No. 68.)

By Mr. Rome:

Q. Mr. Myerberg, who was it that prepared this map?
A. Mr. Germanio.
Q. Was this map also prepared under your supervision and direction?
A. Yes, sir.
Q. And the statistics on the basis of which the population figures and the housing figures are shown on this map, they came from what source?
A. From the Health Department of the City of Baltimore and the Bureau of Buildings in the County.
Q. Mr. Myerberg, what is this map, which is here presently in front of the jury?
A. This is an official Hearne Bros. map of Greater Baltimore, which shows the relative position of the Crest [fol. 339] Theatre to the center of the city, and to the county areas from which we draw.
Q. Mr. Myerberg, there has been some mention by Mr. Raftery of a cemetery being near your theatre. Can you identify that on the map there?
A. Yes, sir. That is located on Rogers Avenue, right there. It is marked on the map in green.

Q. Do you know what is across the street from that cemetery, and surrounding it on all sides?

A. Homes.

Q. Is that new construction?

A. Some of it is new, and some of it is old.

Q. The area that appears on this Hearne map is the area that has been reproduced in larger scale on the two other maps that have earlier been testified by you?

A. Yes, sir.

Q. What transportation facilities are there, Mr. Myerberg, that go past the Crest Theatre?

A. There is a bus, the No. 7 Bus; it comes from downtown Baltimore to north of the theatre.

Q. Is there any east-and-west transportation?

A. No, sir.

Q. None whatever, east-and-west?

A. No, sir.

Q. The largest amount of your patronage is the result [fol. 340] of automobile patronage; is that correct?

A. Yes, sir.

Q. Have you any thought as to the percentage of automobile patronage?

A. I would say, between 80 and 85 per cent of our patronage comes in cars. We have full facilities to take care of them in parking, and, I would say, 85 per cent in automobiles; either 10 or 15 per cent come by walking from the surrounding area or by public transportation.

Mr. Rome: I should like to offer, as Plaintiff's Exhibit 69, the Hearne Map which has been testified to by Mr. Myerberg.

(Hearne Map of the City of Baltimore was marked Plaintiff's Exhibit No. 69.)

The Court: What does that add to the testimony that is material?

Mr. Rome: It sets up on the map the entire area, showing the distances on the one map, and also showing the area from which the Crest draws, that these earlier maps show, but we thought it might be helpful to the jury to have the benefit of the larger map of the county and city in this official manner.

The Court: Very well.

Mr. Rome: If the Court please, I should like now, if I may, to read to the jury the Answer of Loew's In- [fol. 341] corporated, to Plaintiff's Interrogatory No. 7, which asks Loew's why it was that the company refused to license first-run pictures to the Crest Theatre.

This answer, Members of the Jury, from Loew's Incorporated, to that question, is as follows:

"It is the policy of Loew's Incorporated not to license its feature motion pictures for first run exhibition in any city on a day and date basis in a downtown theatre and in a suburban theatre. It is also the policy of Loew's Incorporated to have the first run exhibitions of its feature motion pictures in a city of the size and importance of Baltimore take place in a downtown first run theatre.

"It is the opinion of Loew's Incorporated that neither the Crest Theatre nor any other suburban theatre in Baltimore would be an adequate exclusive first run outlet for any feature motion picture distributed by Loew's Incorporated and that such a first run exhibition of any of its feature motion pictures in any suburban theatre in Baltimore would return much less first run film revenue than would be derived from its first run exhibition in any adequate downtown first run theatre.

"It is the opinion of Loew's Incorporated that either an exclusive or a day and date first run exhibition of any of its feature motion pictures in any suburban theatre [fol. 342] in Baltimore would seriously impair the full license revenue which Loew's Incorporated otherwise would obtain from the subsequent run exhibitions of that picture in Baltimore and in the surrounding area.

"Loew's Incorporated indirectly owns 50 percent of the capital stock of Century-Parkway Corporation which operates Loew's Century Theatre and Loew's Valencia Theatre as first run theatres in Baltimore, Maryland. Marcus Loew Booking Agency, Inc., a subsidiary of Loew's, Incorporated, does the buying and booking of pictures for Loew's Century and Loew's Valencia Theatres and performs other managerial functions for those theatres. Loew's Incorporated regularly exhibits its own feature motion pic-

tures on first run in its own theatre in any city in which it operates a first run theatre.

"It is the opinion of Loew's Incorporated that Loew's Century Theatre, because of its location, seating capacity and other physical characteristics, and management, is the best first run outlet in Baltimore for Loew's feature motion pictures.

"It is the opinion of Loew's Incorporated that Loew's Century Theatre and Loew's Valencia Theatre each is in direct and substantial competition with every other theatre in Baltimore and in the surrounding area, including the plaintiff's Crest Theatre, and that any theatre in Balti- [fol. 343] more exhibiting a feature motion picture on its first run in Baltimore is entitled to clearance over every other theatre in the city and in the surrounding area.

"Even if Loew's Incorporated were willing to license any of its feature motion pictures for an exclusive first run exhibition in a suburban theatre in Baltimore, it is the opinion of Loew's Incorporated that the location and the grossing possibility of the Crest Theatre are not such as to entitle it to preference as such a first run outlet over various other suburban theatres in Baltimore and over the downtown first run theatres in Baltimore and that therefore it would be discriminatory and unfair to license the plaintiff for such a first run exhibition in its Crest Theatre except on a competitive bidding basis as between the Crest Theatre and other suburban theatres in Baltimore as well as the downtown first run theatres in Baltimore.

"Even if Loew's Incorporated were willing to license any of its feature motion pictures for a day and date first run exhibition in a suburban theatre in Baltimore, it is the opinion of Loew's Incorporated that the location and the grossing possibilities of the Crest Theatre are not such as to entitle it to preference as such a first run outlet over various other suburban theatres in Baltimore and that therefore it would be discriminatory and unfair to license [fol. 344] the plaintiff for such a first run exhibition in its Crest Theatre except on a competitive bidding basis as between the Crest Theatre and other suburban theatres in Baltimore.

"For the aforesaid reasons Loew's Incorporated is not

willing to license any of its feature motion pictures to the plaintiff for its first run exhibition in Baltimore at the Crest Theatre as demanded by the plaintiff."

By Mr. Rome:

Q. Mr. Myerberg, during the first 12 months of its operations on the first subsequent run policy, what was the gross earned by the Crest Theatre?

Mr. Raftery: Now, I think we might call for some books to get the exact figures.

Mr. Rome: This gentleman is president of the company.

The Court: Have you taken the figures from your books?

The Witness: Yes.

The Court: He may testify to that.

Mr. Raftery: With the understanding that we want to examine the books.

The Court: Do you have the books available?

Mr. Rome: Not only do we have the books, but they have already been made available to the defendants in earlier pretrial proceedings.

[fol. 345] The Court: Very well.

The Witness: 122,000.

The Court: What was the question?

(Question repeated by the reporter.)

The Witness: $122,000.

The Court: For what period?

Mr. Raftery: Twelve months.

By Mr. Rome:

Q. That was actually the box office admissions received by the Crest Theatre during that period?

A. Yes; without any miscellaneous income in it.

Q. Do you know, Mr. Myerberg, what film rental was paid by the Crest Theatre to the distributor companies on that gross admission?

A. Around $45,000.

Q. Has it ever been your thought, Mr. Myerberg, or did you ever request Loew's Incorporated, that you should have an exclusive first-run in your theatre, to the exclusion

of any other so-called fine suburban theatres, as described in Loew's answer to the Interrogatory?

A. No, sir.

Q. Have you at all times been willing that other suburban theatres in the city of Baltimore should have equal access to first-run product in the city of Baltimore?

A. Yes, sir.

Q. Your opinion, Mr. Myerberg, on the operation of [fol. 346] the Crest Theatre on the first-run basis, would that fact have any effect in impairing the grossing potentialities of the other subsequent-run theatres in the area of the Crest Theatre?

Mr. Raftery: I object.

The Witness: No, sir.

The Court: Do you mean, if they were given what they are asking for?

Mr. Rome: Yes.

The Court: First-run, would it impair the others?

Mr. Rome: Yes, sir.

The Court: Who had a right to compete for them, you mean?

Mr. Rome: There were two aspects to that, sir; and I want to inquire as to both of them. First, what would happen to the other theatres in the area that were playing on a first subsequent-run availability, and what would happen with regard to the theatres in the area other than the Crest, if they might get access to first-run pictures. Those are questions which came up throughout the correspondence between the plaintiff and the distributors. The witness is a man who has had a number of years experience in the motion picture business, and it goes, as we see it, to the validity of the reasons that have been raised by the defendants with regard to the Crest Theatre, and why it [fol. 347] should not have access to first-run product.

The Court: Do you want to say anything?

Mr. Raftery: Yes, Your Honor. The question calls for this witness to guess what would be the results, if he played first-run, to the grosses of other theatres. Now, there is no basis as to what happens when you move a theatre out of its line, and what happens to the immediate-run. It is pure speculation. I don't think the prophets could come

forward with an answer, with any probative value, for the jury to speculate on this situation. I see what he is leading to.

The Court: It would depend largely, wouldn't it, on the mood of the people, what particular movie they wanted to see? That would be affected by the extent of the advertisements, and what you might call the hullabaloo about it in the advertisements in the papers, and otherwise; whether it was sensational or not, whether it was a type that was appealing to the current mood of the people, and may depend upon the weather. It would depend upon the reports that people got about this first run. I think it would depend upon so many factors that it would be highly speculative.

Mr. Rome: I suggest there are a number of well-recognized factors in the motion picture industry bearing on this problem, as to which this witness can properly testify.

[fol. 348] The Court: Very well.

Mr. Rome: There are a number of well-recognized factors in the motion picture industry——

The Court: I think this question is too broad and speculative, and I will sustain the objection.

We will suspend now, and adjourn until tomorrow morning at 10 o'clock.

(Whereupon, at 3:05 o'clock p.m, an adjournment was taken until tomorrow morning, May 13, 1952, at 10:00 o'clock a.m.)

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[fols. 349-350] Reporter's Certificate to foregoing transcript omitted in printing.

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[fol. 351] **Transcript of Proceedings—May 13, 1952, 10:00 A.M.**

[fol. 352] Mr. Raftery: If Your Honor please, I would like to hand up a decision which we have just received from the Ninth Circuit Court of Appeals. I have given my adversaries a copy of it. It is in the case of Chirok v. RKO.

It is interesting, for two reasons: first, the facts are very similar to the facts in this case, except that the municipalities involved are much smaller; secondly, it cites with approval the Fanchon and Marco case, which we gave to Your Honor with our original trial brief. It cites with approval the Walbrook decision of Judge Chesnut. We think it will be helpful to Your Honor on the law points involved here.

The Court: Gentlemen, about any session tomorrow, I will be able to let you know this afternoon. As I said yesterday, there will not be any session in the morning tomorrow, because I am sitting with Judge Soper and Judge Chesnut in a Three-Judge case. I have not yet ascertained whether that case will be short or long. If it is very short, I think we should have an afternoon session in this case, because I want to speed this case along as much as possible. So, unless that will greatly inconvenience you, that will be done, although I will not be able to tell you until this afternoon.

Members of the Jury and counsel, we are ready to [fol. 353] proceed.

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Thereupon HARRY D. MYERBERG resumed the witness-stand and, having been previously sworn, testified further on behalf of the plaintiff, as follows:

Direct examination (Resumed).

By Mr. Rome:

Q. Mr. Myerberg, with regard to the Metro pictures, distributed by Loew's Incorporated, you have already testified that you were not able to get access to first-run pictures from Loew's Incorporated either on an exclusive basis or a day and date basis in Baltimore. Is that correct?

A. Yes, sir.

Q. On what basis were you finally able to license pictures from Loew's Incorporated?

A. On the first subsequent run basis.

Q. Did you obtain those pictures as a result of competitive bidding for them?

A. No, sir. We had understood that we were to com-

petitively bid with the Uptown, Avalon, Pimlico and Pikes, and the theatre winning the picture would have a clearance over the other theatres. But that is not how it worked out. We were day and date with the Uptown Theatre.

Q. That is the only theatre with which you played day and date Metro pictures at that time?

[fol. 354] A. Yes, sir, that and the Ambassador Theatre. But that was not included in the bidding arrangement as I had understood it at that time.

Q. How long did that situation continue with regard to the pictures distributed by Loew's Incorporated?

A. About one year and after, or during that year, I had continuously spoken to Loew's as I did to other companies, and set forth the fact again of the terrific competition we were in with the Uptown and Avalon and the rest of the theatres I have mentioned, and the necessity of not playing day and date. One was about a mile away from me and one about a mile and a half and one was less than a mile. It was impossible to even cut my losses by doing something of that sort. Finally, about 13 or 14 months after we were open, Loew's instituted competitive bidding between these theatres.

Q. What was the system that was devised at that time with regard to the clearance that would be accorded the theatre that obtained the picture as the successful bidder?

A. If the Crest Theatre obtained the picture as the successful bidder, they were to receive seven days clearance over Pimlico, seven days clearance from the last play date, that is, over the Uptown, and seven days clearance over the Avalon, and 14 days clearance over the Pikes.

Q. What would have been the situation if the Uptown [fol. 355] or any of the other theatres had been the successful bidder?

A. They would have the same clearance over the other theatres.

Q. How long did that system continue in operation with regard to Metro pictures?

Mr. Raftery: I object to the use of the word "system". He has his contracts, and they are the best evidence. I am not objecting on that ground, but I object to including "system" and "policies" in leading questions.

The Court: Well, it is a matter of terminology.

Mr. Rome: I make no invidious comparison.

The Court: I will allow it. Go ahead.

Mr. Raftery: I think this witness, since he has all of the contracts, should put them in, and save a lot of time.

By Mr. Rome:

Q. How long did you continue to bid in that manner with regard to Metro pictures, Mr. Myerberg?

A. For about one year, at which time the Metro, without notice to us, arbitrarily took away our clearance over the Avalon Theatre. In plain words, when we bid on a picture against the Uptown and Avalon and Pikes and Pimlico, we no longer had any clearance over the Avalon. If I won the picture, Avalon could play day and date with my theatre. If the Uptown won the picture, they could play day and date [fol. 356] with the Avalon. Other than that, the bidding arrangement has remained the same up to the present day.

Mr. Rome: Mr. Boyd, may I call upon you for a letter sent by Mr. Adams?

Well, I have a copy of it.

By Mr. Rome:

Q. Mr. Myerberg, who is it who owns the Uptown, Avalon and Pimlico Theatres?

A. Mr. Garman.

Q. All three theatres are run by the same party?

A. They are controlled by Mr. Garman.

Mr. Rome: If the Court please, I offer in evidence as Plaintiff's Exhibit No. 70 a copy of a letter on the stationery of Metro-Goldwyn-Mayer Pictures, addressed to Mr. J. M. Eisenberg, New York City.

"Dear Mr. Eisenberg:

"We are attaching copy of request for competitive bidding made by the Crest Theatre, Baltimore, Md.

"As you know, the Crest Theatre has brought suit in the Philadelphia Courts demanding the right to exhibit first run product in the City of Baltimore.

"Data concerning this situation was forwarded to your office under date of October 19, 1948 when the original availability was set for this theatre. Since the opening of the Crest Theatre our grosses in the Uptown Theatre have deteriorated steadily, leading us to believe that con-
[fol. 357] trary to our original opinion these two theatres are in substantial competition and, therefore, we now recommend the institution of competitive bidding.

"We further wish to advise that Mr. Garman of the Uptown Theatre has stated that he is not agreeable to bidding and will bring suit against the next company that uses that method of placing product.

"As the Pimlico Theatre and Uptown Theatre, owned by Mr. Garman, are only one block apart we consider both houses in competition with the Crest, however, the Pimlico is a slough or action house, playing in an inconsistent policy.

"The Avalon Theatre, also owned and operated by Mr. Garman, is two miles from the Crest and is not, in our opinion, in substantial competition with the Crest. In addition, the Crest and Uptown Theatres are first subsequent run houses whereas the Avalon has an availability of '7 days after Uptown, or as available.'

"Therefore, we recommend that bidding be instituted between the Crest, Uptown and Pimlico Theatres for a first subsequent run with clearance granted the successful bidder of 7 days ahead of the losing theatres, it being doubtful if Mr. Garman will follow the Crest Theatre in his Uptown and Pimlico Theatres since we rarely play the Pimlico under present conditions. This would give the Avalon Theatre the
[fol. 358] same availability it presently holds.

"Awaiting your decision in the matter and with kindest regards,

"Sincerely,
"(Sgd) J. A. Adams,
"Resident Manager."

There is an attachment, carbon copies marked to Messrs. Berger, Hirsch and Bezahler.

Mr. Raftery: When you read that, you referred to the letters, did you?

(Letter, June 1, 1950, Metro-Goldwyn-Mayer Pictures, to J. M. Eisenberg, was marked Plaintiff's Exhibit No. 70.)

Mr. Rome: If the Court please, I wish to offer in evidence, as Plaintiff's Exhibit No. 71, a copy of a form 1279E-10M-3-50-M, Loew's Inc., which reads as follows:

"Date prepared 5/31/50. Branch, Washington, D.C.

"Theatre, Pimlico. Cap. 1142. City & State, Baltimore, Md. Pop. 859,100.

"Exhibitor, Suburban Amuse. & Dev. Co. Circuit (x). Single (x). Changes Per Wk. 4. Adm. Price 27.

"Present Run, Availability, Clearance: Sub run in Baltimore, Md. 21 days after 1st run Baltimore, Md., and/or 7 days after Parkway, or as available. Clearance: 14 days ahead of Pikesville, Md. 7 days ahead of Avalon, Baltimore, Md.

"Number M-G-M features offered past 12 months: 5 [fol. 359] Number licensed: 5."

Then there appears, members of the jury, four pictures.

"Production Caught. Date available 6/26/49. Dates Played 6/28-29/49. Days of Wk. Tuesday-Wednesday. Terms 25%. Gross (Dollars only) 299. Rental (Dollars only) 74. If Checked Indicate: No.

"Big Jack. Date Available 7/3/49. Dates Played 7/3-4/49. Days of Wk. SM. "Terms U115SpSS. Gross (Dollars only) 282. Rental (Dollars Only) 70. If Checked Indicate: No.

"Intruder in Dust. Date Available 4/23/50. Dates Played 4/25-26/50. Days of Wk. TW. Terms 25% Gross (Dollars only) 211. Rental (Dollars Only) 52. If Checked Indicate: No.

"Johnny Eager. Date Available 1/29/50. Dates Played 1/29-30/50. Days of Wk. SM. Terms 25%. Gross (Dollars only) 368. Rental (Dollars Only) 92/1. If Checked Indicate: No."

(Copy of Loew's Form 1279E-10M-3-50-M, dated 5/31/50, was marked Plaintiff's Exhibit No. 71.)

Mr. Raftery: If Your Honor please, I don't know where we are going with such a long reading of figures which, I am sure, mean nothing to anybody.

The Court: I do not see the applicability of all of these [fol. 360] details.

Mr. Rome: The purpose is to show the change in clearance which took place with regard to these theatres after the Crest Theatre was opened.

The Court: Can't you summarize that?

Mr. Rome: I will be glad to.

The Court: I don't think you need to read the names.

Mr. Raftery: I understand these are charts prepared in the Washington Exchange and sent to New York to aid them in deciding who was the successful bidder under the bidding that was put in there.

Mr. Rome: On the contrary, sir, that could not possibly be the case, because at this time competitive bidding had not yet been instituted by Metro with regard to these pictures.

Mr. Boyd: It had been requested.

Mr. Rome: It had been requested.

The Court: I will let you put it in. But can't you summarize it? You can summarize it in argument, if you can't do it now.

Mr. Rome: Members of the jury, Exhibit No. 71 shows, as to the Pimlico Theatre, a playing position of Sub run in Baltimore, 21 days after 1st run in Baltimore, and/or 7 days after Parkway, or as available, with clearance noted [fol. 361] 14 days ahead of Pikesville, and 7 days ahead of Avalon, Baltimore, Maryland.

Exhibit No. 72, which I wish to offer in evidence, is also a form of Loew's, Incorporated, applicable to Pimlico Theatre, which indicates, as its playing position, Sub run in Baltimore, Maryland, 7 days after first run in zone, Uptown or Pimlico, or Avalon, or as available. Clearance: None.

(Loew's Inc. Form 1279E-10M-3-50-M, dated 5/31/50, was marked Plaintiff's Exhibit No. 72.)

[fol. 362] Mr. Rome: I hereby offer in evidence as plaintiff's exhibit No. 73 a copy of Loew's Incorporated Form No. 1279B-8-48 relating to the Uptown Theatre, dated 10/18/48, showing as its playing position 21 days after first-run Baltimore, Maryland, and/or 7 days after Park-

way. Fourteen days ahead of Pikesville, Maryland. Fourteen days ahead of Avalon.

The Clerk: Plaintiff's exhibit No. 73.

(Loew's Incorporated Form 1279B-8-48, 10/18/48 re Uptown Theatre, was marked Plaintiff's Exhibit No. 73.)

Mr. Rome: I hereby offer in evidence as plaintiff's exhibit No. 74 a form of Loew's Incorporated, No. 1279E, prepared May 31, 1950, applicable to the Uptown Theatre, with it being noted "Before Crest opening," the playing position of the Uptown Theatre being indicated as follows: "Sub-run. 21 days after 1st run Balto., Md., and/or 7 days after Parkway. 14 days ahead of Pikesville, Md. 7 days ahead of Avalon, Baltimore, Md."

Mr. Raftery: Mr. Rome, you did not intend to convey the idea, by reading "Before Crest opening," that that was a clearance provision?

Mr. Rome: I am reading only what appears here on the form, Mr. Raftery.

Mr. Raftery: "Before Crest opening" appears up here (indicating).

Mr. Rome: Applicable to the Uptown before Crest [fol. 363] opening.

Mr. Raftery: Yes. But it has nothing to do with clearance. You have "clearance" down here (indicating).

Mr. Rome: I do not know that that is so, Mr. Raftery. I can only follow the form.

Mr. Raftery: I say you are unfair if you do it.

Mr. Rome: On the contrary, I say I am not being unfair if I do it. I am trying to follow scrupulously what appears on the form.

The Clerk: Plaintiff's exhibit No. 74.

(Loew's Inc. Form 1279E, May 31, 1950, re Uptown Theatre, Before Crest Opening, was marked Plaintiff's Exhibit No. 74.)

Mr. Rome: I hereby offer in evidence as plaintiff's exhibit No. 75 a form of Loew's Incorporated, 1279E, dated May 31, 1950, applicable to the Uptown Theatre, with it again being noted in parentheses, Your Honor, above the word "Uptown" the words "After Crest opening," with

the playing position being noted as follows: "Sub-run. 21 days after 1st run Balto., Md., and/or 7 days after Parkway. 14 days ahead of Pikesville, Md. 14 days ahead of Avalon, Balto., Md."

The Clerk: Plaintiff's exhibit No. 75.

(Loew's Inc. Form 1279E, May 31, 1950, re Uptown Theatre, After Crest Opening, was marked Plaintiff's Exhibit No. 75.)

[fol. 364] Mr. Rome: I hereby offer in evidence as plaintiff's exhibit No. 76 a copy of Form 1279E of Loew's Incorporated, and prepared 5/31/50, applicable to the Crest Theatre, with its playing position being noted as follows: "Sub-run in Baltimore, Md., 21 days after 1st run, Baltimore, Md., and/or 7 days after Parkway, or as available. Clearance: None."

The Clerk: Plaintiff's exhibit No. 76.

(Loew's Inc. Form 1279E, 5/31/50, re Crest Theatre, was marked Plaintiff's Exhibit No. 76.)

By Mr. Rome:

Q. Mr. Myerberg, is the matter of clearance of importance to a theatre?

A. Yes.

The Court: Let the witness define that word again. I think it has been defined, but let him define it again.

The Witness: Clearance is that period which elapses between the completion of the engagement at one theatre and the beginning of the engagement at the next theatre that it is going to play in. That period in between 7, 14, or 21 days we are speaking of is known as the "clearance period."

The Court: Now, take one of those exhibits, the last one put in, which I believe will illustrate what I mean. What was that exhibit number?

Mr. Rome: 76, Your Honor.

The Court: Now, will you read what Mr. Rome read [fol. 365] about the period of days of grace, which it might be called, before it might be run by a particular theatre? And

there follows, as I understand it, those periods by the term "no clearance."

The Witness: Yes, sir.

The Court: Now, that is a little confusing to the layman. Will you just explain that in reading those periods there?

The Witness: Yes, sir.

21 days after first-run means that the Crest Theatre was permitted to open a picture 21 days, or thereabouts, after the completion of the first-run engagement in downtown Baltimore. "And/or 7 days after Parkway," meant that even though it may have been 21, 28 or 35 days after downtown, we could not play that picture and it would not be available for us until 7 days after the last play date at the Parkway Theatre.

Then it has "or as available," which referred to the additional period of time. If it was not available in 21 days it would be available in 28, 35 or 40 days. And "clearance" meant that the Crest Theatre enjoyed over other theatres in the area was none. They could play day and date with us anytime they pleased.

Does that explain it, Your Honor?

The Court: I think so, yes.

[fol. 366] By Mr. Rome:

Q. Mr. Myerberg, may I ask you to take one of the other exhibits applicable to the Uptown Theatre, and will you be good enough to explain to the Court in the same manner what is the situation there with regard to the Uptown Theatre?

A. The Uptown Theatre, "21 days after first-run Baltimore," which meant the same thing I explained insofar as last complete play date of the downtown theatre, we had to wait 21 days; so did the Uptown Theatre. "And/or 7 days," which meant they could not play until 7 days after the completion at the Parkway Theatre.

The Court: That might be any time?

The Witness: Any time, yes, sir.

The Court: It may be very, very much later than the 21-day period after Baltimore?

The Witness: It could be a minimum of 21 and maybe as many as 60 days, although I do not think that has

happened. There may have been 40 or 45 days. I do not think it has gotten anymore than that.

The Court: Does it mean—will you read that again, please?

The Witness: It says 21 days after first-run Baltimore and/or 7 days after the Parkway, which no matter how long the picture had run the first engagement downtown, we still had to wait until 7 days after the completion of the [fol. 367] engagement at the Parkway, whenever that was.

The Court: Suppose it did not get to the suburbs until three months, then you would have to wait 7 days, wouldn't you?

The Witness: We had to wait 7 days after the Parkway engagement. If it were delayed three months going to the Parkway Theatre we still would have to wait 7 days after the Parkway.

The Court: Then what did you mean a minute ago when you said a minimum of 21?

The Witness: We could not play it before 21 days if it went to the Parkway immediately on its availability from the Century Theatre. It is set up that it would probably wind up 21 days, we would have a picture 21 to 28 days after the first-run engagement, but that picture could be held up. We could not play until even after the Parkway was finished, and that clearance would bring it in ahead of 21 days—we could not play it until after 21 days.

Mr. Raftery: Did I understand that the clearance was the same as the Uptown?

The Witness: The clearance was the same as the Uptown as with the Parkway.

By Mr. Rome:

Q. With regard to the 21 days and/or 7 days?

A. With regard to the 21 days and/or 7 days. They were [fol. 368] only that far. The change in the clearance is right here. The Uptown Theatre had 14 days' clearance ahead of Pikesville, Maryland, which was the Pike's Theatre. We enjoyed none. The Avalon Theatre, it says here, 14 days ahead of the Avalon, Baltimore, Maryland, we enjoyed no clearance.

Q. Ahead of the Avalon?

A. About of the Avalon.

Q. What admission charge was made at the Avalon Theatre, Mr. Myerberg, if you know?

A. At that time it was either 30 or 32 cents, I don't recall which.

Q. Was it the same admission charge as that made by the Crest Theatre?

A. No, sir, we charged 40 cents from the opening of the theatre.

Q. Even though the Avalon Theatre charged a lesser admission price, it might play at the same time the Crest Theatre?

Mr. Raftery: I submit that admission prices in this case are not involved at all, are not involved in the case at all.

Mr. Rome: On the contrary, sir, although there has been no claim with regard to price fixing or anything of the kind, I do not understand why Mr. Raftery is so touchy with regard to this question. We are attempting to bring [fol. 869] out the playing situation of the Avalon and Uptown Theatres with regard to the Crest.

The Court: I think it is one of the comparative features.

Mr. Rome: It regards clearance in the motion picture industry.

Mr. Raftery: I am not touchy.

Mr. Rome: I am sorry, Mr. Myerberg, I did not hear your answer with regard to that last question.

The Witness: Will the Reporter read it, please?

(Whereupon the last answer was read by the Reporter.)

By Mr. Rome:

Q. From your experience in the motion picture industry, Mr. Myerberg, is it a usual thing to permit a theatre which charges a lower admission price to play on the same availability day and date with the theatre charging a higher admission price?

A. No, sir, not when it is in substantial competition to the other.

Q. In your opinion, is the Avalon in substantial competition with the Crest Theatre?

A. Yes, sir.

Q. In your opinion, is the Uptown in substantial competition with the Crest Theatre?

A. Yes, sir.

Q. Is that equally true as to the Pimlico Theatre?

[fol. 370] A. Pimlico and Pike's Theatres, also.

The Court: State the location of these theatres. I think you may have given them before, however.

The Witness: You mean the street location, sir?

The Court: Yes.

The Witness: The Avalon Theatre is located one block below Cold Spring Lane on Park Heights Avenue. The Uptown Theatre is located between Garrison Avenue and Spa-lding Avenue on Park Heights Avenue. The Pimlico Theatre is located between Spa-lding Avenue and Belvedere Avenue on Park Heights Avenue. The Crest Theatre is located near the intersection of Rogers Avenue and Reisterstown Road, and the Pike's Theatre is located on Reisterstown Road in Pikesville.

By Mr. Rome:

Q. How many seats are there in the Avalon Theatre, if you know, Mr. Myerberg?

A. I would say about 800.

Q. And in the Uptown Theatre?

A. About 1100.

Q. In the Pimlico Theatre?

A. A little over 1100.

Q. And in the Pike's Theatre?

A. I would say between 6 and 7 hundred.

Q. Under what conditions or terms is it usual for theatres to be accorded clearance over other theatres in the [fol. 371] motion picture industry, Mr. Myerberg? Why is a theatre given clearance?

A. Well, one, because it is considered in substantial competition to the other. Two, because of admission price, it is not the controlling factor, it is one factor that is greatly considered as exemplified by the fact that the downtown theatres charge a much greater admission price, playing a picture on first run, and receive clearance over

the subsequent runs.' That is an important controlling factor. And I think another thing is the theatre itself, its ability to gross, its appointments, its decorations and size of the theatre itself.

Q. So, if theatres are in substantial competition, normally one theatre is accorded clearance over another with regard to a particular picture?

A. Yes, sir.

Q. Normally theatres in substantial competition are not required to play day and date with each other on the same picture?

A. No, sir.

Mr. Rome: Mr. Boyd, may I call upon you, please, for a copy of a memo dated June 6, 1950 from Mr. Sober?

If the Court please, I offer in evidence as plaintiff's exhibit No. 77 a copy of an office memo of Loew's Incorporated, from Mr. Sober to Messrs. Rodgers, Saunders, [fol. 372] Bezahler, date 6/6/50, subject competitive bidding. The memo reads as follows: "Our Washington, D. C office has been authorized to institute competitive bidding in Baltimore, Md. between the Crest and Uptown Theatres for 1st subsequent run in Baltimore, the successful theatre to have 7 days' clearances over the loser and also over the Pimlico and Avalon Theatres." The initials "P. S." appear below.

Mr. Raftery: What is the date of it?

Mr. Rome: It is dated 6/6/50, June 6, 1950.

The Clerk: Plaintiff's exhibit No. 77.

(Loew's Inc. office memo, 6/6/50, Mr. Sober to Messrs. Rodgers, Saunders, Bezahler, was marked Plaintiff's Exhibit No. 77.)

Mr. Rome: Mr. Boyd, may I have now, please, the copy of a letter dated June 6, 1950 from Mr. Sober to Mr. Adams?

If the Court please, I offer in evidence as plaintiff's exhibit No. 78, a copy of a letter on the stationery of Loew's Incorporated, addressed to Mr. J. A. Adams, Washington, D. C., dated June 6, 1950 re Crest Theatre, Baltimore, Maryland.

"Dear Mr. Adams:

"Effective immediately, you may institute competitive bidding between the operators of the Crest and the Uptown Theatres for 1st subsequent run exhibition of our product [fol. 373] in Baltimore, the successful theatre to have 7 days' clearance over the loser and also over the Pimlico and Avalon Theatres.

"Should the operator of the Uptown Theatre desire to bid for his Pimlico or Avalon Theatres, instead of for the Uptown, he should be given that privilege.

"Please notify both exhibitors in the usual manner and it is hoped you will be able to submit pictures for bidding here without delay.

"With kind regards.

"Sincerely yours,
"(Sgd) Pincus Sober."

With carbon copies to Messrs. Berger and Hirsch.

The Clerk: Plaintiff's exhibit No. 78.

(Letter, June 6, 1950, Pincus Sober to J. A. Adams, re Crest Theatre, was marked Plaintiff's Exhibit No. 78.)

Mr. Rome: May I call upon you, Mr. Boyd, for a copy of a letter of June 9, 1950, from Mr. J. A. Adams to Mr. Pincus Sober, New York City?

I offer in evidence, sir, as plaintiff's exhibit No. 79, a copy of a letter on the stationery of Loew's Incorporated, Washington, D. C., dated June 9, 1950, addressed to Mr. Pincus Sober, New York City, re Crest Theatre, Baltimore, Maryland.

[fol. 374] "Dear Mr. Sober:

"In reply to your letter of June 6 regarding the above situation we wish to question the decision to grant the Avalon Theatre the privilege to bid with the Crest Theatre.

"In our letter of June 1 we pointed out that the Avalon now plays '7 days after the Uptown' and is a sub-run two miles from the Crest Theatre, therefore coming in our opinion not in substantial competition.

"Would appreciate your thoughts in the matter.

"Kindest regards.

"Sincerely,

"(Sgd) J. A. Adams, Resident Manager."

With carbon copies to Mr. Berger and Mr. Hirsch.

The Clerk: Plaintiff's exhibit No. 79.

(Letter from J. A. Adams to Mr. Pincus Sober, June 9, 1950, re Crest Theatre, was marked Plaintiff's Exhibit No. 79.)

[fol. 375] Mr. Rome: Mr. Boyd, may I call for copy of letter of June 21, 1950, from Mr. Adams to Mr. Berger?

Mr. Boyd: Here it is.

Mr. Rome: If the Court please, I offer in evidence, as Plaintiff's Exhibit 80, a copy of a letter dated June 21, 1950, going from J. A. Adams, Resident Manager, addressed to Mr. R. Berger, Washington, D. C.

"Dear Mr. Berger:

"In our letter to Mr. Eisenberg dated June 1st, copy of which was forwarded to your office, we requested the institution of competitive bidding between the Crest, Uptown and Pimlico Theatres for a first subsequent run in Baltimore, Md., and pointed out that, in our opinion, the Avalon Theatre was not deserving of a first subsequent run availability. In addition to which, its normal playing position with us is and was '7 days after the Uptown'. Consequently, we asked that the Avalon not be included in the bidding.

"Mr. Sober's reply of June 6th stated that we were to allow Mr. Garman the privilege of bidding for the Uptown, Pimlico *or* Avalon Theatres.

"When I called Mr. Garman this morning and advised him that we were including the Avalon he stated that not only would he not bid against the Crest Theatre for his Uptown-Pimlico Theatres but that if we included the Ava-

[fol. 376] lon, he in turn would bring suit, stating that the Avalon Theatre was a first sub run with Paramount and Warners and he, consequently, feels that it should be considered by Metro for that same run.

"The Avalon is .8 of a mile from the Uptown on Park Heights Avenue and is an older but slightly larger theatre than the Uptown.

"We are, however, going ahead with bidding in these situations as per the instructions contained in Mr. Sober's letter of June 6th.

"Kindest regards.

"Sincerely
"(Sgd) J. A. Adams,
"Resident Manager.

(Copy of letter, June 21, 1950, J. A. Adams to R. Berger, was marked Plaintiff's Exhibit No. 80.)

Mr. Rome: Mr. Boyd, may I have a copy of letter of August 21, 1950, from Mr. Adams to Mr. Eisenberg?

Mr. Boyd: Here it is.

Mr. Rome: If the Court please, I offer in evidence as Plaintiff's Exhibit 81 a copy of a letter on the stationery of Loew's Incorporated Washington, D. C., dated August 21, 1950, addressed to Mr. J. Eisenberg, New York.

"Dear Mr. Eisenberg:

"As per your suggestion, the writer has contacted Mr. [fol. 377] Garman and expressed Mr. Rodgers' regrets that we are unable to comply with his request for a first subsequent run availability in the Avalon Theatre—Baltimore, Md.

"Competitive bidding is to be continued with the four theatres if they so desire, and the successful theatre will have clearance over the other three.

"Kindest regards.

"Sincerely,
"(Sgd) J. A. Adams,
"Resident Manager.

"cc: Messrs. Rodgers, Berger, Hirsch, Benahler."

(Copy of letter, August 21, 1950, J. A. Adams to J. Eisenberg, was marked Plaintiff's Exhibit No. 81.)

By Mr. Rome:

Q. Mr. Myerberg, do you know who was the Mr. Rodgers referred to in this last letter?

A. If it is Mr. William Rodgers, he was general sales manager of Loew's Incorporated.

Mr. Rome: If the Court please, I offer in evidence as Plaintiff's Exhibit 82 a copy of a letter on the stationery of Loew's Incorporated, Washington, D. C., dated June 22, 1951, addressed to Mr. Harry Myerberg, "Re: Crest Theatre, offering the opportunity to the Crest Theatre of bidding competitively for the picture called Go For Broke, the clearance being indicated as 14 days ahead of Pikes-[fol. 378] ville, Maryland; 7 days ahead of Uptown and Pimlico Theatres.

(Copy of letter, June 22, 1951, J. A. Adams to Harry Myerberg, was marked Plaintiff's Exhibit No. 82.)

Mr. Rome: I offer in evidence, as Plaintiff's Exhibit 83, a copy of a letter dated June 25, 1951, from Harry D. Myerberg to Mr. J. A. Adams.

"Dear Mr. Adams:

"Pursuant to your request for bid for 'Go For Broke', dated June 22, 1951, we note that under the heading of Clearance, the Avalon Theatre was inadvertently omitted.

"Kindly forward new request including Avalon Theatre in Clearance in order that we may immediately submit our bid.

"Very truly yours,
"Theatre Enterprises, Inc.,
"By (Sgd) Harry D. Myerberg."

(Copy of letter, June 25, 1951, Harry D. Myerberg to J. A. Adams, was marked Plaintiff's Exhibit No. 83.)

Mr. Rome: I offer in evidence, as Plaintiff's Exhibit 84, a letter on the stationery of Loew's Incorporated, Washington, dated June 26, 1951, addressed to Mr. Myerberg.

"Dear Mr. Myerberg:

[fol. 379] "In response to your inquiry of June 25, we wish to advise that the Avalon Theatre will no longer be included in the clearance for bids concerning the Crest Theatre.

"Would you, therefore, utilize the data presented on June 22 in submitting your bid for Go For Broke.

"Kindest regards.

"Sincerely,
"(Sgd) J. A. Adams,
"Resident Manager."

(Letter, June 26, 1951, J. A. Adams to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 84.)

Mr. Rome: I offer in evidence as Plaintiff's Exhibit 85, a copy of a letter dated July 10, 1951, from Harry D. Myerberg to Loew's Incorporated, Washington, D. C.

"Attention: Mr. J. A. Adams.

"Dear Mr. Adams:

"In answer to your letter of June 26th, 1951, I cannot understand why your organization without discussion or notice to us of your intent, decided to discontinue our clearance over the Avalon Theatre.

"Will you kindly forward to us the reasons for your decision on this matter.

"Very truly yours,
"Theatre Enterprises, Inc.
"By (Sgd) Harry D. Myerberg."

[fol. 380] (Copy of letter, July 10, 1951, Harry D. Myerberg to Loew's Incorporated, was marked Plaintiff's Exhibit No. 85.)

Mr. Rome: I offer, sir, as Plaintiff's Exhibit 86, a letter on the stationery of Loew's Incorporated, Washington, D. C., dated July 11, 1951, from Mr. Myerberg, or rather, it is from J. A. Adams, addressed to Mr. Harry D. Myerberg.

"Dear Mr. Myerberg:

"In reply to your letter of July 10, we are extremely sorry that you were not advised of our action of removing the Avalon Theatre from the Crest-Uptown bidding prior to its actual removal. This was an inadvertence on the

part of the writer as it is our usual policy to notify the exhibitor prior to making any change.

"Upon a thorough review of this situation it was, after again discussing the matter with our Legal Department, our studied opinion that the Avalon Theatre was in no wise in substantial competition with the Crest Theatre, and since it is the responsibility of the distributor to prove the existence of substantial competition in the setting up of clearance we made this deletion.

"Hoping this explanation is to your satisfaction, and with kindest regards,

"Sincerely,
"J. A. Adams,
"Resident Manager."

[fol. 331] (Letter, July 11, 1951, J. A. Adams to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 86.)

By Mr. Rome:

Q. Mr. Myerberg, did you license pictures via competitive bidding from any other company other than Loew's Incorporated?

A. Yes; one other permitted us to bid. That was RKO.

Q. What clearances were accorded you, if the Crest Theatre is the successful bidder for a picture?

A. Seven days ahead of the Avalon, Uptown, and Pimlico Theatres.

Mr. Raftery: He left out his playing position in stating clearances. The contracts tell the story so much better than he can. He did not testify as to what he played. The other day, it was 21 days after Downtown, and 7 days after the Parkway.

Mr. Rome: The witness has long since testified that the only pictures he gets, he plays on a subsequent first run availability.

Mr. Raftery: The Parkway is not in the situation of the RKO situation. Will you concede that?

Mr. Rome: Yes.

By Mr. Rome:

Q. Just to get this straight, Mr. Myerberg: Mr. Raftery has stated that the RKO is in no way concerned with the

Parkway situation. What is the fact with regard to RKO pictures playing in the Parkway Theatre?

[fol. 382] A. It is my recollection that just recently they played a picture on the same clearance as the Metro pictures played, 7 days ahead of the neighborhood. That is not the usual policy, and I do not want anyone to believe this has been the policy of RKO. It has not, but it seemed to be the beginning of one.

Q. On what availability have you been playing product from RKO?

A. Twenty-one days after the final play date first-run downtown Baltimore, bidding against the Uptown, Pimlico and Avalon Theatres, and, respecting clearance to the successful bidder, 7 days over those theatres.

Q. Any one of those theatres that is the successful bidder gets 7 days over the losers on the bid?

A. Yes.

Q. Did you seek to obtain pictures by competitive bidding from any other company?

A. Yes, sir; I sought to obtain from all companies.

Mr. Raftery: On this, Your Honor, I have to get specific data. It is the only way we can get it. He cannot say, "I sought to get it from all companies." I want conversations on this, and dates.

By Mr. Rome:

Q. What company, separate and apart from those you have mentioned, did you seek to have licensed pictures?

[fol. 383] A. Twentieth Century-Fox.

Q. When was that, if you recall?

A. That was at the opening of the theatre, when we had requested first-run pictures and had been turned down, and wanted to open the theatre to minimize the loss. We took what was given us uniformly by everybody 21 days after the final play date downtown, except with Metro, which was and/or 7 days, and Universal and/or 7 days, after the Parkway Theatre. We requested each one to enter into competitive negotiations with us, and those theatres and some others that the companies considered substantially competitive, and Fox was one of those.

Q. Did Fox license you pictures by competitive bidding?

A. No; they told me they would prefer to have the status quo, and they meant by that, to play pictures day and date with the Avalon and Uptown Theatres.

Q. Who said that?

A. As I recall, it was in a letter from Mr. Norris, of Twentieth Century-Fox. A telegram, I think it was a telegram.

Q. Did you seek to license by competitive bidding from Twentieth Century-Fox at any time subsequent to that early effort, before your theatre opened?

A. We again, we continuously, even to the present day, [fol. 384] we have tried to do that, and I think the last formal effort was made about a year or so after the theatre opened, but we have continuously talked to Twentieth Century-Fox, the fact that these theatres were in substantial competition and could not play day and date.

Q. Did you make similar efforts with regard to any other company?

A. Yes, sir; Paramount Pictures.

Q. When did you discuss it with them?

A. We discussed it with Mr. Thompson and Mr. Benson. Mr. Thompson, I don't know his exact title, he was either sales manager or salesman in the Baltimore area; and Mr. Benson was the branch manager.

Q. Did Paramount grant or refuse your effort to license pictures through competitive bidding?

A. They refused that.

Q. Did you make a similar effort with any other company?

A. Columbia. They also refused.

Q. When did you seek that from Columbia, or to whom did you speak there?

A. Mr. Caplan and Mr. Wingfield. Mr. Caplan is or was the branch manager, and Mr. Wingfield is the salesman.

Q. And Columbia granted or refused?

[fol. 385] A. Refused to grant competitive bidding.

Q. When was it you made the effort with regard to Columbia?

A. When the theatre first opened, and continued it through until the present date; but I think the last time we

had written informally about it was about a year or 14 or 15 months after the theatre opened.

Q. Did you make a similar effort with any other company?

A. Universal.

Q. Whom did you see there, and when?

A. Mr. Martin, and I had some discussions with Mr. Meyers about it, and I don't recall who else. I don't think it was anybody else in the conversation. I retract. I think Mr. Scully was also in some of these conversations with Mr. Martin and myself regarding the advisability of competitive bidding in the area.

Q. Which Mr. Scully was that?

A. I think, Mr. John Scully, who was either the district manager or eastern division manager of Universal Pictures.

Q. Did you get in touch with any other company with regard to it?

A. Warner's.

Q. Whom did you see there?

[fol. 386] A. Mr. Smeltzer and Mr. Biersdorf.

Q. When?

A. With the inception or opening of the theatre, as I stated before, and we found that we could not get Warner pictures, and they offered us the same as anybody else, 21 days, and it was necessary to open the theatre, and we opened under protest, under that policy, and we requested competitive bidding then from them, and did not receive it, and I think we renewed it about 12 months, formally, in a letter. I think the letter came about by their request to us to send them a letter, and they would take it up with the New York office and see what could be done; and we sent them a letter—I think it was about 12 months after—but all during the whole time, and up to the present time, we continuously pursued the question of not playing those theatres on a day and date, even to the point of splitting the product, or doing something. The two theatres could not live or get along at all under those conditions.

Q. Were you able to get pictures by competitive bidding from any other companies other than RKO and Metro?

A. No sir.

Q. You have told the playing position of the Crest Theatre with Metro product and RKO product. What is the playing position of the Crest Theatre with regard to the [fol. 387] other companies?

A. Well, with Paramount, 21 days after the completion or final playing date Baltimore first-run, day and date, or no clearance, I may add, over any theatre in my competitive area, it means these theatres would play day and date with us, or I could play day and date with them, but they are all in the competitive situation. The same playing arrangement is true with Universal, United Artists, Columbia—I may have missed one, but the playing arrangements are all the same.

Q. Is there any difference with United Artists or Paramount with regard to the Parkway situation?

A. Yes; United Artists has a clause in its pictures that play the Parkway Theatre, that we must play 7 days after the Parkway; and on those pictures, in Universal, those pictures play the Loew Theatres, and consequently are moved over to three Loew's downtown, the three runs in the Loew's Theatre, not downtown—two downtown, and then the Parkway Theatre, those are also 7 days after the Parkway Theatre.

Q. One of the reasons that was given to you why the Crest Theatre could not have access to first-run product, either on an exclusive or day and date basis, with downtown, was that your theatre was in substantial competition with the downtown theatres; is that correct, Mr. Myerberg? [fol. 388] A. That was one of the reasons given. The other reasons uniformly given to me was the fact that that was the national policy, that they absolutely would not play these pictures in theatres located out of the downtown area; that they had done it, and I pointed out a few exceptions to the contrary; but those were exceptions to the general rule, and that is their policy, and you could not get it from anybody.

Q. Do you consider your theatre in substantial competition with the first-run theatres located in the downtown area of the city?

A. No, sir.

Q. Why not?

A. Because of distance, mostly. As I stated before, we are between 5½ and 6 miles from the closest downtown theatre.

Another explanation for that, we have gone into this fact rather thoroughly from the time before we built the theatre up to the present time, continuously trying to analyze the situation, and we have come up with one thing, the fact that the largest grossing theatre downtown is the Century Theatre. Now, on an average—these are averages—on an average, the Century Theatre, as close as we can come to it—and I believe that is fairly close—plays to approximately 20,000 people a week. That means 20,000 [fol. 389] paid admissions a week. In Baltimore and Greater Baltimore, the population is 1,300,000, or thereabouts. We take out of that population approximately 275,000 colored people, which gives the Century the possibility of draw from a high of 1,025,000 people, in round figures. Their 20,000 represents two per cent of the entire population of the city of Baltimore, and that is the largest grossing house in the city of Baltimore.

Suppose 2 per cent that came from our area, or let's say, put it at 50 per cent more, that 3 per cent came from our area, certainly, that is not substantial competition.

Q. Now, there are how many people located in the area from which the Crest Theatre draws?

A. 125,000.

Q. In your opinion, as a result of your experience in the motion picture industry, is a population of 125,000 people sufficient to support a first-run theatre?

A. More than sufficient.

Q. Is there anything on which you base that?

A. Using the same figures, we would only have to play to approximately 15 per cent of our population to almost equal the number of people that go to the Century Theatre. That is 15 per cent of our population. And may I add here, that population, with the exception of a couple thousand, is all white.

[fol. 390] Q. How do you compare your theatre with the downtown theatres, in so far as suitability for first-run is concerned, Mr. Myerberg?

A. Well, we are a newer theatre, with newer, as I described before, ideas in motion picture design. We have a greater comfort in the seating of the theatre, because of the fact, as I have explained before, the staggered seats and the spaces between the seats, where your knees are not in contact with the seat in front of you, if you are sitting in an upright posture, of course. The fact of our free parking lot, the fact of our television lounge, and then, although the Stanley and the Century, and probably Keith's, are larger than our theatre, we still have ample size for first-run pictures, or to exhibit first-run pictures, and return a considerable return to ourselves and to the distributors, as great, if not greater than downtown theatres.

Q. Does any theatre located downtown offer free parking facilities to its patrons?

A. Not to my knowledge; no, sir.

Q. What about the suitability of your theatre with regard to its equipment, projection equipment?

A. We have the finest projection equipment that is possible to buy, projection and sound. I might add something: the suitability of the theatre is borne out in another respect. We grossed, in the first 12 months of our operation, [fol. 391] over $122,000. That does not include any candy concession business, or any miscellaneous income. That is actual box office receipts. In the year 1950, we claim close to equalling the gross of the Hippodrome and Town Theatres.

Mr. Raftery: That is objected to.

The Court: What did you say, sir?

Mr. Raftery: He said he came close to grossing with his theatre what the Hippodrome and Town Theatres grossed. There is no evidence of this, regarding what the Hippodrome or Town Theatres gross, and he has not even testified to what he grossed.

Mr. Rome: On the contrary, Mr. Myerberg has testified to what the gross of his theatre was.

The Court: If the witness claims he knows, I will let him testify to the comparative figures.

Mr. Raftery: He said, in the first 12 months he grossed $122,000, and then it was from February, 1949, to February 25, 1950. Now, he has volunteered the statement that in the year 1950, without telling us what he grossed in 1950, he grossed almost as much as the Hippodrome Theatre, a downtown theatre run by somebody else, and the Town Theatre, run by somebody else. No evidence in this record——

The Court: He has not been asked for the figures. I assume you will ask him.

[fol. 392] Mr. Raftery: How can he testify to what somebody else grossed?

The Court: He might, if he had the information.

Mr. Raftery: Where would he get it?

The Court: From them, I suppose.

Mr. Raftery: Pure hearsay.

Mr. Rome: Mr. Raftery forgets the fact that in interrogatories in this case, these distributor companies, the defendants, have furnished figures concerning film rental received by them from the downtown first-run theatres, and the gross receipts reported by those theatres to them.

The Court: I will allow it.

Mr. Raftery: If that is what he is testifying from, it is different.

By Mr. Rome:

Q. On what do you base the statement, Mr. Myerberg, with regard to the gross that has been earned at the Crest Theatre and its comparison with the grosses earned at the downtown theatres?

A. In the interrogatories that were asked of the distributors during the pretrial examination of this case, which figures you made available to me, I can go even further than that, Mr. Rome. If we would project—I said we almost grossed as much. I would say we would have out-grossed them, and I can prove that, without the shadow of a doubt.

[fol. 393] We played an admission price——

Mr. Raftery: I submit that is a voluntary statement of what he thinks he could do.

The Witness: This is not what I think I could do.

The Court: Go ahead.

The Witness: We grossed $122,000. The accounting year, normally, for a theatre, if not using the calendar year, is from September to September. What accounting Mr. Rappaport or any other exhibitor, or Warner Bros., or Loew's Incorporated, use, I don't know; but that was the usually accepted method in the business.

My receipts show on a fiscal year basis through February of one year and through February of the next year. I gave the 1950 of the Hippodrome and Town Theatres, because I assume it was from September, 1949, to September, 1950, which closely resembled, or resembled more closely, the period of time that I was trying to compare in my own theatre. If you wish, we can examine the 1950-51 in the same light.

But, to go back to the fact that we charged an admission price at that time of 40 cents, including tax, which gave us 33 cents net, the Town and the Hippodrome—I think the Hippodrome charged 70 cents, although I am not positive. But give them 65 cents, which is 54 cents net, which is 14 cents per admission more than I charged, which [fol. 394] would be 42 per cent or 43 per cent more. If you take that 43 per cent and add it to our $122,000 of actual gross you would come up with a much greater amount of gross even though we were playing on a day and date policy with a theatre a mile away; or suppose we had a run in our own area, not this sort of run, but with a clearance over the other theatres, certainly we could have grossed considerably more than that. But, as Mr. Raftery has said, that is mere speculation. We would have grossed more if we projected the admission price which we would have charged. We would have charged downtown prices if we had day and date with downtown. That comes to a figure greater than the gross of the Town or the Hippodrome Theatre for that year.

Mr. Raftery: I move to strike out his answer. It is pure speculation, not based upon any figures or books or

records of either the Hippodrome or the Town; and it is entirely hearsay on the part of this witness.

The Court: He used admission tabulations.

Mr. Raftery: No; we haven't any admission tabulation. I just looked up the record.

The Court: He has given it in his testimony. He spoke hypothetically of figures, but he matched them with figures, or he has used the figure he said he would have charged. [fol. 395] I will allow it.

Mr. Raftery: An exception, if Your Honor please.

By Mr. Rome:

Q. If you had had access to first-run pictures, how many pictures a year would be needed for the operation of the Crest Theatre?

Mr. Raftery: That is objected to. How would he know?

The Court: I did not hear that.

Mr. Rome: I asked how many pictures would be needed by the Crest Theatre if it were to have access to first-run product. Mr. Raftery has said he wonders how he knows. I think the witness' answer will amply demonstrate it.

The Court: That is a good deal more speculative, because it will depend upon the character of the picture, what the public thought of it, how much it had been advertised, the appeal it had emotionally and in every other way, whether a reproduction of a famous play; there are many, many factors which would enter into it.

Mr. Rome: It would range within certain limits.

The Court: I will allow the witness to give the general estimate. I think, as the operator of the theatre, he is entitled to that.

The Witness: As you have said, Your Honor, it is very true it depends upon the excellence of the picture.

The Court: Not always on the excellence, but notoriety,— [fol. 396] doesn't it?

The Witness: Quite frequently. I would say anywhere between 25 or 35 to 52 pictures a year. I cannot play any more than 52, because the policy would be on a week basis. The number less than 52 would depend solely upon the box

office value of the picture. It may be anywhere from 25 to 52.

By Mr. Rome:

Q. If your theatre were to play first run pictures, how many more prints of film would that make necessary to be furnished to the City of Baltimore?

A. One, if my theatre played first run, if there is only one print being played downtown.

Q. How many theatres a day in Baltimore play the first subsequent run on the same date?

A. Between 22 and 30, depending upon the picture.

Q. Meaning, as you have testified, each one of those theatres means a print of the picture?

A. Yes. That would be anywhere, let us say, from 22 to 30 prints of the picture simultaneously.

Q. What clearance would you ask for the Crest Theatre if it were to have access to first run pictures?

A. The same clearance as downtown now enjoys,—with the exception of the Parkway situation—and I believe that that clearance could be lowered as time went on.

Q. There has been some statement made that you were [fol. 397] attacking the system of run and clearance. Are you levelling any attack against the system of run and clearance?

Mr. Watkins: He agreed with the clearance and run.

Mr. Rome: I will withdraw the question and put it in this way:

By Mr. Rome:

Q. Are you making any attack on the system of run and clearance in the City of Baltimore?

A. No; runs and clearances, basically, are all right; but they are not all right when they set a definite pattern whereby nobody can come in and nobody can change it, or where people are completely excluded from doing business.

Q. Would the granting of first run product to your Crest Theatre hurt in any way the downtown first run theatres?

A. No, sir.

Q. Why not?

A. For the first I outlined before, that the largest grossing theatre downtown would only be within 3 per cent competition. Assume it is 3 per cent; they would not draw more than 3 per cent from our area. That is not substantial competition. With plenty of people in our area, we would do more than that. I think this bears out what Mr. Lichtman said in his article that has been introduced here, that there is a great loss of motion picture revenue from [fol. 398] people who are the lost audience of the motion pictures. It is not the many other things they talked about; it is this lost motion-picture audience. And that is caused by the rigid control of the first run pictures in the downtown area, making it inconvenient, and sometimes impossible, to go downtown to see them, instead of bringing them out where people can see them conveniently.

Q. Would the granting of first run product to the Crest Theatre hurt the other theatres that are located in the immediate neighborhood of the Crest Theatre?

A. Theatres playing subsequent to the Crest Theatre would be helped. They would be helped because of the large advertising that we would do in the area that would bring the picture to the attention of more people in our area, and its attributes, and also by word of mouth of a larger number of people in our area who saw the picture. That can only help it; it can't hurt it.

Q. Would the granting of first run product to the Crest Theatre have any effect on the public, in your opinion?

A. It would be much more convenient for the public; and I think we would get back into the theatre a great number of the audience that has been lost,—where it would not be necessary for them to make a journey downtown through the traffic and then try to find a parking place, if they could, at expense. They could come to the theatre and park in [fol. 399] our free parking area. And, also, it is more convenient for them, because they do not have to drive through the congested traffic in the congested area.

Q. What you have just said with regard to the convenience it would be to the public from playing first run at the Crest Theatre would be equally true of any other theatre located outside of the downtown area of the city, that is, which had access to first run product?

A. Yes, as long as they have the parking facilities and everything necessary.

Q. The two defendant companies that own theatres downtown are Warner and Loew's. Do any of the other distributing companies which are defendants in this action own any theatres, to your knowledge, Mr. Myerberg?

A. No, sir.

Q. In Baltimore?

A. In Baltimore, no, sir. They own them throughout the country. They own many theatres, and it goes into the thousands throughout the country,—the Big Five.

Mr. Raftery: I object. The question was: do any of these defendants other than Warner and Loew's own theatres in Baltimore. The witness says "no".

By Mr. Rome:

Q. Do any of the defendants own theatres anywhere apart from Baltimore?

Mr. Raftery: I object. We are trying the Baltimore case. [fol. 400] Why go off on side issues?

Mr. Rome: On the contrary, sir, it goes to the very vital issue.

The Court: I will allow it.

The Witness: Yes, sir, they do. They own thousands of theatres throughout the country.

By Mr. Rome:

Q. What defendants do own theatres?

A. Those known as the Big Five: Loew's Incorporated, Warner Bros., Paramount, RKO——

Q. You mentioned Loew's, Warner Bros., Paramount and RKO. The other one is Fox, isn't it?

A. That is correct; it is Fox.

The Court: We will take a 10-minute recess now, gentlemen.

(After a short recess, the following occurred:)

[fol. 401] The Court: Very well.

By Mr. Rome:

Q. Mr. Myerberg, you have referred to the fact that in your opinion the population of 125,000 people was enough to support a first-run theatre. Has there been anything else that has confirmed your view in that regard?

A. Recently Loew's Incorporated placed an ad in all the trade papers requesting theatres in towns of 100,000 people or more to contact them, who were interested in playing their great, new picture Quo Vadis. And we contacted them within the prescribed period of time and received a letter in return stating that the picture had already been sold in Baltimore. But they did say in their ad that they wanted it from towns of 100,000 population or more, which definitely shows that 100,000 or 125,000 people, within the motion picture industry——

Mr. Raftery: I move to strike out the last part beginning "which definitely shows."

The Court: Well, the witness means indicated to him. I will allow it.

Mr. Rome: If the Court please, I offer in evidence as plaintiff's exhibit No. 87 a copy of a trade paper known as the "Motion Picture Daily," for the date Wednesday, December 26, 1951, which contains an ad run by Loew's Incorporated applicable to the picture Quo Vadis, which contains the following statement:

"We repeat the thought previously expressed that the [fol. 402] initial engagement of Quo Vadis should be confined to first runs in cities of approximately 100,000 population. We believe that the soundest plan of distribution is to open this picture first in the exchange centers in each city of the United States."

The ad goes on to say: "We are now ready to receive offers for the first-run exhibition of Quo Vadis in situations within the approximate category mentioned above. Any exhibitor having a suitable theatre who is interested in exhibiting the picture in any of those situations should notify our nearest exchange of that interest within 7 days after the publication date of this announcement. His re-

quest will receive immediate consideration and the proper form will be forwarded to him on which to make his offer."

"(Signed) Loew's Inc."

The Clerk: Plaintiff's exhibit No. 87.

(Trade paper "Motion Picture Daily," Wednesday, December 26, 1951, was marked Plaintiff's Exhibit No. 87.)

Mr. Rome: I offer in evidence, sir, as plaintiff's exhibit No. 88 a copy of a letter dated January 2, 1952—that, members of the jury, having been dated December 26th,—addressed to Loew's Inc., New York.

"Gentlemen:

"Our client, Theatre Enterprises, Inc., which owns and operates the Crest Theatre in Baltimore, Maryland is [fol. 403] interested in exhibiting your picture 'Quo Vadis' either on an exclusive first-run basis in the City of Baltimore or on a day and date basis with other theatres which may perhaps exhibit that picture in Baltimore.

"In accordance with the invitation contained in advertisements published by your company we are hereby requesting you to forward at once the proper form on which Theatre Enterprises, Inc., may submit its offer of terms for the licensing of this picture.

"Yours very truly,

"(Sgd) Edwin P. Rome

"For Gray, Anderson, Schaffer & Rome."

The Clerk: Plaintiff's Exhibit No. 88.

(Copy of letter, January 2, 1952, from Edwin P. Rome to Loew's Inc., was marked Plaintiff's Exhibit No. 88.)

Mr. Rome: I offer in evidence, sir, as plaintiff's exhibit No. 89 a letter on the stationery of Loew's Incorporated, New York, dated January 7, 1952, addressed to me.

"Dear Mr. Rome:

"Your letter of January 2nd, addressed to Loew's Incorporated regarding the exhibition of Quo Vadis at the Crest Theatre, Baltimore, Maryland, has been referred to me as an attorney for the company.

"Apart from the inadequacy of the Crest Theatre for [fol. 404] the pre-release first-run showing of Quo Vadis in Baltimore, we cannot comply with your request as Quo Vadis has already been booked to open at our own Century Theatre on January 16, 1952.

"Very truly yours,
"(Sgd) Jay M. Eisenberg."

The Clerk: Plaintiff's exhibit No. 89.

(Letter, January 7, 1952, from Jay M. Eisenberg to Edwin P. Rome, was marked Plaintiff's Exhibit No. 89.)

By Mr. Rome:

Q. So that actually, Mr. Myerberg, we received on your behalf an answer from Loew's Incorporated turning down your request for an opportunity——

Mr. Raftery: The letter speaks for itself. He is reading what they said, that the Crest Theatre was inadequate and they had it booked at the Century.

Mr. Rome: I would like an opportunity, if I may, to finish the question to the witness. I wanted to bring out, sir, the fact that although the ad that ran in the trade paper called for any suitable theatre to apply within 7 days, that within this 7 days we had already heard from Loew's Incorporated that this picture had already been booked in Baltimore.

The Court: I will allow the question.

By Mr. Rome:

Q. It is a fact, is it not, Mr. Myerberg, that although [fol. 405] the advertisement of Loew's Incorporated inviting any exhibitor having a suitable theatre in a city with a population of over 100,000 to apply within 7 days of the date of the ad, we, as your attorneys on your behalf, had already received a reply from Loew's within the 7 days saying that Quo Vadis had already been sold and booked for the Century Theatre, Baltimore, Maryland?

A. Yes, sir, and that did, the inquiry, as I remember, was not only for exclusive run but for day and date run.

We felt we could exhibit it at the same time as the Century Theatre, or if they desired we play it exclusively, we would play it exclusively.

Mr. Raftery: I have been wondering where the 7 days are involved in your last question. I wish the Reporter would read that last question, because the ad was December 26th. Mr. Rome's letter is January 2nd. The turndown is January 7th. I do not know, but that sounds like 12 days to me, not 7.

Mr. Rome: The offer, sir, had been submitted within the 7 days, and I misspoke. You are quite right, Mr. Raftery. I apologize, sir. The reply from Loew's is dated, as appears there, sir, and I withdraw that statement that we had received a reply from Loew's within the 7 days' time. But it remains a fact that Loew's had already booked the picture Quo Vadis at that time in accordance with that letter.

[fol. 406] Mr. Boyd: It does not remain a fact at all, if Your Honor please. There is no evidence in this case as to when, prior to January 7th, Loew's had booked that picture. I think it is time Mr. Rome restricted himself to the facts. He has misstated them.

The Court: Only the letter stated as of that date there had been a prior booking.

Mr. Boyd: There is no implication it was any less than 7 days, and Mr. Rome seeks, I understand, to interpret it as less than 7 days the picture had already been booked.

The Court: I understand that he had retracted that statement.

Mr. Rome: That is exactly right.

Mr. Boyd: I think the retraction should stop there and not have any further explanation.

Mr. Rome: I insist upon the fact the letter, within 7 days, sought a reply in accordance with the ad, and the opportunity to get the forms from Loew's Incorporated.

I apologize to the gentlemen for my misstatement.

The Court: In other words, you mean apparently they did not conform with the advertisement by not waiting to consider it? They did not say they waited to consider all

applications within the 7 days, by the tone of their letter.

Mr. Boyd: I think that is exactly what it means, and [fol. 407] I think the facts will not prove that point nor that observation. All they have is a letter dated January 7th, which is well more than 7 days after the ad saying it has already been booked. Now, there is no implication in that at all they did not wait the 7 days.

The Court: Well, I think perhaps you are right, but it is also susceptible of the other interpretation. It is rather poorly worded, the last sentence, apart from the inadequacy, and so forth, "we cannot comply with your request as Quo Vadis has already been booked to open at our own Century Theatre."

Mr. Boyd: It could have been on the 6th.

The Court: Mr. Rome meaning that if it did not carry his interpretation they would have said: "Your application duly received and considered but the award has been made to somebody else," rather than saying it has already been booked, which meant to imply that his application was never considered. Is that what you mean?

Mr. Rome: Yes, sir.

The Court: I think it is that construction, but it is what the letter meant. It is rather inartistic.

Mr. Rome: I also extend my apologies to the Court for the statement I made.

If the Court please, I should like permission to read to the members of the jury and to the Court certain answers [fol. 408] furnished by some of the defendants in their interrogatories with regard to the gross admissions of the downtown theatres as reported to the defendants by the various exhibitors.

The Court: Are these lengthy?

Mr. Rome: No, sir.

The Court: Very well.

Mr. Rome: Members of the jury, Loew's Incorporated answered certain supplemental interrogatories, one of which inquired as follows:

"State year by year the total income received by the Loew's Century Theatre during the years 1948, 1949 and 1950, excluding admission taxes."

Answer by Loew's Incorporated:

"For the year 1948, $572,014.28; for the year 1949, $497,317.33; for the year 1950, $452,036.96."

Interrogatory number 10, members of the jury, inquired as follows:

"State year by year the total income received by the Loew's Valencia Theatre during the years 1948, 1949 and 1950, excluding admissions taxes."

Answer:

"For the year 1948, $136,836.77; for the year 1949, $125,457.00; for the year 1950, $118,506.84."

A similar interrogatory, members of the jury, was ad- [fol. 409] dressed to Warner Brother Circuit Management Corporation as to the Stanley Theatre, and it was answered in the follwing manner as to the Stanley Theatre:

"For the fiscal year ending August 28, 1948, boxoffice receipts of $498,378.17; miscellaneous income for that period of time is shown as $6,193.60; for the fiscal year ending August 27, 1949, boxoffice receipts of $396,046.59, with miscellaneous income being shown as $6,174.61; for the fiscal year ending August 26, 1950, boxoffice receipts reported as $362,083.17, with miscellaneous income being shown as $7,947.40."

A similar interrogatory was addressed to Twentieth Century-Fox Film Corporation, which answered as follows:

"This interrogatory requests the total amount of admissions paid to each of the theatres to which Twentieth Century-Fox Film Corporation licenses its pictures on first-run, in volume, for the years 1948, 1949 and 1950. Twentieth Century-Fox Film Corporation does not keep records which would enable it to give 'the total amount of admissions' paid to each theatre to which it licenses its pictures on first-run in Baltimore during that period. It does, however, have the boxoffice receipts reported by the exhibitor on pictures licensed on a participation or a percentage basis.

"The information reported by the exhibitor, it is presumed, does not include admission taxes. Set out below are the [fol. 410] total boxoffice receipts for the pictures licensed first-run in Baltimore for the years 1948, 1949 and 1950, for which the requested information is available.

"On most pictures which were licensed on a flat rental basis, Twentieth Century-Fox Corporation has no information as to the boxoffice receipts. Occasionally boxoffice receipts were reported for flat pictures. Where an exhibitor submitted such a report the receipts are included below:

"As to the year 1948 the total boxoffice receipts reported for the New Theatre, $403,012.14. For the Mayfair Theatre, $9,293.35; for the year 1949 for the New Theatre, $359,469.66; for the Mayfair Theatre, $27,268.91; for the Valencia Theatre—"just a statement—" 'flat rental of one picture.' For the year 1950 the total boxoffice receipts of the New Theatre reported as $287,651.3[illegible]; for the Mayfair Theatre, $5,536.20; Keith's Theatre, $5,166.84; the Little Theatre, $910.48; the Hippodrome Theatre is reported as having one picture at a flat rental basis, no figures being given."

A similar interrogatory was addressed to RKO Radio Pictures, Incorporated, which answered as follows:

"The following list for the seasons 1947 and 1948, for 1948 and 1949, and for 1949 and 1950, indicates the admissions paid to each of the theatres listed in answer to Interrogatory 1—" that is those theatres to which they licensed first-run pictures in Baltimore "—while a film [fol. 411] distributed by RKO Radio Pictures, Inc., was being exhibited in the indicated theatre. This list is limited to films licensed on percentage terms. This amount indicated does not include admission taxes.

"For the Hippodrome Theatre for the season 1947-1948, a total amount of admissions $117,683.97; for the season 1948-1949 as to the Hippodrome Theatre, $23,371.72; for the season 1949-1950, $07,981.80; for the Town Theatre for the season 1947-1948, total amount of admissions, $263,173.25; for the season 1948-1949, $224,264.00; for the season 1949-1950, $124,035.93."

Again a similar interrogatory being addressed to Paramount Film Distributing Corporation, which was answered in the following manner:

"The total gross receipts received on the first-run exhibition of pictures distributed by this defendant or an affiliated or predecessor company at each of the theatres named in the answer to Interrogatory No. 1 for each of the years 1948, 1949 and 1950, were as follows:

For the year 1948 as to the Keith Theatre $227,280.60; for the year 1949 as to the Keith Theatre, $123,356.32; for the year 1950 as to the Keith Theatre, $130,122.00; for the year 1948 as to the Stanley Theatre, $51,501.40; for the year 1949 as to the Stanley Theatre, $66,143.74; for the year 1950 as to the Stanley Theatre, $104,338.68; as to [fol. 412] the Mayfair Theatre in the year 1948, $43,749.75; in the year 1949 as to the Mayfair Theatre, $16,935.66; and in the year 1950, $23,318.25."

There was reported for the year 1950 at the Little Theatre, total gross receipts of $13,096.00. This added that the amount set forth in the sub-division "A" which I have just read, does not include admission taxes.

A similar interrogatory having been addressed to Columbia Pictures Corporation, it was answered as follows:

"The gross admission receipts exclusive of admission taxes reported to have been received from theatres, from exhibition in Baltimore on first-run of such of this defendant's motion picture features from which film rentals were computed as a whole or in part of gross receipts were as follows:

"For the Hippodrome Theatre for the season 1948-1949, $109,328.00; for the year 1949-1950, $144,563.00; for the season 1950-1951, $22,567.00; for the Town Theatre, the season 1948-1949, $43,024.00; for the season 1949-1950, $36,401.00; for the season 1950-1951, $75,501.00; for the Mayfair Theatre for the season 1948-1950, $1,799.00; for the season 1950-1951, $11,745.00; for the Little Theatre for the season 1949-1950, $3,838.58; for the season 1950-1951, $1,292.00."

The Court: I would seem at least to the Court that those [fol. 413] figures require some additional explanation be-

cause of the overlapping of the theatres with respect to the names of the apparent owners. Do you see what I mean?

Mr. Rome: Yes, sir, I do.

The Court: Cannot you make that clear? In other words, there were five owners, I believe: Loew's, Warner's, Paramount, RKO and Fox.

Mr. Raftery: No. There is Loew's, RKO, Mr. Izzy Rappaport owns the Hippodrome and Town, and he is not here, his books are not here. Mr. Schaeberger owns the Keith, and a man named Hickey I think controls the Mayfair.

The Court: I am just trying to go by what Mr. Rome said. Maybe I have given some of the names wrong, but you did give the figures with respect to Loew's, did you not?

Mr. Rome: Yes, sir.

The Court: And you did give them with respect to Paramount?

Mr. Raftery: No, Warner's.

The Court: Warner's.

Mr. Raftery: Those are the only two accurate ones, the rest are inaccurate.

The Court: I am not talking about whether or not they are accurate or inaccurate. I am just trying to get the testimony cleared up.

You did give them for Fox and RKO, did you not?

[fol. 414] Mr. Rome: That is right, sir.

The Court: The point I am making here, and perhaps it confuses the jury, you gave figures relating to several theatres under each of those names, and then they were duplicated.

Mr. Rome: The explanation of that is——

The Court: The names of the theatres were duplicated. You see what I mean?

Mr. Rome: Yes, sir, indeed I do, yes, sir.

The Court: Now, can you not have that cleared up through the witness?

Mr. Rome: Yes, sir, I would be glad to do that.

Mr. Raftery: That is the point of my objection. The witness is not the one who could clear it up.

The Court: Maybe counsel can.

Mr. Rome: Sir, If I may take a moment, I think it can be clarified very readily.

As to the Stanley Theatre, we have figures now from Warner Brothers Circuit Management, which actually runs the theatre, which figures give the actual gross admissions. We have given that.

As to the Century Theatre, the Valencia Theatre, we have those figures coming from Loew's Incorporated, which actually run those two theatres. And we have the total grosses as to those two theatres.

[fol. 415] As to the New Theatre, the New Theatre, as has been brought out in the testimony, exhibits Fox product alone, and we have the figure reported by the exhibitor in the New Theatre to the Twentieth Century-Fox Corporation as to its total gross admissions for those pictures, on which he paid a percentage of the gross receipts to the distributor, it being important to bear in mind, sir, that the distributor is interested in finding out from the exhibitor what gross he earned, because the return to the distributor is dependent upon a percentage of the gross.

The Court: I do not know that I have made myself clear, and your answer does not seem to give me the answer I want. I will give you an example of what I mean. I think this is correct. You referred as an example, to the Hippodrome Theatre three different times, at least three different time, in referring to what were apparently three different owners.

Mr. Rome: No, sir, not as three different owners, but the three different companies that supplied the Hippodrome Theatre with first-run product. The Hippodrome Theatre, sir, and the Town Theatre, and the Keith Theatre exhibit product from more than one company and, therefore, what we have attempted to do is to give the gross admissions as reported to each one of the distributor companies which has had its product exhibited in the theatre.

[fol. 416] The Court: Rather than lump them all under the theatre?

Mr. Rome: They will have to be added together in order to get——

The Court: That explains it.

Mr. Rome: That is right.

The Court: I assumed it was something like that.

Mr. Rome: Adding them together gives the gross for each one of the other theatres, yes, sir.

So there is no misunderstanding about it, sir, I would like to state for the record that we do not have from Universal the total amount of gross receipts, gross admissions reported by the Keith Theatre to Universal and, consequently, the figures as to the Keith Theatre, if they were to be added together on the basis of what I have already stated, would be admittedly incomplete. But as will come out subsequently, sir, we have attempted to base our calculations as to those theatres on which there can be no substantial variations in the figures, the Loew's Theatres, the Warner Theatres, as to which theatres, as admitted by Mr. Raftery, are indisputable. The New Theatre is equally, we believe, indisputable because it exhibited only Fox products, and it reported to Fox what its total receipts were, and that is equally true as to the Town and Hippodrome Theatres which exhibited RKO and Columbia pictures.

[fol. 417] The Court: As I understand it, your answers to my specific question, as you have given these figures, are the figures of the gross income to the various distributors you have named, to the various theatres.

Mr. Boyd: No, sir.

Mr. Rome: The gross receipts reported by each exhibitor in the downtown first-run theatres to each distributor from which it licensed first-run product in the City of Baltimore.

The Court: Yes. That is what I have said, the gross receipts to the distributor. It is the report that the distributor gets on what the respective theatre took in on the pictures given by the respective distributors or licensed by the respective distributors?

Mr. Rome: That is correct.

Mr. Raftery: And so to straighten Mr. Rome out again, he said he does not have an answer from Universal. I find that on the 14th of November, 1951, the Universal's answer was served showing what the film rentals, only, were.

Mr. Rome: Exactly, not gross admissions, which was the reason for my statement to the Court.

Mr. Raftery: I just wanted to know the fact.

Mr. Rome: I haven't made a mistake.

Mr. Raftery: But the important thing I rose to speak about is the figures of theatres like Keith, the Hippodrome [fol. 418] and others, other than the Loew's and Warner houses, they do not reflect the gross receipts on pictures that have played on flat rental, or pictures that have played, or they may have played from other suppliers than the eight defendants in this case.

Mr. Rome: There is not any dispute about that, sir. I thought it had been brought out in the answer—only as to the films on which, the distributors received a percentage of the receipts as film rental, but I think it was generally recognized in the film industry that the great majority of films are licensed on a percentage basis, sir.

The Court: You were talking only of first-run pictures.

Mr. Rome: That is right, sir, only the first-run pictures.

The Court: Very well.

By Mr. Rome:

Q. Mr. Myerberg, I hand you an undated letter or report on the stationery of A. William Isaacs Company, and ask if you can identify what that is?

A. Yes, sir, this is a statement as to the operations of the Crest Theatre for the year February 26, 1949 to February 28, 1950.

Q. Who is A. William Isaacs?

A. He was a certified public accountant who analyzes the Crest Theatre account.

[fol. 419] Q. He audits the books of Theatre Enterprises, Incorporated?

A. Yes, sir.

Q. This report was submitted to you, by me to you as president of Theatre Enterprises, Incorporated?

A. Yes, sir.

Q. And it was prepared, to your knowledge, on the basis of the books and records of the Theatre Enterprises?

Mr. Raftery: How do we know that? Here is a piece of paper with figures which he is substituting for an auditor's report.

Mr. Rome: I think this shows that as the president of the company he is perfectly in a position to testify that the firm of certified public accountants which audited the

books of the company prepared this summary report of the statement of operations of the company, and submitted it.

The Court: I will allow it.

Mr. Rome: I offer that in evidence, sir, as plaintiff's exhibit No. 90, a report headed: "Statement of operations Theatre Enterprises, Incorporated, for the period February 26, 1949 to February 28, 1950.

[fol. 420] Mr. Raftery: May I state my objection for the record: I object to that as not the best evidence.

The Court: Do you mean you want the auditor here?

Mr. Raftery: It is a summary report.

The Court: If the president of the company says it is a summary of the auditor's report given to him, that you are not satisfied with that, and you want the auditor and all the books?

Mr. Raftery: Your Honor, I examined this gentleman on deposition and tried to get from him, as president of the company, something about the figures. So did Mr. Watkins. He said he knew nothing about the figures and we would have to get it from Mr. Isaacs.

Mr. Rome: That is not a completely accurate statement.

Mr. Raftery: We have since tried to get the auditor, I mean, an audit of the company, and we haven't been too successful. I admit they cooperated in every way, and we did the best we could. If this witness will vouch for the correctness of this report, and will acquaint himself so he can be particularly cross-examined on the financial structure of this company, I will withdraw any objection. I am not trying to impede, or bring auditors.

The Court: I do not suppose the president of the average company which employs auditors can vouch for the figures [fol. 421] given him by the auditors. The most they can do is to try to employ a competent auditor, and the figures are supplied by the auditor and given to him, and those are the figures. If you make a showing that you want the auditor here, and all the books, then you are entitled to it; but pending that, I think the president of the company ought to be allowed to submit what I understand is a summary of the audit given to him, which he believes to have been honestly made. Isn't that what you are offering it for?

Mr. Rome: That is perfectly correct, sir.

The Court: If it is inaccurate, you have the right either to cross-examine this witness, or the auditor, to show that.

Mr. Raftery: I will withdraw any objection because of the absence of the auditor. That is not what we are after. We want to be able, when we get to it, to inquire into—if this witness knows the things we want——

The Court: I suppose he does.

Mr. Raftery: If he doesn't, we will ask them to produce the auditor.

The Court: Very well.

Mr. Rome: If I may, sir, it will take a brief moment to read pertinent portions of this report.

The Court: Very well.

Mr. Rome: For the period February 26, 1949, to Febru- [fol. 422] ary 28, 1950, there is shown as income:

| | | |
|---|---|---|
| Box Office Admissions | $122,796.86 | |
| Income from Concessions | 5,239.49 | |
| Miscellaneous Income | 283.72 | |
| | | $128,320.07 |

There is shown or reported as expenses:

| | | |
|---|---|---|
| Film Costs | $45,859.21 | |
| Freight and Express | 589.47 | |
| Stage Attractions | 440.00 | |
| Payroll | 29,919.68 | |
| Rent | 33,000.00 | |
| Repairs | 27.17 | |
| Taxes and Licenses | 2,055.16 | |
| Depreciation | 178.96 | |
| Advertising | 11,753.44 | |
| Dues and Subscriptions | 751.00 | |
| Entertainment | 662.76 | |
| Heat, Light, Power and Water | 6,709.04 | |
| Insurance | 1,264.18 | |
| Miscellaneous Operating Expense & Supplies | 3,997.63 | |
| Service Charges—Equipment | 864.86 | |
| Traveling Expenses | 290.00 | |
| Telephone and Telegraph | 751.39 | |
| Other Expenses | 1,610.64 | |
| | | $140,733.59 |

[fol. 423] Showing a loss of $12,413.52.

Mr. Raftery: For what period was that?

Mr. Rome: February 26, 1949, to February 28, 1950.

Mr. Raftery: The first full year?

Mr. Rome: That is right, sir.

(Statement of Operations, Theatre Enterprises, Inc., February 26, 1949 to February 28, 1950, was marked Plaintiff's Exhibit No. 90.)

By Mr. Rome:

Q. Mr. Myerberg, did Theatre Enterprises, Incorporated, pay any executive salaries to any of its officers or directors?

A. No, sir. Those salaries are only the operating salaries in that statement, as I understand, the salaries of the manager, ushers, cleaners, and so forth.

Q. There is an item there shown as income from concessions. What has that reference to?

A. That represents the candy stand, the drink stand, and so forth, in the theatre.

Q. There is shown expenses of $440 for stage attractions. What has that reference to?

A. We were running a little kiddie show on Saturday morning, and that represents the cost to take care of that, for that period of time. It was a children's amateur stage show.

[fol. 424] Q. There is shown an item of $33,000 for rent. What does that represent?

A. That was the rent Theatre Enterprises was to pay Pem Construction Company for the theatre, the lease on the theatre.

Q. There is shown an item of $11,753.44 for advertising. If you were to have access to first-run pictures, would your advertising expense go up in any way?

A. Yes; that would increase five or six hundred dollars a week.

Q. There is shown here an item of $6,709.04 for heat, light, power and water. It has been testified that the Crest Theatre is part of the Hill Top Shopping Center. Did any of those items have reference to any of the shops which are part of the center?

A. It only has reference to the two or three stores that are located in the theatre building and are served by the heating plant of the theatre. However, during that period of time covered by this statement, the stores were unoccupied and the entire amount is attributable to the theatre.

Q. You have already testified, Mr. Myerberg, but will you please give it again, what your weekly operating expenses for the Crest Theatre on this present basis come to?

A. For that period?

[fol. 425] Q. Yes.

A. Somewhere between $1,800 and $1,900 per week, without film.

Q. Would those operating expenses on a weekly basis be affected in any way if you were to have access to first-run pictures at the Crest Theatre?

A. The only substantial way that would be affected would be through the increased advertising, and perhaps a few more ushers to handle the crowds that would come.

Q. Is there any other way in which your operating expenses would be affected up or down?

A. No, sir.

Q. Despite the amount of gross admissions taken in at the box office, has it been a fact that the Crest Theatre has actually operated at a loss from the period of its opening?

A. Yes, sir.

Q. Some statement has been made by Mr. Raftery concerning the fact that the Hill Top Shopping Center was not a planned shopping center, as is the Edmondson Village. What is your statement with regard to that, Mr. Myerberg? Was it a planned center?

A. I don't know what Mr. Raftery meant by a shopping center, but the shopping center was a completely planned shopping center. It is true, it is not as large as Edmond-

[fol. 426] son Village, and it is a different design than Edmondson Village; but it is our impression that the planned shopping center covers the outward appearance of the buildings, all of the brick, the front trim, the granite that is used in it, the design of the canopy—it is all designed, it was all designed, at one time, as a planned shopping center, along with the parking areas, and so forth. I don't know

what Mr. Raftery meant, as I said before, because the thing was planned by an architect, my brother Julius, who was the architect, at one time to be built as a planned shopping center.

Q. Now, the statement has also been made by Mr. Raftery that Baltimore, in so far as its first-run motion pictures are concerned, is an illustration of the greatest competition in the motion picture industry that one might possibly be able to find. Has it been the fact that there has been the greatest competition in the first-run field in the city of Baltimore?

A. There is great competition for the patronage of each theatre, but there has been no competition whatever between the distributors to license pictures between the theatres.

Q. Will you explain that a bit more?

A. Well, it has been the policy for the New Theatre always to have Fox pictures, except what we call slough [fol. 427] pictures, a very second-grade picture, has always gone into the New Theatre for a period of 20 years, as I testified before. The Hippodrome and Town have always had Columbia and RKO, and it seems incredible, but at the same time they will not give a picture to another theatre where they would have gotten more rentals as exemplified by the fact that some theatres gross more than others, and it seems the distributors, if there was competition between distributors to go into certain theatres, that they would have sent their pictures into the theatres where they would have got the greatest return; but that has been the practice along that line for 20 years, that I know of.

Q. Has there been any change in the personnel of the branch offices in Washington during the period of time that the Crest Theatre opened?

A. Yes; there has been considerable change.

Q. What changes have come about, to your knowledge, with regard to any of these companies?

A. Well, Mr. Benson is no longer with Paramount. Mr. Isaacs is there. Some of the salesmen that had been with some of the other companies are now with different companies. Do you want me to list them? I can list them.

Q. Have there been any changes in the position of branch manager, with the exception of Mr. Benson being replaced by Mr. Isaacs?

[fol. 428] A. Mr. Martin changed to Philadelphia and, unfortunately, subsequently died. Mr. Biersdorf is no longer with Warner Bros. Mr. Rosen has come in to replace Mr. Norris with Fox, and Mr. Norris has moved out. Mr. Minsky, who was then division manager at that time for Fox, is now with Paramount. Mr. Lichtman, who was going a little higher, he was with Metro at one time, and, I think, president of the United Artists at one time, or some executive, is now general sales manager of Fox.

Q. Despite all the changes in the personnel in Washington has there ever been a visit made to your theatre, to your knowledge, or any investigation made of the situation, as to the Crest Theatre in Baltimore by any of the new people who have come in to replace the outgoing personnel in those Washington offices?

A. There may have been, but not to my knowledge.

Q. No one ever came, that you know of?

A. No.

Q. How many changes a week of shows has been the practice at the Crest Theatre?

A. Well, we opened the theatre with the expectation to play, after we couldn't get first-run pictures, to play a policy called four-and-three, playing a picture four days and three days, opening on a Saturday. I think I have explained the thing before, that theatre accounting is [fol. 429] divided into tenths, two-tenths being attributed to Saturday, and three-tenths to Sunday, and one-tenth to each day of the week; so that Saturday and Sunday would represent five-tenths of the week's playing time, or five-tenths of the week's grossing possibilities.

Q. That is generally recognized throughout the industry?

A. Yes. We want to play pictures Saturday, Sunday, Monday and Tuesday, giving the distributor seven-tenths of the week of playing time for the top picture of that week, and for the second-best picture of that week we wanted to give it three-tenths of the playing time, Wednesday Thursday and Friday. We started that policy. We

opened with DON JUAN, a Warner Bros. picture. We opened the theatre Saturday, and we found that only two or possibly three of the companies would go along on a Saturday opening. They wanted to play Sunday opening. That is the way they were distributing their pictures in the city of Baltimore, and that is the way they wanted to continue. The reason Warner Bros. gave us day and date was that at that time the Metropolitan Theatre, which was owned by Warner Bros., or leased by them, the building still having been owned by them, was playing Saturday opening, and they gave it to me. Loew's Incorporated agreed to a Saturday opening, and I think RKO or Paramount—I think it was Paramount—granted us a Saturday opening, but the other companies refused to give it to us. It was quite obvious we could not run on a policy whereby one week we would have to open Saturday, and the next week on Sunday. All of these companies, in a period of time, with the exception of Loew's, refused to give us pictures on Saturday and gave them to us on Sunday. I could never understand that because I am offering them the greatest playing time of the week, and that is shown in the accounting system of theatres. Loew's Incorporated did not continue to grant us a Saturday opening.

[fol. 430]

Q. Excuse me. Saturday and Sunday are generally considered and referred to in the motion picture industry as preferred playing time?

A. Yes, being five-tenths of the week; yes. We were forced to go to a Sunday opening, and we stayed on that Sunday opening, playing pictures on Sunday, Monday, Tuesday and Wednesday, Thursday, Friday and Saturday; that is, Sunday, Monday, Tuesday and Wednesday was one change; and Thursday, Friday and Saturday was another change. We then experimented with three changes a week, and went back to the two changes a week, which we are playing at this time.

Now, there are some cases where we go to the three changes and, that is due to the poor quality of the pictures and we must do that.

Mr. Rome: I call upon you, Mr. Raftery, for a copy of a [fol. 431] letter from Mr. Brecheen to Mr. Zimmerman, of RKO, dated September 16, 1949.

Mr. Raftery: Here it is.

Mr. Rome: If the Court please, I offer in evidence, as Plaintiff's Exhibit 91, copy of a letter on the stationery of RKO Radio Pictures Inc., Washington, D. C., dated September 16, 1949, addressed to Mr. William Zimmerman, RKO Radio Pictures, New York, "Re: Crest Theatre, Baltimore, Md."

"Dear Bill:

"Enclosed, on behalf of the above theatre, is a letter dated Sept. 13, 1949, written to us by Mr. James J. Lindsay, Attorney, of Baltimore, concerning this theatre.

"If you will recall, when the Crest theatre first opened, the exhibitor asked for first run Baltimore, Md. He made a trip to New York together with his attorney and talked to you personally about this matter, after which you wrote him that you would not grant him a first run in the City of Baltimore, but would give him a right to bid in the zone against the Uptown, Avalon and Pimlico theatres. We, accordingly, instituted bidding. Then, the exhibitor wouldn't offer any bids, and we found ourselves without a customer either at the Crest or at the Uptown, Avalon or Pimlico theatres. We then discontinued bidding, and we [fol. 432] sold one or two pictures to the Crest theatre, and we have gone right along selling the Uptown, Avalon and Pimlico. Since that time we have been unable to make many deals with this exhibitor because he will only negotiate for a picture from us when he can't buy one elsewhere. He wants to change our pattern to release pictures Saturday opening straight 21 days after first run Baltimore. We don't propose to set up a Saturday opening in that City at the present time. It is neither feasible or practicable—and we, therefore, had to make our pictures first neighborhood run available on Sunday opening. Furthermore, we are not going to specify 21 days in any contract.

"Sometimes, circumstances over which we have not control, prevent our making a picture available exactly 21 days after first run. The most this theatre is entitled to is first

neighborhood run on the availability that we set up. Please, therefore, handle it accordingly with this attorney.

"Kindest regards.

"Yours very truly,
"(Sgd) J. B. Brecheen,
"Branch Manager."

(Copy of letter, September 16, 1949, J. B. Brecheen to William Zimmerman, was marked Plaintiff's Exhibit No. 91.)

[fols. 433-434] By Mr. Rome:

Q. Who is the James J. Lindsay referred to in this letter, Mr. Myerberg?

A. He was the attorney who incorporated Theatre Enterprises.

Q. Did you have him represent you with regard to this matter?

A. Yes, sir.

Q. Did he accompany you when you went to New York to see Mr. Zimmerman?

A. No, sir.

Q. Were you accompanied by anyone when you went to see Mr. Zimmerman in New York?

A. No; I went by myself.

Q. This letter refers to some difference of opinion about your playing RKO pictures in Baltimore. Is there any explanation for that?

A. Yes, sir. RKO pictures at that time were of a very poor quality. They had very few pictures that I thought were deserving of playing the Crest Theatre and that I wanted to offer the public. Whenever RKO had a picture of that quality, we played it.

The Court: Well, now, we will take a recess until 2 o'clock.

(Whereupon, at 12:50 o'clock p.m., a recess was taken until 2:00 o'clock p.m.)

[fol. 435] AFTERNOON SESSION

(The Court met, pursuant to the taking of the recess, at 2:00 o'clock p. m.)

The Court: Gentlemen, I have concluded that, while there is a little bit of speculation about it, in all likelihood, we can have one session tomorrow, beginning at 2 o'clock, and probably sit a little later. I do not mean very late, but I think we might sit today until 4 o'clock.

I would like to push this case along as much as I can. I find the Three-Judge suit will not take more, probably, than the morning session; so you will be free tomorrow morning. We will resume again at 2 o'clock.

Members of the Jury and Counsel, we are ready to proceed.

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HARRY D. MYERBERG resumed the witness-stand and, having been previously sworn, testified further on behalf of the plaintiff, as follows:

Direct examination (Resumed).

By Mr. Rome:

Q. Mr. Myerberg, at the time of the luncheon recess, you had been testifying with regard to the playing of pictures in the Crest Theatre opening on Saturday, and that there came a time when that was changed. Now, will you complete the telling of the incidents with regard to that playing of pictures on Saturday and what happened in connection with it?

A. Well, we went to a Sunday opening until about three or four months ago, or maybe five months ago, when all of the distributors, each one of them, uniformly granted Saturday opening in the City of Baltimore. That meant we [fol. 436] could then open a picture on Saturday. However, some of them, I think one or two of them, permitted us to open on Friday, but between that time we opened on Sunday, and now the arrangement is such that we open on Saturday. And they all granted it to us at one time and took it away from us at one time.

Mr. Boyd: You don't mean that, really?

The Witness: Except Loew's Incorporated.

Mr. Boyd: Thank you.

By Mr. Rome:

Q. Now, what is the significance to be attached in your mind to the refusal on the part of the company to permit you to open a picture on Saturday on first-subsequent run?

Mr. Raftery: Why is that pertinent?

The Court: I didn't hear your question. Speak a little louder, please.

Mr. Rome: I asked what is the significance in your mind to the refusal on the part of the company to permit the Crest Theatre to open a picture on Saturday.

Mr. Raftery: I object to it, asking for the operation of his mind. That is not a fact.

The Court: What reasons they gave you, if any, of what you think are the reasons implied in the action.

Mr. Raftery: That is different.

The Witness: I can start back, sir, and say the fact they [fol. 437] refused to give me a Saturday opening.

Mr. Raftery: Your question was limited to other than Loew's?

By Mr. Rome:

Q. Those companies which refused to permit you to open on Saturday, does not include Loew's?

A. Yes, sir, when they refused to give me the Saturday opening, they told me they would rather have a Sunday opening in Baltimore. That is the way they wanted to play it. I could never reconcile that, because I was offering them much more playing time. I was offering them Saturday, Sunday, Monday and Tuesday, 7/10ths of the week for their picture and they wanted less playing time, and I couldn't reconcile that, and the reason they did that, they wanted to control the system. That is why they did it to us, when they came to getting playing time.

Q. When you refer to 7/10ths of the week, you have reference to 7/10ths of the movie week?

A. 7/10ths of the movie week, yes, sir.

Q. The week being divided into 10ths, as you explained.

A. That is as I have explained before.

Q. How many shows a week are given in the Crest Theatre, Mr. Myerberg?

A. I would say 35 or 36.

Q. Why would there be the difference?

A. On Saturday we open a little earlier and get in [fol. 438] an additional show most of the time. On Sunday we open a little later. It would be 35 or 36 shows, depending upon the feature.

Q. Have you ever been able to license a picture in your Crest Theatre on a flat film rental?

A. Are you speaking of subsequent runs?

Q. Yes.

A. No, sir.

Q. All of the pictures licensed to the Crest Theatre have been on a percentage of the gross as the film rental?

A. Yes, sir.

Q. Do you know of your own knowledge in the City of Baltimore whether many pictures are licensed on a flat rental basis?

A. I know quite a number of exhibitors in the first subsequent run field, as well as other fields, what they tell me, none of them have a license on first subsequent run other than on a rental basis. There may be some exceptions to that, I don't know, but generally speaking it is on a percentage basis.

Q. Who is Mark Silver, Mr. Myerberg?

A. Mark Silver, until about the first part of 1951, was the Eastern Division manager of United Artists Pictures.

Q. Did he ever have any discussions with you or anyone else, to your knowledge, with regard to attempts to obtain [fol. 439] first-run pictures for the Crest and other theatres located outside of the downtown area in Baltimore?

A. I had two discussions about that with Mr. Silver.

Q. When was this?

A. The first discussion when he was still the Division Manager of United Artists, and the specific picture was The Champion.

Q. Do you recall the approximate time of this conversation?

A. I would say July of 1950 or thereabouts. It may have been July or August, sometime in there, 1950.

Q. What happened at that time?

A. Mr. Silver came to me and asked me whether we would be interested in exhibiting The Champion day and date with downtown and in conjunction with several other theatres located in suburban areas. I said, of course, that that is the thing we have been trying to get, dated before the theatre opened, before we built the theatre. He said: "Well, I will take it up with the New York Office—" he was for it—"and see whether they wanted to handle it that way," and I never heard from Mr. Silver again about it, although I inquired. It opened exclusive downtown in Baltimore. Again I spoke to Mr. Silver and he came to me, but at that time he was no longer employed by United Artists.

Mr. Raftery: I am going to object to conversations [fol. 440] after the man is no longer an employee of the defendant.

Mr. Rome: This has to do, sir, with renewed efforts to obtain products from the company. It is not that Mr. Silver was acting for the company at this time, but simply someone acting on behalf of Theatre Enterprises, Incorporated, in an attempt to license first-run pictures.

The Court: Well, now, read what the question was.

(Whereupon the record was read by the Reporter.)

The Court: What is your objection to that?

Mr. Raftery: That is not the question. He said after I left, after Silver had left United Artists, I had a conversation with him. After the employe left the defendant he said he had something to do with getting Mr. Silver to get pictures for them. Evidently Mr. Silver was——

The Court: I think he is no longer in the employment of the parties.

Mr. Rome: That is correct, sir. He was not in the employ.

The Court: I will exclude it. It could not bind them.

Mr. Rome: We are not seeking to bind any of the defendants with regard to this sir. We are attempting to

bring out the entire effort that was made by the Crest Theatre to obtain product——

[fol. 441] The Court: Well, it is hearsay, giving the conversation had with a person who does not represent any of the parties here in the case. That is hearsay.

Mr. Rome: Very well, sir.

By Mr. Rome:

Q. Mr. Myerberg, did Mr. Silver, acting on your behalf, ever seek to license first-run pictures for the Crest Theatre as well as other theatres in the City of Baltimore?

A. Yes, sir.

Mr. Raftery: Now, how would that be? He is taking the same thing and turning it around and saying that Mr. Silver acted in his behalf. Let him call Mr. Silver to the stand.

Mr. Rome: Very well, sir, I will not pursue it any further.

By Mr. Rome:

Q. What is a sliding scale in the motion picture business, Mr. Myerberg?

A. It is a method of selling pictures or licensing pictures, the right to exhibit pictures.

Q. Will you explain what it is, please? How does a sliding scale work?

A. A sliding scale is basically a percentage of the gross, starting with 20 or 25 per cent of the gross, at a low figure, and graduating up to 50 per cent as the gross increases.

[fol. 442] Q. Let us take as an example the picture "A" is licensed to a theatre on a sliding scale basis. How would that operate in actual practice?

The Court: He has already in the course of his testimony given several examples of that. I recall it a day or two ago. You gave several examples by quoting the rates, did you not?

The Witness: No, sir, I do not believe I did, sir. However, you may be right.

The Court: You spoke about changes in the gross percentage.

The Witness: Yes, sir, but this sliding scale is a little different. If your gross does not hit a certain figure, the scale is down or up. They may be going back to the tenth system of accounting in the theatre business again. There is so much per tenth of playing time, and let us take any figure, say, it is $200 a tenth, that if a picture played on Saturday, the playing time being two-tenths of the week, and in the scale started at 25%, at $200 a tenth, the theatre would then be paying two times $200, or $400 at 25%, and it would then graduate up to 50% in certain stages of the increase of the gross.

By Mr. Rome:

Q. Is there any recognized method in the motion picture industry, to your knowledge, which serves as the [fol. 443] basis for the creation of such a sliding scale for film rental?

A. Well, there are certain methods. One method was the taking of the—usually used by exhibitors and distributors. There was the taking of the expense of the house less film rental and establishing that, and by that 25% film rental the theatre was figured to make 25% of that film rental. If the system of film rental was $100 at 25% of the gross and the theatre was figured to make 25 dollars when they had paid $100 film rental. There were other methods, but I don't know what methods were used.

Q. Is it advantageous to a theatre to have a sliding scale for the basis of its film rental?

A. Yes, sir.

Q. Why is that?

A. On a fixed percentage, regardless of what the picture does, how it is, you pay that fixed percentage. If you pay 40% for the picture, and the picture does not reach 40% of the base, you pay that 40%, but if you buy a picture on a sliding scale it may reach 50%. We are perfectly willing to pay that, because you have a large enough gross to afford to pay it, and if it reaches 25% you pay 25% also.

Q. Does the Crest Theatre operate under a sliding scale from any of its distributors?

A. After the first year of operation we were able to [fol. 444] obtain certain sliding scales.

Q. What about the first year of operation? What happened regarding sliding scales during that period of time?

A. We were trying to get them, but were unsuccessful in obtaining it.

Q. From what companies did you seek to obtain sliding scales?

A. From all the eight companies.

Q. Was there any reason given why you could not be given a sliding scale by any of the companies?

A. I was given as a reason they had to have more experience in the grossing potential of the house. When I set forth that the grossing potential of the house quite frequently was not necessary, they said they wanted four or five months to establish it. They did not do it, however. I also called to their attention they had been playing flat rental pictures in the Uptown Theatre for ten years, when their first picture after that period went in there on a sliding scale without any experience.

Now, Loew's, after a while, it may have been before the year was up, granted us the first sliding scale we had in the theatre.

Q. Thereafter did any of the other companies grant the Crest a sliding scale?

A. Of course the sliding scale was done away with [fol. 445] when we bid on pictures, and that is understandable. There were other companies granted a sliding scale after that period. It was considerably after, I would say it was six months to a year after, after Loew's originally instituted the sliding scale. We are now playing on scale from Universal, Fox, Warner's, and Columbia. RKO and Metro we are bidding on.

I may add here, too, that the establishment of those scales from these other companies was done in a very arbitrary manner.

Q. What do you mean by that?

A. I can recall Fox, when we tried to establish a scale with Fox, we had several very good grossing pictures with

Fox, and they wanted to go along and take the average gross of the theatre and work out our scale. I saw no way I could break them down, when I had not done it for other exhibitors in the city. I said: "Well, let us see what we come to." When we did that, they wanted to share in all pictures we had grossed on.

Q. With whom did you have that conversation?

A. Mr. Norris. Paramount had never given us a scale.

Q. As a result of the inability of the Crest Theatre to obtain access to first-run pictures either on exclusive or day and date basis, has the Crest Theatre operated and suffered damage thereby?

Mr. Raftery: That is objected to. Incompetent, im-
[fol. 446] material, irrelevant and purely speculative.

Mr. Rome: I do not see, sir, how anything could be more relevant to the issue which is before the Court than the fact that this theatre has operated in such a manner that it has not been able to achieve the kind of a gross it would have to achieve under first-run operation. It goes to the heart of the case.

The Court: I will allow it.

Mr. Raftery: If Your Honor please, he has asked the witness to testify to a fact that is wholly within the province of the jury. He says: "Has the Crest Theatre suffered damage?" Now, that is question. He has not asked for any factual thing. He is asking him to say the company has been damaged.

The Court: Well, he has given the figures as showing a loss over the years.

Mr. Raftery: Well, they speak for themselves.

The Court: Well, having given those figures, I think he should be allowed to explain or give his reasons for those losses.

Mr. Raftery: He has testified that the theatre lost $12,000 in operations on first neighborhood run. He is now asking him to say as a result of not having played first-run pictures in the City of Baltimore, either on a day and date or an exclusive basis, have you suffered damage?
[fol. 447] I say there is nothing in the record——

The Court: Well, the whole case is based upon the claim he suffered damage from this. We must not confuse the

legal use of the word "damage" with "damage" as used by the plaintiff who claims he has suffered a loss. The Court in due time will instruct the jury how they should look upon the testimony and what should be the measure of damages, if they should find the plaintiff has been damaged. Those are all factual questions for the jury, but I think the plaintiff is entitled to explain his reasons. The jury may believe them or they may not. That is a different way of putting the question.

I will allow it. Do you understand the question?

The Witness: No, sir. Will the Reporter please read the question?

(Whereupon the question was read by the Reporter.)

[fol. 448] The Witness: Yes, sir, as stated, a great amount of damage.

By Mr. Rome:

Q. If you had had first-run pictures——

Mr. Raftery: To save objecting, may I be considered as objecting to this line of questions and have an exception?

The Court: Yes, an exception all through, and the same ruling.

By Mr. Rome:

Q. If the Crest Theatre had played first-run pictures either on an exclusive or on a day and date basis in the city of Baltimore, would it have earned a larger amount of gross admissions at the box office, in your opinion?

A. Yes, sir; considerable.

Q. You have said that the Crest Theatre suffered damage. Have you been able to estimate an amount of damage that has been suffered as a result of not having first-run pictures?

A. Yes, sir.

Mr. Watkins: Is this day and date, or exclusive, or both?

Mr. Rome: This is either on an exclusive or day and date basis.

Mr. Raftery: I think they should be separated.

The Court: Very well; separate them.

[fol. 499] By Mr. Rome:

Q. Is there any reason, in your opinion, Mr. Myerberg, for there to have been any difference in the amount of gross that your theatre would have earned if it had played on an exclusive first-run basis rather than on a day and date first-run basis?

A. No, sir, because we did not consider ourselves in substantial opposition to downtown. We felt as though we could gross just as much if downtown theatres played with us, or if we played exclusive. It did not change it substantially.

Q. Have you been able to arrive at an estimate based on facts with regard to the amount of damage that you have suffered as a result of the Crest not having played first-run pictures either on an exclusive or on a day and date first-run basis?

A. Yes; we have projected that, by taking a picture, a Metro picture. If we had played that clear, which is on first subsequent run, and played it 21 days after downtown, not on the first-run, either day and date or exclusive, but 21 days after downtown——

Q. You use the expression, you "played this picture clear". What do you mean by that?

A. Clear of the Uptown and Pimlico and Pikes and Avalon Theatres, those in that area; but we thought, we played day and date with the Ambassador Theatre, and we took [fol. 450] that picture and projected the gross of that picture, which came to some 380-some dollars, $380 or $385, one-tenth of playing time. On that basis, we would have done $3,850, approximately, a week.

Mr. Watkins: I dislike interrupting the witness, but I examined this witness by way of deposition in advance of the trial, and there are a number of instances in which he was asked the manner in which damages were computed, and he repeated every time that he did not know how to estimate the damages, did not know how the estimate of damages was made; that he turned the figures over to Mr. Rome, and Mr. Rome exclusively had computed the damages, and he had no knowledge as to how that was done, and that he did not understand them.

The Witness: May I answer that?

The Court: Have you computed the figures you are about to give?

The Witness: As I testified in my deposition, I did not know the legal assessment of damages. I told Mr. Watkins at that time that I had computed certain figures. I had gotten these figures up and turned them over to Mr. Rome, who set forth the measure of damage, what was legally considered to be the measure of damages. That is correct. I do not mean to give any misimpression about that. I did turn those figures over. These figures I am giving now [fol. 451] were compiled by me. I happen to have arrived, in my compiling those figures, at a much larger figure than Mr. Rome did. Mr. Rome brought that figure down within what he considered the legal assessment of damages. That is correct.

The Court: It seems to the Court that we are wasting a good deal of time here in disputing this. The plaintiff has a right to give his testimony as to his claim for damages. Otherwise, there would not be any sense in saying he could bring a suit. The jury may believe he is right, or they may think he is wrong. They may think he is right in whole, or in part, and also, when it comes to the matter of instructing the jury as to the legal measure of damages, it is possible in the case that the jury is instructed that the measure adopted by the plaintiff must be thrown out; but you cannot deny the plaintiff the right to give his figures of his claim, provided it relates to his claim. He cannot bring in another claim, which he has not put in his pleadings, but other than that, he has a right to give to the jury what he thinks is the measure of his damages.

Mr. Watkins: Your Honor, perhaps I should have reserved that for cross-examination. However, it is so clear to me that he had denied any knowledge of damages, or any ability to estimate them, that I thought this was the [fol. 452] appropriate time.

The Court: He has given the explanation now. You can question him on cross-examination, if you want to. Go ahead, Mr. Rome.

By Mr. Rome:

Q. Will you pursue your answer with regard to taking the picture—Perhaps it would be better to start again, and explain what you did.

A. If the Clerk will read the last portion of my statement, I will appreciate it very much.

(Last answer of witness repeated by the Reporter.)

The Witness: At our admission prices, which were over 50 per cent less than the admission prices of downtown, or they were over 50 per cent more than ours. If you would multiply or add 50 per cent of $3,850, it would bring us to $5,200, or $5,300. No—it would be about $5,600. At the downtown prices. But if we are playing that picture at downtown admission prices, we would have grossed around $5,600, or within a hundred dollars of that.

Now, we logically felt that if we were playing a picture day and date with downtown, or exclusive, that we would have increased our business a minimum, taking a conservative estimate, of about 25 per cent. That would bring us up to around $8,000, or $8,200 a week, on the average. Multiplying that by the 52 weeks, would give us four-[fol. 453] hundred-and-some-odd-thousand dollars. Subtracting from that the film rental which we would have had to pay, and taking 35 per cent average, which we feel is fair, of the total gross, as film rental, would bring us down to somewhere around $203,000, or $204,000, or $205,000, and that was the measure of damages that we have claimed.

Mr. Rome: If the Court please, for what I hope will be for the convenience of the Court and jury, and also for my friends on the other side, we have attempted to prepare a brief statement of this, in very simple form, which I should like to submit.

I offer in evidence, if I may, sir, as Plaintiff's Exhibit 92, a copy of the paper referring to a computation of damage based on projecting the gross admissions of the picture called THE STRATTON STORY, and I will ask Mr. Myerberg if he will take this and explain it to the Court and Jury.

The Court: He has already explained it, hasn't he?

The Witness: I have already gone through this, but this gives the exact figures.

The Court: He has done that, without giving the exact figures.

There is one thing which seems to the Court should be in here, if you are going to introduce it in evidence. That [fol. 454] is the date. You do not even give the year in here. The actual gross admissions from The Stratton Story at subsequent-run admission prices, when?

Mr. Rome: I will give that date, sir. THE STRATTON STORY played in the Crest Theatre on July 23rd, 24th, 25th and 26th, 1949.

The Court: I will let you introduce it with the additional information in there.

Mr. Raftery: We object to the introduction.

The Court: Overruled. Are you introducing it now and offering it?

Mr. Rome: Yes.

(Computation of figures by the witness Myerberg on THE STRATTON STORY, was marked Plaintiff's Exhibit No. 92.)

By Mr. Rome:

Q. Mr. Myerberg, was there any other method which was discussed or which was come upon, which served to confirm the estimate of damage which you have just testified to with regard to the projection of THE STRATTON STORY?

A. Yes, sir.

Q. What was that?

A. Well, we went into that matter. We played 35 shows a week, and at each show that we would fill the house, or each day that we would have an equivalent, or the number [fol. 455] of performances which would be an equivalent of a full show, would be 1,600 admissions, with 1,600 seats, and by taking 50 cents as a round figure—the admission price was 54 cents, but taking 50 cents as a round figure, we would have taken in per performance approximately $800.

Now, if we figure that we would have these ten full shows, or the number of people attending our theatre for the entire 35 shows, to be condensed into tenths, we would still have $8,000 a week, or thereabouts, and that came out

to the same figure, after taking the 35 per cent for film. It came out very close to it.

Q. In other words, you mean if you were playing, or if you were to fill your house a minimum of ten times a week on a first-run basis, you would thereby earn or gross at the theatre over $800?

A. Per performance?

Q. Per performance.

A. Yes.

Q. That would be over $8,000 per week?

A. Yes, sir.

Q. And then, multiplying that by the number of weeks in the year, gives you the gross from which you deduct once more an average film rental which would be paid?

A. Yes; I said, using the same computation as I used before, you wind up with almost the same amount of [fol. 456] money.

Mr. Rome: If I may, sir, I should like to offer in evidence, as Plaintiff's Exhibit 93, the summary of this calculation, which sets forth the detail, giving the actual figures.

The Court: Very well.

Mr. Raftery: I make the same objection. It is highly speculative, and there is no basis.

The Court: Same ruling.

(Second statement computed by the Witness Myerberg on The Stratton Story, was marked Plaintiff's Exhibit No. 93.)

By Mr. Rome:

Q. Mr. Myerberg, do you consider the Crest Theatre to be comparable to any of the theatres downtown?

A. I would say it is comparable to all theatres downtown, and in some respects superior to them; and the superior point arises from our free parking area, being a newer theatre, and the new innovations, as I have explained before, that have been introduced into the theatre.

Secondly, I think, if, even, as I mentioned before, under those conditions, or under those conditions that we have

played, under first subsequent run pictures day and date with theatres located a mile or a mile-and-a-half from us, we have been able to gross a considerable amount of [fol. 457] money, and in some cases projecting it as much, if not more than at least several of the downtown theatres, at least two or three of the downtown theatres.

Q. With regard to the playing of pictures in the Crest Theatre on first subsequent run, you have claimed in the complaint that you were also damaged by the treatment accorded you by these distributors on that basis?

A. Yes, sir; I have.

Q. Have you been able to make a computation of the amount of damage which was suffered by the Crest Theatre as a result of that course of action?

A. Well, it went back to The Stratton Story.

Mr. Raftery: If Your Honor please, this is the second cause of action. There has been no evidence offered here of any money discrimination, or any discrimination of any kind or character to support a witness coming forward with an opinion of this character, and we object to this as not only being highly speculative, but not based on any facts or evidence upon which any witness could estimate or guess damage.

The Court: As I understand it, the double-barrelled character of the plaintiff's claim, so to speak, it is this: first, the plaintiff claims that it should have been given first-run opportunity; and, secondly, or at least first subsequent [fol. 458] run; isn't that correct, put in plain language?

Mr. Rome: There is a difference in the motion picture industry. The plaintiff claims first-run either on an exclusive or day and date basis, and that represents the first cause of action, so-called.

In the second cause of action, the plaintiff complains that as a result of the treatment accorded the Crest Theatre, even on the first-subsequent-run basis, it was damaged and, although Mr. Raftery has said that there is nothing in the record with regard to that, I can point out to the Court that there has been evidence offered at some length with regard to the fact that the Crest Theatre was compelled to play after the Parkway, which is one of the things alleged in

the complaint. It had an unreasonable clearance imposed against it.

Moreover, there is also evidence in the record with regard to the fact that the Crest Theatre, even on first subsequent run, was compelled to play day and date with theatres a mile or a mile-and-a-half away, which we claim are in substantial competition and; hence, there is an unreasonable clearance there.

The Court: That is what I meant to say, if I had finished my statement. As I understand the claim, it is that the subsequent-run arrangement was unfair. It is claimed [fol. 459] that it was unfair, and that it was not what you might call an out-and-out proper subsequent-run license.

Mr. Rome: That is right.

The Court: And there is testimony relating to that. Whether the jury believes it or not, is not a question now for the Court to determine. I will allow it.

Mr. Raftery: I would like to make the same objection, without arising, and having the same exception, to the entire line.

The Court: The same ruling.

By Mr. Rome:

Q. The last question, I believe, Mr. Myerberg, inquired whether or not you were able to make an estimate of the amount of damage suffered by the Crest Theatre as a result of the action with regard to your playing pictures on first subsequent run?

A. Well, we went back to THE STRATTON STORY, again. As I have said, this picture played first subsequent run clear, in the area of Uptown, Avalon, Pimlico and Pikes Theatres, which we consider all in opposition. When we played this picture at our admission prices on the basis of that clearance, we were able to gross $385 a tenth; so, projecting that to ten-tenths for the week, it was $3,850; and by deducting or multiplying that by 52, again, using the same method of multiplying that by 52, and using the same method of calculation as we used before, in deducting the [fol. 460] film rental from that, of 35 per cent, we came out with a damage of fifty-some-odd-thousand dollars, I think it was $53,000.

Mr. Rome: If the Court please, I offer in evidence, as Plaintiff's Exhibit 94, a summary of the computation of damage as to that second cause of action, as just now explained by the witness.

Mr. Raftery: I make the same objection.

The Court: Same ruling.

(Summary of computation of damage as to second cause of action was marked Plaintiff's Exhibit No. 94.)

By Mr. Rome:

Q. Mr. Myerberg, can you tell us how it was that you happened to play the picture, THE STRATTON STORY, clear, as you call it, in the area of the Crest Theatre?

A. I am not sure. That may have been one of the first bidding pictures. I am not sure of that.

Q. Was it a usual thing for you to be able to play a picture clear in your area?

A. No, sir; not until bidding was instituted.

The Court: Not until what?

The Witness: Not until we were permitted to bid on RKO and Metro pictures. There may have been one or two pictures that slipped in, in the meantime. I don't know. THE STRATTON STORY may have been one of those pictures, [fol. 461] and it may have been under bidding. I really cannot answer that question.

By Mr. Rome:

Q. Was there any particular reason why you used THE STRATTON STORY as the examples here, in making your calculation of damage?

A. Yes, sir; I was trying to explain that. I said THE STRATTON STORY, being a picture that we had played under conditions of first subsequent run, in so far as clearance was concerned, one of the few pictures which we played that way, it was only our idea to take some picture that did not have an opposition and didn't play and date with theatres like the Avalon, and we took that picture for that reason.

Mr. Rome: Sir, I have no other questions.

The Court: Let me see if I understand you. The complaint was filed in March, 1951?

Mr. Rome: March 20th, 1950.

The Court: I mean, 1950. 1950 or——

Mr. Rome: 1950, sir.

Mr. Boyd: That was in Philadelphia.

The Court: And removed?

Mr. Boyd: That is right.

The Court: Well, now, this tabulation of alleged damages, are you claiming that to be computed on the basis of the years from 1948 up to 1950, two years in place of one?

Mr. Rome: No, sir; we are claiming only for the period [fol. 462] of just about 52 weeks, from the time that the theatre opened February 26th.

The Court: It opened in 1949?

Mr. Rome: That is right.

The Court: I understand. I was confused for a moment. I thought it was 1948, but it was 1949, so it was only a one-year basis for your alleged damage.

Mr. Rome: Yes; there is only one year involved.

Cross-examination.

By Mr. Raftery:

Q. Mr. Myerberg, you were examined by Mr. Watkins——

The Court: Mr. Raftery, you may be seated, if you want to be. Under our examination practice, on cross-examination, you do not need to stand all the time, unless you want to.

Mr. Raftery: I will sit while I am reading this, and rest by standing.

By Mr. Raftery:

Q. Do you remember being examined by Mr. Watkins at length on a deposition, on the question of damages—do you remember that?

A. Yes, sir.

Q. Do you remember being asked this question by Mr. Watkins, on page 89:

"Q. The claim is made in the complaint: 'As the result of the discriminatory conduct of the defendants with regard [fol. 463] to their licensing of subsequent run pictures to

the Crest Theatre, plaintiff has suffered damages in the amount of $52,000.' I assume that relates to the damages claimed up to March 20, 1950, the date of the filing of the suit.

"A. I think so."

Do you remember being asked that and making that answer?

A. Yes, sir.

Q. And you later signed this deposition and swore to it?

A. Yes, sir.

Q. Do you remember being asked:

"Q. What was the experience been since then, have you continued to sustain damage?

"A. It may even be greater.

"Q. When you refer to——

"A. Let me explain that damage. I gave my attorney certain information he requested and he set up the measure of damage."

Do you remember making that statement?

A. Yes, I thought I explained that to the Court a minute ago.

"Q. Does it mean that you were at that time operating at a loss, or does it mean your profits have been reduced to extent of $52,000?

[fol. 464] "A. I don't know on what basis my attorney established this measure of damage. I don't think profit had anything to do with it. He requested certain information from me and I gave him that information. The establishing of the change, he established, the measure of damage, he established. How he established it, I really don't know. I knew the amount and I went along with him on the amount."

Do you remember making that observation?

A. Yes; and I have explained it.

Q. Who was the attorney you gave that information to?

A. Mr. Edwin Rome.

Q. The gentleman here?

A. Yes.

"Q. You made no inquiry as to how the amount was determined?

"A. Only in a very sketchy manner. I knew the amount he had set forth——"

Do you remember being asked that question and making that answer?

A. Yes, sir, I do; and as I said before, I explained it again.

"Q. It is roughly $1,000 a week, isn't it? That was about the basis, wasn't it?

"A. I don't know. With the number of weeks and the amount we can find out very well.

[fol. 465] "Q. Do you know how much of the $52,000 represents claimed damage from exacting a greater film rental from the Crest than were required from other theatres for a similar product?

"A. No, I don't."

Do you remember being asked that question and making that answer?

A. Yes, sir.

"Q. Do you know how much of the $52,000 represents claimed damages from withholding pictures, withholding clearance from the Crest?

"A. No, I do not."

Do you remember being asked that question and making that answer?

A. Yes, sir.

"Q. Do you know how much of the $52,000 represents damages claimed from the imposing of unreasonable and discriminatory clearance on the Crest?

"A. I don't."

Do you remember being asked that, and making that answer?

A. Yes, sir.

Q. And that was back on October 22, 1951, right?

A. If you say so.

Q. Do you remember being asked by Mr. Watkins, and [fol. 466] making this answer:

"Q. How much of the $22,000 is claimed to be applicable to each of the various distributors?

"A. Again my attorney handled that. I don't know. I only knew the lump sum amounts, and that is all."

Do you remember being asked that and making that answer?

A. Yes, sir.

Q. Do you remember being asked the question:

"Q. What material was requested by your attorney for the purpose of computing damages under the second count, that is, the damages claimed to result from discrimination in licensing you in the exhibition of pictures?

"A. From the records of the theatre."

Do you remember making that answer to that question?

A. Yes, sir.

Q. Now, all those answers that you made were true and correct, were they not, when you made them?

A. Yes, sir, and I think it is borne out by the testimony I just made.

Mr. Raftery: I move to strike out the last. It called for a Yes or No.

The Court: The witness is going to have an opportunity to explain. Have you finished?

Mr. Raftery: No, sir. There is a lot more.

[fol. 467] The Court: He should be given an opportunity. I will give him the opportunity to explain now, if he wants to do so.

The Witness: I want to say that when these questions were being asked me, they were being asked me, as I understood, how this thing was arrived at and what was the measure of damage. Here, this was figured, and one of the things they are mentioning there—I have given you a lump of money, and information I gave my attorney, who in turn has given you the measure of damage, as I tried to explain before. Probably I did it poorly, but I tried to explain the fact that I gave him this information from the records of the company. I gave him the gross figures from The Stratton Story, and here is the basis of what we did in the theatre. Here is the real potential of the theatre on the

picture, and I made a computation of that, and I gave it to him, and he in turn computed the measure of damages. It is the same thing I said in my deposition, the same identical question he was asking for; and he asked for other things that I could have probably answered them, and I did answer them. I told them, in the deposition, I gave my attorney the figures, and he reported them.

Q. Well, now, do you remember being asked this question, on page 92, and making this answer:

"Q. What is your understanding as to the manner in [fol. 468] which the figure of $52,000 was reached?

"A. I don't know."

Do you remember answering that question in that way?

A. Yes, sir.

Q. I missed one question, I am sorry. Do you remember being asked this question, on page 92:

"Q. And you haven't any record as to the method by which the computation was made, or the figure of $52,000 was reached?"

The Witness: No, sir; and I repeat again, not the legal assessment of it.

Mr. Raftery: I had not read the answer.

"A. I have some sketchy recollection that we did discuss something about it, but I left that entirely up to my attorneys."

Do you remember that?

A. Yes; and I repeat, that was the legal aspects of the estimate of damage, which I still don't know but very little about, sir.

By Mr. Raftery:

Q. In the middle of page 93:

"Q. What was the basis upon which you reached the conclusion that the figure was reasonable?

"Mr. Rome: I think Mr. Myerberg has already answered that, too, sir, and has said it was left entirely to his

attorney, he presented it to him, and he accepted the [fol. 469] figure."

Now, did you accept the figure that Mr. Rome presented to you as the damage figure in the second cause of action?

A. Only in so far as the legal aspects of that damage were concerned. I don't know, as I have stated before, and I did not know, how you assess damages in conspiracy suits of this sort, and I left that up to my lawyer; and, as I said before, the figure I had given to him was considerably greater than he thought should have been assessed, because of the rules of law.

Q. Now, Mr. Rome gave you a figure of approximately a thousand dollars a week?

Mr. Rome: On the contrary, that is not an accurate statement. The figure of a thousand dollars is a statement made by Mr. Watkins in the deposition.

By Mr. Raftery:

Q. You testified here today, in response to Mr. Rome's question, that your estimated damage or guessed damage was approximately $53,000 for the second cause of action; isn't that a fact?

A. Yes, sir.

Q. On page 93, do you remember being asked this question:

"Q. Why did the figure $52,000 seem all right to you as a claim for damages for discrimination in licensing [fol. 470] subsequently run pictures?

"A. Because I think that was my loss for that period of time."

Do you remember being asked that question and making that answer?

A. Yes, sir I thought that——

Q. Now, the next, do you remember being asked this question:

"Q. What was the reason you thought it was $52,000 rather than $25,000?

"A. For no reason. The computations were made by my attorney, were left entirely up to him. It seemed reasonable to me on that basis as far as I went into it."

Do you remember being asked that, and making that answer?

A. Yes; I made that answer, also, and it has the same explanation as the other answers, when this entire damage was being discussed. Now, we can go back to the other question you have asked there, about whether I lost $53,000. I have been informed by my attorneys, and it seems perfectly reasonable that we should be reimbursed in the amount of money that we would have made during that period of time that this discrimination lasted against us. That was part of the legal thing I did not understand.

Mr. Raftery: I think that is redirect, possibly, and [fol. 471] I move to strike it as not responsive to the question I asked.

The Court: Motion is overruled.

By Mr. Raftery—reading:

"Q. Did you attempt any mental breakdown of this figure?

"A. No."

Is that right?

A. Yes, sir.

Q. On page 153, do you remember Mr. Watkins asking you this question:

"Q. The claim for damages in the first count for refusal to license first-run pictures at the Crest is the sum of $205,000. That figure, again, is up to the time of the filing of the suit, I suppose?

"A. I understand that is correct."

Do you remember that answer?

A. Yes.

Q. Now, the period for which you were asking the $205,000, in the first cause of action, is approximately one year, 52 weeks. It is a year, is it not?

A. It is a little more than a year.

Q. Well, a year and a day, something like that; is that right?

A. I would have to have the exact date of the filing [fol. 472] of the suit. I don't know, sir.

Q. As a matter of fact, in this exhibit your counsel offered today, it is your basis, the amount is for one year, and the amount that is figured is $204,814?

A. Yes, sir; that is the 52 weeks. That is correct.

Q. So, the $205,000, in round figures, that you referred to in this question asked by Mr. Watkins, the answer corresponds to the $204,814 figure that you have advanced here today?

A. Yes, sir.

Q. Now, on page 154:

"Q. The figure $205,000, is the attorneys' computation?

"A. That is correct."

Do you remember being asked that question and making that answer?

A. Yes.

Q. And then, that is the same Mr. Rome who made the $52,000 computation; right?

A. Only in so far as the legal aspects of the thing were concerned.

Q. Wait a minute. The next question is:

"Q. Just as the sum of $52,000?

"A. Yes."

Do you remember being asked that, and answering that?

[fol. 473] A. Yes.

Q. The next question is:

"Q. And you don't know any more about the method of the computation of that than you do of the $52,000?

"A. No, I don't."

Do you remember being asked that question and making that answer?

A. Yes, sir; I do.

Q. The next question:

"Q. Do you know on what admission prices the figure $205,000 is calculated?

"A. No, but I assume it is at the downtown admission prices. I don't know that to be a fact, that is just an assumption."

Do you remember being asked that question and making that answer?

A. Yes. And, to further explain that, I told Mr. Watkins, throughout that deposition, that I did not have access to my figures for a period of some time; that they were in the hands of my attorneys. I did not have access to my records. If you read that, it is in the deposition. I did not have access to my records, because I had only got them the night before, or the day before, and I had no time to study them; and this is for three or four years, and Mr. Watkins asked me for certain records, and I furnished [fol. 474] them to him.

Q. On page 204—now, I am asking the questions, and not Mr. Watkins—The question was:

"Q. Mr. Myerberg, in your previous examination, you testified you turned over to Mr. Rome, for the purpose of computing damages, the grosses of each picture the Crest Theatre had played, the film rental, and other data. Do you remember when you turned over those data to Mr. Rome?

"A. No. There is a letter, I think, in the file that has been made available to you transmitting that information."

Do you remember being asked that, and making that answer?

A. Yes, sir.

Q. (Reading:)

"Q. You say it was made available to us?

"Mr. Rome: No, it was not.

"The Witness: It was not.

"Mr. Rome: We know that was between counsel and it was not made available.

"Mr. Raftery: Do you claim privilege on it?

"Mr. Rome: I see no relevancy of this particular matter. We do claim privilege.

"Mr. Raftery: Then we are going to claim relevancy on [fol. 475] that, because the witness says you are the infernal machine that concocted this damage.

"Mr. Rome: I am perfectly willing to stand by the statement that the witness has made."

So, isn't it a fact, Mr. Myerberg, that, in your presence, Mr. Rome claimed privilege on the data that you claim you turned over to him and refused to give it to us for examination?

A. That discussion, Mr. Raftery, was between me and Mr. Rome—I mean, between you and Mr. Rome—and was couched in legal language. I did not understand very much of it, to be perfectly frank with you.

Q. But I understood this much, and I think you did, that we did not get any of the papers or records that we were after. Is that a fact?

A. No, sir; you got all of them, as far as I know, except this intimate correspondence that went between Mr. Rome and me.

Mr. Rome: That is not an accurate statement of fact, because the defendant piled in interrogatories on the plaintiff, asking how the measure of damage was computed, and the method by which it was arrived at, and the plaintiff answered fully, setting forth all the facts related here today; and I think it is unnecessary for Mr. Raftery to try to draw the inference that we attempted to hide anything [fol. 476] other than private correspondence between client and attorney.

Mr. Raftery: All I asked for in the deposition was that Mr. Rome give me the figures upon which he based his calculation. By that, I mean Mr. Rome's calculation of damage. There is nothing in the interrogatory, or the answer to it,—and the answer is in front of Your Honor,—other than the bald conclusions along the lines we got today.

Now, I will resume the reading of these things, having disposed of that matter.

Mr. Rome: On the contrary, Mr. Raftery, there is also the statement here, if the Court please, which indicates that the very first thing that Mr. Raftery talked about a lot, has only to do with the matter of a date at which time Mr. Myerberg turned over to me the data which led to the method whereby the damage was computed. That date was furnished, because, on page 205 of the deposition, there appears the statement, made in response to a question by Mr. Watkins, as follows:

"Mr. Watkins: Do you have any objection to telling when that material was turned over to you, Mr. Rome?

"Mr. Rome: I would say it was turned over to me sometime in a matter of weeks, or perhaps even months before the complaint was filed."

And that was the very thing that led to the original [fol. 477] discussion with regard to the problem of privilege. The question was: "Do you remember when you turned over those data to Mr. Rome?" He was asked for a date, and that answer was given to them at that time.

[fol. 478] By Mr. Raftery:

Q. Now, the question at the bottom of page 154. Do you remember being asked this question by Mr. Watkins and making this answer:

"Do you know whether the figure $205,000 is arrived at on the basis of your present operating expenses or increase in your operating expenses?"

"A. I don't know that I ever gave Mr. Rome any operating expenses. I gave him gross, play days," and so forth.

Do you remember making that answer in response to that question?

A. Yes, sir.

Q. "Q: Do you know upon what number of runs or length of runs the figure of $205,000 is computed?

"A. I do not follow that question.

"Q. Do you know upon how many pictures a year, do you know upon the playing of how many pictures a year the $205,000 is predicated?

"A. The only thing is that I submitted all the pictures we had played to Mr. Rome, and he determined the measure of damage. No, sir, I do not have any further information."

The Court: I think we are belaboring this entirely too much. The witness, in effect, as I understand it, has said what one might say to his lawyer or his accountant in an income tax matter. Trusting him, he might say, whether wisely or not, "here are the figures which I think you will

[fol. 479] need from which I understand it is possible to compute my damages. I do not know just how they should be computed for court purposes, but you go ahead and use them and give me your summary."

Now, that is what the witness has said about eight times, and it seems to me that we are wasting time going over that.

Mr. Raftery: I will suspend at this moment on that.

By Mr. Raftery:

Q. In your computation of damages on the first cause of action you arrived at a figure of $436,800 as your estimate gross at the Crest Theatre for the 52-week period ending in March of 1950; is that right?

A. It was thereabouts.

Would it be in order, sir, for me to have those figures?

The Court: Yes. (Document handed to witness.)

The Witness: Thank you, sir.

Will you read that question, again, Mr. Reporter, please?

(Whereupon the pending question was read by the Reporter.)

The Witness: Yes, sir.

By Mr. Raftery:

Q. Now, what theatre downtown, playing first-run pictures, for the calendar year of 1949 grossed in excess [fol. 480] of $400,000 for the whole year, if any?

A. There were two theatres, as I recall it. I do not recall the exact figures, but there are two theatres, the Stanley and the Century.

That is just my contention, Mr. Raftery, that this theatre had the same potential and even greater than those theatres.

Q. According to the figure you read this morning the Century gross for the year 1949 was, $497,317.33; is that right?

A. In 1949? I think that is right, sir.

Q. What did the Stanley gross?

Mr. Rome: $398,046.

By Mr. Raftery:

Q. Now, according to the figures put in by you and Mr. Rome this morning, what did you estimate the gross at the New Theatre for the year 1949?

Mr. Rome: The New Theatre for the year 1949, sir, had a gross of $359,469.

By Mr. Raftery:

Q. So you estimate that your theatre on Reisterstown Road, six miles from downtown, would gross just as much or more than either the Stanley or the Century Theatres located in the heart of downtown; is that right?

A. Yes, sir; I do.

Q. I think you testified you had one means of transportation. By that I mean public transportation, to get out to [fol. 481] your theatre; is that right?

A. Yes, sir, one bus line; that is correct.

Q. Isn't it a fact that every downtown bus line and trolley car feeds from every part of the city to downtown here in Baltimore?

A. That is a fact, Mr. Raftery, but I do not think that is completely relevant to the question, and I think you can take the drive-in theatres, and the fundamental success of them, they haven't public transportation, they depend solely upon the vehicular traffic, and I think I stated before in my testimony that 80 to 85 per cent of our people came by car, by private transportation.

Q. You are estimating that you would have grossed out there approximately $8,000 a week; is not that a fact?

A. $8400, yes, sir.

Q. $8400. That is exactly the same figure Mr. Rome set up in his answer to the interrogatory; is not that a fact?

A. I did not see those, sir, but I imagine it is.

Q. Now, how much of that $8400 do you estimate you take in on the Monday through Friday matinees at the Crest Theatre?

A. A very small percentage of it.

Q. Five percent?

A. I would say between 10 and 15 per cent.

Q. Somewhere between $800 and $1200 would be taken in [fol. 482] on the five matinees; right?

A. That is correct, five; not the Saturday and Sunday, they would be much larger.

Q. By the way, this interrogatory that you just told us you have not seen, I show you the answer and I ask you if that is your signature?

A. Yes, sir. I was in error. I am sorry.

Q. And sworn to?

A. Yes, sir, that is my signature.

Q. What do you mean by an exclusive first-run Baltimore City?

The Court: Exclusive first-run Baltimore City?

Mr. Raftery: Right.

The Court: He stated that about 10 times.

Mr. Raftery: I am not certain we have it right yet.

The Court: Go ahead.

The Witness: Exclusive first-run Baltimore City would mean a picture that played one theatre in Baltimore and greater Baltimore exclusive to all other theatres on a first-run engagement.

By Mr. Raftery:

Q. With clearance over all the other theatres?

A. With clearance over all the other theatres, yes sir. [fol. 483] Q. And what is the usual clearance given on an exclusive first-run?

A. In Baltimore City?

Q. Yes.

A. 21 days.

Q. And you have no quarrel with that?

A. I have no quarrel with that clearance and run, as such, but as I stated before, insofar as it becomes fixed, and prohibits any exhibitor from exhibiting a picture and keeps him out of first-run, I do have a quarrel, but as to first-run clearance, I do not.

Q. But first-run and clearance, you recognize first the right to an exclusive first-run and second, the right to 21 days' clearance over the next succeeding?

A. Provided the statement that I made is not effective.

Q. Now, the day and date with downtown first-run is exactly the same except some theatre other than the downtown theatre is playing day and date with it; is that right?

A. Some other theatre?

Q. Yes.

A. Maybe playing, yes, maybe located in the downtown area or out of the downtown area.

Q. Now, day and date neighborhood with downtown first-run would be the instance of a theatre like the Crest playing day and date with some theatre downtown; is that right?

[fol. 484] A. I do not quite understand the question, Mr. Raftery.

Mr. Raftery: Will you read it, please?

(Whereupon the pending question was read by the Reporter.)

The Witness: Playing a simultaneous run, yes, sir.

By Mr. Raftery:

Q. Now, what clearance should the downtown theatre have in connection with its first-run where it is playing on a day and date basis in Baltimore?

A. If it is playing on a day and date basis in Baltimore it would have no clearance over the theatre it was playing with.

Q. But would have 21 days over every other theatre that was not playing with it?

A. Well, that is correct.

Q. And what clearance would the Crest Theatre playing on a day and date basis have?

A. Well, I have testified before 21 days and possibly it could be reduced.

Q. Over what theatres?

A. Over the theatres in our competitive area with whom we are in competition.

Q. Now, you testified you were not in substantial competition with downtown because in your opinion either two [fol. 485] or three per cent was all that was drawn from your neighborhood or your competitive area to the downtown theatres; is that right?

A. To any one downtown theatre, yes, sir.

Q. What per cent would you consider substantial competition above the two or three per cent?

A. I do not know, Mr. Raftery, but I certainly know that two or three percent is not substantial.

Q. What would you consider substantial, five per cent?

A. I don't know. That would be based solely upon circumstances; in some situations five per cent may be and in some situations twenty-five per cent might not be.

Q. How about ten per cent?

A. The same answer holds true to that, sir.

Q. Assume that ten per cent of the audience at the downtown theatres come from your competitive area, would you say that the theatres in that competitive area were in substantial competition with downtown?

A. I say again it depends on the circumstances.

Q. On what circumstances?

A. It depends on the area, the closest to downtown and a number of other things. Now, in some situations I can conceive of where ten per cent would be substantial and in other situations I can see where twenty or twenty-five per cent would not be substantial.

[fol 400] Q. Well, tell us the situation.

A. Well, on the ten per cent basis, if the city was so arranged where the draw was one-sided and it backed up to a river or something of that sort, I could see where possibly twenty-five per cent would not be substantial because of the population area. I think the substantial competition depends upon distance and admission price. If in the event I were charging a lesser admission price than downtown and if I were closer to downtown than I am, then the competition would be greater.

Q. Have you any other explanations to make in regard to that?

A. Not at this moment.

Q. Now, which of the downtown first-run theatres would you be willing to play day and date with?

A. Any of them or all of them.

Let me explain, Mr. Raftery. I mean by that we would attempt to play the best picture available at the Great Theatre at all times. We feel the public in the area de-

serve that. We believe the best picture is the best to use if it is available. Whatever played in the downtown area we would play day and date.

Q. Now, take a picture like African Queen, I believe that played downtown at the Century Theatre; is not that correct?

[fol. 487] A. Yes, sir, that is correct.

Q. If that happened to be available and you wanted it, you would be willing to play that, as I understand it, day and date with Century Theatre; is not that right?

A. Yes, sir.

Q. Now, if that same picture were playing at Keith's Theatre rather than at the Century and you wanted that picture, you would be willing to play it day and date; is that right?

A. Yes, sir, that is correct.

Q. And if that same picture were playing at the Stanley Theatre, and you wanted it day and date, you would be willing to play it?

A. Yes, sir.

Q. And I ask the same question about the Mayfair, the Town, the Hippodrome, the New, or the Velencia.

A. The same thing holds true of those, yes.

Q. So, in reality, as far as the experience that you are seeking to establish here, day and date first-run with downtown, it does not make a bit of difference to you or to your claim what theatres of the group we have named any particular product plays in; is not that a fact?

A. Yes, sir, that is.

Mr. Raftery: May we have a minute, Your Honor?

The Court: Anything in rebuttal?

[fol. 488] Mr. Raftery: May I have a minute to confer with counsel?

The Court: Oh, I thought you said you had no more questions.

Mr. Raftery: In fact, I was getting a little out of breath.

By Mr. Raftery:

Q. Mr. Myerberg, on the first day of your examination, in response to Mr. Rome's questions, you told us about a

conversation you had with Mr. Benson of Paramount in regard to the Paramount Theatre at Kansas City. Do you remember that testimony?

A. Yes, sir.

Q. Now, will you tell us what that was? I missed part of it.

A. It is in the deposition there, sir. You can read it.

Q. Now, what was the conversation?

A. The conversation was to the effect the Paramount Theatre, the Neumann Theatre, at Kansas City, had played Paramount pictures on exclusive first-run and was located out of the downtown area, and Mr. Benson told me at that time he knew about that.

Q. Now, you also said you had the same conversation with Mr. Brecheen, and told him about the Paramount Theatre in Kansas City.

[fol. 489] A. Yes, sir, that is correct.

Q. And they told you they knew all about it but that was a horse of a different color, or something to that effect?

A. Yes, but later I found that wasn't a fact. I was mistaken in that situation. It was Fox in Kansas City that was playing day and date with downtown, as I understood it. Although I had a recollection of Paramount doing that, I cannot seem to substantiate that.

Q. As a matter of fact, the Paramount Theatre in Kansas City, instead of being way out in the country——

A. Where is the Neumann Theatre, sir?

Q. At the corner of 12th and Main.

A. I was mistaken. I understood that was a fact.

Q. So, then, as regards this Paramount playing pictures out in the hinterland in Kansas City, you are mistaken?

A. If that is a fact that the Paramount—and I was led to believe it is, but it seems strange that Mr. Benson and Mr. Brecheen at that time would not have refuted that if they had known about it.

Q. Have you ever been in Kansas City?

A. No, sir.

Q. Apparently it surprises you to know that neither Mr. Brecheen nor Mr. Benson had been to Kansas City?

A. I don't know about that.

[fol. 490] Q. So, all three of you were in error; is not that right?

A. It is possible.

Q. Let us go to Washington. Yesterday you moved the Ontario Theatre from Columbia Road to Connecticut Avenue; is not that correct?

A. I did not move it. Connecticut Avenue slipped out instead of Columbia Road.

Q. But you are thoroughly familiar with that situation?

A. I would not say that I am thoroughly familiar with that situation, but I know where Columbia Road is. I know the theatre, I know the area around there fairly well. I will not say that I know it completely, but I know enough about it to know how to get there and what surrounds the theatre.

Q. You testified yesterday that Fox was selling its pictures exclusive first-run to the Ontario Theatre, that is, exclusive first-run, Washington, on competitive bidding basis; is not that right?

A. Either competitive bid or competitive negotiation, yes, sir.

Q. And what was the picture you told us that was playing there or just finished playing there at the Ontario Theatre?

A. The new picture based on the life of—Song In My

[fol. 491] Heart.

Q. The life of Jane Frohman?

A. Jane Frohman, yes.

Q. One of Fox's biggest releases; right?

A. Yes, sir.

Q. And a very successful picture?

A. Yes, sir.

Q. Would it surprise you if I were to suggest to you that the picture Song In My Heart has just finished playing for four weeks at Loew's Palace at downtown Washington on an exclusive first-run?

A. Yes, sir, it would, because the information came from the operators of the Ontario Theatre.

Q. You have been in touch with the operators of the Ontario Theatre?

A. Yes, I have. I know them and have talked to them. I have talked to them a number of times and with others, too.

Q. And you contemplated calling them as witnesses in this case?

A. Yes, we did.

Q. Now, you do not dispute the fact that Song In My Heart has just finished playing at Loew's Palace Theatre, did you?

A. If you say so, sir, I will take your word for it.

[fol. 492] Q. Do you know what the experience has been of the operators of the Ontario Theatre in playing on first neighborhood run exclusive in the city of Washington on the Fox product, on the pictures they play?

A. I do not think they played first neighborhood run, sir.

Q. I mean first-run. Pardon me.

A. Yes, I am familiar with their experience.

Q. And they have been very successful on the Fox Pictures they have been playing; is that right?

A. Well, if Song In My Heart was the only Fox picture they told me that had played there, I don't know whether they played Fox pictures, I know they played several Paramount pictures.

Q. Your knowledge of the Ontario situations and the Ambassador situation in Washington is very superficial, isn't it, Mr. Myerberg?

A. Not as to location. The pictures that they played and when they played them, I would say, yes, but as to the physical features, the location of the theatres and the method of operation, no; I mean the run that they played. I know them. But the actual pictures they play, I am not too familiar with them. I know some pictures that went to the Ontario Theatre, this is one I was told went in there, but evidently it did not.

[fol. 493] Q. Now, the Ontario Theatre and Ambassador Theatre in Washington are located in one of the most densely populated parts of the city of Washington; is that right, by white folk, I mean?

A. It is densely populated, yes, sir. I don't know whether it is one of the most densely populated. I have never made a study of it. I know this, in asking Mr.

Boucher the population around his theatre, he said it was 75,000 within a 2-mile radius, and that is not as densely populated as the area around the Crest Theatre.

Q. I mean no vacant space of any kind or character around either the Ambassador or the Ontario Theatres.

A. Oh, yes, very close to it is Rock Creek Park, isn't it?

Q. Yes. But you have practically nothing but large apartments and hotels in the neighborhood; is not that a fact?

A. The neighborhood is quite populated with apartments and hotels.

Q. Near the Shoreham Hotel?

A. Yes, sir.

Q. Near the Wardman Park?

A. Yes, that is correct.

Q. And near all the large apartment houses on 16th Street?

[fol. 494] A. In that area, yes, I would say.

Q. Columbia Road?

A. Yes.

Q. And Eighteenth Street?

A. Yes.

Q. And Connecticut Avenue?

A. Yes, sir.

Q. And I ask your opinion, not Mr. Boucher's, as to whether the Ambassador-Ontario area is not far more populated than the area around Rogers Road and Reisterstown Road?

A. I never made a survey of it, Mr. Raftery, but as I say, relying on Mr. Boucher, who is a very astute exhibitor, I think even you will admit, he gave me those figures. In comparing them to my area, I would say I have more population.

Q. You have more?

A. According to those figures, yes, sir.

Q. According to the figures he gave you?

A. According to the figures he gave me. I have made no study of the population of Washington. Sometimes it is very misleading.

Q. And you have no knowledge of whether the policy is a success or failure?

A. The fact they are still bidding on pictures, still playing first-run, I think the exhibitor may be satisfied with [fol. 495] the way it is going, and so is the distributor.

Q. You do?

A. Yes, sir.

Q. And you have no figures upon which to base that?

A. I did not say that, sir. I know on one picture, Mr. Benson told me about, The Detective Story at Paramount Theatre, the figure was somewhere around $40,000 gross.

Q. In how many weeks?

A. Four or five weeks. I do not recall, from four or five weeks.

Q. That is the only one he told you about?

A. He told me about the Bob Hope picture. He said he was doing fairly well with that. How good, I don't know. I know one thing, it is generally conceded in the industry or in any business, that you cannot hope to have a business immediately reach its peak, that there is a period of six to eight months or a year or year and a half before that store or theatre will start reaching its peak. At the opening it has a couple of weeks that are considerably better, then it goes down and then it is a slow, gradual build-up to the peak. The theatre can run only the two pictures, five pictures or six pictures. There is no criterion by which you can gauge that theatre until that policy is established.

Q. He did not tell you what he did with the Death Of [fol. 496] A Salesman, did he?

A. He told me. He did not say how much. He got in trouble with the picture on account of the Communist angle. Some writer or producer had been a Communist, and he picked this picture because of the unusual stage show, because of the unusual publicity of the stage show, and it had been expected it would do a very large gross, but it did very little because, I don't know whether it was the producer or writer, or both of them, were Communists, and the theatre was being picketed.

Q. Can you estimate how much you would have lost at the Crest Theatre if Paramount had accepted your guarantee of $35,000 on Samson and Delilah?

A. I think we would have made money and a considerable amount of it.

Q. You do?

A. Yes, sir.

Q. How many weeks, in your opinion, would you have had to play that picture before you got the $35,000 you had to pay Paramount?

A. That picture was released on an increased admission price, as I recall, $1.35, in the evenings.

Q. Wasn't it a dollar net?

A. It was a dollar or $1.25. And the matinee price, I think, was 75 cents or a net of whatever that came to, and we had figured we could play Samson and Delilah a mini- [fol. 497] mum of eight to ten weeks in our theatre, and we would have grossed well over $80,000 on the picture.

I have those computations in our file; I could probably get them. They are in pencil, and we made them prior to the submission of the bid. That figure was not picked out of the hat. The picture can pay $35,000 film rental in the proper theatre. If you go back to the picture I had bid on with Columbia, Jolson Sings Again, which in my opinion and in the opinion of the industry was as good a picture as Samson and Delilah, that grossed in film rental about $38,000 to the distributor or thereabouts, it may have been $37,000.

That definitely proves here is a theatre that over a period of 52 weeks we had grossed, if we would project our admission price to theirs, as much if not more money than they that year, after they took out vaudeville—not after they took out vaudeville, before. And they were able to pay $38,000 in film rental, so our $35,000 offer for Samson and Delilah was not excessive.

Q. In other words, you could have done, according to your statement, better business at the Crest Theatre than this picture did at the Stanley?

A. Yes, sir, I have always contended that.

Q. Notwithstanding the fact the Stanley has 3,000 seats? [fol. 498] A. Yes, sir.

Q. Is a fine theatre?

A. Yes, sir.

Q. Well-managed?

A. Yes, sir.

Q. Has a greater potential draw than your theatre; right?

A. Well, yes, it has a greater potential draw, but evidently it does not draw it because people will not come downtown, and I may further pursue that, Mr. Raftery, and I do not mean to go far from this. Fox Film, as far as a loss to the theatre is concerned, Fox Film has another picture coming up, Diplomatic Career, I think. You are familiar with it.

Q. I am not.

A. Tyrone Power. Anytime Fox Film wants an offer on that picture to play day and date exclusive in the City of Baltimore, I will give them a $15,000 certified check, to be put up within 24 hours, either to play that picture day and date downtown or exclusive in the City of Baltimore.

Q. Can you tell this Court and jury the date that Mr. Rome on your behalf made the $35,000 offer to Paramount, how much money the plaintiff in this case had in the bank?

A. Very little, in the Theatre Enterprise, but we were willing, as our communication called, to send them a [fol. 499] certified check in the amount of $35,000 if they accepted our bid.

Q. Now, what generally happens in this business when a theatre fails to earn a bid of that character?

A. I do not follow you, Mr. Raftery.

Q. Isn't it a fact that if it does not gross it, you are back to the distributor wanting an adjustment?

A. Not on bid pictures, no, sir. I refer you to back to Metro Pictures. I bid on one of the Metro pictures $2,000, and I grossed $2700, and I never went back to the distributor asking for a refund.

Q. What picture was that?

A. I can look it up and give it to you, sir. It is one of the musicals back in the first few months when we were bidding, and I would be very, very happy to look it up for you if you want me to.

Q. All right.

A. Pardon me. I don't think I grossed $2700. I grossed $2500, but I was told by Metro, incidentally, when we did bid, it was the policy of their company in the event the

picture did not do it, there were no rebates or nothing, that that was the price you gave for the picture, they wouldn't give anything back.

Q. The Theatre Enterprises in this case is a Maryland corporation, is that right?

[fol. 500] A. Yes, sir.

Q. And you were one of the incorporators?

A. Yes.

Q. Or caused it to be incorporated?

A. I caused it to be incorporated, yes, sir.

Q. Now, what was the paid-in capital into that company?

A. Well, I think there was $350 worth of stock supposed to be issued. I don't think it was ever paid, though.

Q. In other words, there were $350 subscribed for the capital stock; is that right?

A. Yes, sir.

Q. And the $350 was never paid in?

A. That is quite possible. But if you are trying to get, Mr. Raftery,——

Q. Just a minute. The $350 was never paid in; is that right?

A. That is correct.

Q. So, the plaintiff in this action is a company with no paid-in capital of any kind or character?

A. No, sir, that is not a fact. The Theatre Enterprises is a family company, owned by my brothers and myself, like other companies are. The Crest Theatre was built at a cost of $460-some thousand, a difference between the first mortgage of $307,000 and the $460-some thousand was put up in cash by us. That is the capital of this company, not [fol. 501] the $350 not subscribed, separate or anything of that sort.

Q. Let us make it right. The Pem Construction Company is another of your family companies?

A. That is right.

Q. How do you spell that first word?

A. P-e-m.

Q. P-e-m?

A. Yes, sir.

Q. And the Pem Construction Company acquired the land on which this shopping center was built; right? Or did it?

A. I think it was originally bought by M. J. Myerberg Corporation, another family company, if my recollection is correct, and then sold at the price of purchase to Pem Construction Company.

Q. And Pem Construction Company proceeded to erect the stores and the theatre?

A. Yes, sir.

Q. And there was originally a mortgage of $315,000 placed by Pem Construction Company with some building and loan company; right?

A. That is correct, a construction loan for financing.

Q. What was the name?

A. Aurora Building & Loan Association.

Q. And that $315,000 building loan was made to Pem?

A. That is correct, sir.

[fol. 502] Q. And Pem was on the obligation?

A. Yes, sir.

Q. And, then, Pem became the landlord of this plaintiff, of that theatre after the theatre was built?

A. Yes, sir. That was done because of advice of counsel, he did not think our charter in the Pem Construction Company, as I recollect at this time, there was some discussion at that period of time whether the Pem charter would permit us to operate a theatre, so we organized the Theatre Enterprises, Incorporated, to operate the theatre.

Q. Then by an oral lease on a month-to-month basis——

A. That is correct.

Q. ——the plaintiff in this case went into possession of the theatre?

A. It all being the same people, that is correct, sir.

Q. And what was the rental?

A. The rental was around $30,000 or $33,000 a year.

Q. According to that statement you put in today, it was $33,000 a year?

A. That is correct, sir.

Q. Now, at some later date, the Pem Construction Company sold this theatre and the equipment to the plaintiff? in this action; is that right?

A. Yes, sir.

[fol. 503] Q. And you said something the other day to Mr. Rome about the purchase price. Do you recall what that was?

A. I would say around $415,000.

[fol. 504] By Mr. Raftery:

Q. Now, at the time of the sale, the Aurora Building & Loan released the Pem Construction Company from the obligation on the $315,000 mortgage; is that right?

A. Yes, sir.

Q. Theatre Enterprises, this company with no paid-in capital, assumed the mortgage to Aurora and became the mortgagee?

A. No, sir; that is not the fact.

Q. Who did?

A. The mortgage was remade in the amount of $307,000.

Q. To whom?

A. To the Theatre Enterprises. I mean, after all, Mr. Raftery, you know as well as I do that banks do not lend out to corporations for any structure at all. The individual has the capacity to do things and pay.

Q. Let me ask you this: The Theatre Enterprises became the sole obligor to Aurora on $307,000?

A. Yes, sir.

Q. At the time, there were a series of chattel mortgages made to Dusman covering the equipment in the theatre; is that right?

A. No, sir.

Q. What were the Dusman papers?

A. The Dusman papers on the certain projection equip-[fol. 505] ment, that up to that time had been paid off, practically. The $75,000 chattel mortgage was made back to the Pem Construction Company, which is solely-owned by us.

Q. At any rate, the plaintiff in this action put up no cash in acquiring the title to this property; is that right?

A. Just a transaction between ourselves; yes.

Q. May I ask that, again: Theatre Enterprises, the plaintiff in this action, became the owner of the theatre without the payment of any cash into it?

A. Or a small amount, maybe a small amount, the expenses, in cash.

Q. In other words, the insurance adjustment, or the usual things you have on the question of a title; is that right?

A. That is right.

Q. And that is the company that is suing here for $250,000 damages, for one year only, in connection with the operation of this theatre; is that right?

A. No, sir; that is not right. I think you are confusing the issue. I think we have an investment in that theatre in the difference between $307,000 and the $460,000, which is $153,000. Now, we have that much invested there. Whether you are going to take corporate identities, and so forth, and take this thing and make it misleading, that is some-[fol. 506] thing I cannot say, Mr. Raftery.

Q. Theatre Enterprises is the company that makes the $35,000 bids, isn't it?

A. Yes; a certified check.

Q. And Theatre Enterprises is the company that has made everything?

A. Yes.

Q. And Theatre Enterprises is the one that owns this theatre?

A. That's right.

Q. And Theatre Enterprises is the one that is suing here?

A. That is correct.

Q. And it is not "we" that is suing, but it is Theatre Enterprises?

A. It is Theatre Enterprises; but I think you are misleading on the investment in that theatre. I think you are misleading and minimizing it, completely.

The Court: We will take a recess now, gentlemen, and come back tomorrow afternoon at two o'clock. There will be no morning session in this case, because I have to sit with Judge Soper and Judge Chesnut, in the morning, on a Three-Judge case. We will reconvene at 2 o'clock, that is after lunch, tomorrow afternoon.

(Whereupon, at 4:05 p.m., an adjournment was taken until 2:00 o'clock p.m., May 14, 1952.)

[fols. 507-509] Reporters Certificate to foregoing transcript omitted in printing.

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[fol. 510] Transcript of Proceedings—May 14, 1952, 10:00 A.M.

The Court: We are ready to proceed, gentlemen, as soon as the jury comes in. We will sit until 4 o'clock, or probably not much after that. I think we will have to have a session on Friday, also.

Mr. Watkins: Will that be in the morning or the afternoon?

The Court: In the morning, I think.

(The Jury then resumed seats in the jury box.)

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Whereupon HARRY D. MYERBERG resumed the witness-stand and, having been previously sworn, testified further on behalf of the plaintiff, as follows:

Cross-examination (Resumed).

By Mr. Raftery:

Q. Mr. Myerberg, in your request for first run, day and date with downtown for exhibition at the Crest, you were seeking the same run from each of the eight distributors? Isn't that right?

A. I was seeking the right to play their pictures on that run, yes, sir.

Q. You were seeking the same uniform run, insofar as each of the eight was concerned,—first run day and date?

A. First run day and date, or first run exclusive, depending upon how the distributor wanted to sell me films.

Q. You were seeking the same from each of the eight, [fol. 511] whether first run day and date or first run exclusive? Is that right?

A. I was requesting a right, to permit access to their films, yes, sir.

Q. First run?

A. First run day and date, or first run exclusive. That is correct, yes, sir.

Q. You were seeking uniformity as to that, anyway? Isn't that a fact?

A. I was asking each one of them, yes.

Q. Now, having failed to get either first run exclusive or first run day and date, you then sought the same first neighborhood run from each of the eight, the eight companies?

A. No, sir; that is not correct. That was a run they gave me. It was not the run that I sought.

Q. Isn't it a fact, by your testimony, that you asked each of the 8 for competitive bidding for first run in the zone around your theatre?

A. That was an answer to their telling me, each one of them, that they would only permit that particular run on that basis. That is when I requested it. They said, "Send me a letter requesting that. That is all we will grant and give you." I think my testimony bears that out.

Q. Let's take it this way. When you wrote the letter, [fol. 512] which we will refer to as the World Premier letter, on either October 12th or October 14th, 1948, you wrote exactly the same letter to the 7 companies to whom you sent that letter? Isn't that a fact?

A. That is correct.

Q. At least, there was uniformity in the letter you wrote to each one of them?

A. I don't know what you mean by "uniformity". I had a letter to write to each one of these people about the same things, at their request, at each one's request. Their requests were identical; so the letters were identical.

Q. And you asked each one of the 7 you wrote to to grant you a World Premier on a first run picture for exhibition at the Crest Theatre? Isn't that correct?

A. Hoping that I would get one. That is correct.

Q. And they were all uniform?

A. Yes, sir; and the answers were uniform.

Q. In connection with clearance, we will take up first the first run exclusive. You asked for the same clearance from each of the 8 whom you asked for first run?

A. I don't think any clearance was asked for in my letter.

Q. You don't think what?

A. I don't think any clearance was asked for in my letter.

[fol. 513] Q. I didn't ask you that. I asked you if you did not ask each distributor defendant for the same clearance, for whatever run you wanted to license or did license for exhibition in the Crest Theatre?

A. I don't think I quite understand your question; I am sorry.

Q. Let's take it up in this way. You bought some pictures, or a picture, from RKO for exhibition at the Crest Theatre? Is that right?

A. No, sir; I never bought one first run day and date.

Q. For any run?

A. You mean as a hypothetical case?

Q. Take an actual case. Tell me what RKO film you played in your theatre the first year you were in business?

A. I can't think of one.

Q. Well, you did play an RKO picture?

A. Yes.

Q. Do you remember what clearance you asked RKO to give you on that particular picture?

A. I asked for clearance over Uptown, Pimlico, Pikes and Avalon Theatres.

Q. And you asked for the same clearance from every other distributor furnishing you pictures at your theatre?

A. I said this, that I thought if they made me play, under protest, pictures on a first subsequent run, that we [fol. 514] were in substantial competition with those theatres I have just mentioned, namely, Uptown, Pimlico, Pikes and Avalon, and that we should have competitive negotiations, and the winner of the picture should receive clearance over the others. Yes, sir, I did say that.

Q. The same identical clearance?

A. Yes, sir.

Q. And at least there was uniformity in your demand for clearance? Is that right? "Yes" or "no".

A. I would say "yes."

Q. Now, Mr. Myerberg, I think you testified yesterday that you asked every one of the distributors to license you pictures on a sliding scale. Isn't that a fact?

A. On a what? I am sorry, but I did not hear the question.

Q. On a sliding scale.

A. Yes. After we got into it, we asked them to license them to us on a sliding scale, because that was being done to other theatres in the neighborhood and in the area, and I thought we were deserving of it, although the playing arrangement was under protest.

Q. We know your playing arrangement was under protest. In fact, you wrote the same letter to 7 of these distributors in December, 1948, telling them that you were going to play under protest?

[fol. 515] A. Yes, sir; because I got the same request from the 7 distributors, the identical request from each; and that called for an identical letter. I just saw no sense in re-wording the letter.

Q. I meant 1948. Did I say 1949?

Mr. Rome: You said 1949.

By Mr. Raftery:

Q. I think you testified yesterday that you asked each distributor defendant to permit you to open pictures on Saturday at the Crest Theatre?

A. That is correct.

Q. And you made the same identical request of every one of the 8?

A. That is correct.

Q. And there was uniformity in your request? Is that right?

A. Yes. I asked each one of them the same thing.

Q. And I think you told us the only one of the 8 who granted your request was Metro or Loew's?

A. No; I said Metro and Warner's and Paramount; and Paramount and Warner's took it away from me, and Loew's continued it.

Q. They took it away from you during the period you are complaining about here in the lawsuit?

A. I think it was.

Q. And none of the others granted your request at all?

[fol. 516] A. No, sir.

Q. That includes United Artists, Columbia, Twentieth Century-Fox, RKO?

A. RKO had granted it to me on a couple of pictures; Paramount had granted it to me on several pictures; and it is possible United Artists may have granted it to me on one or two pictures.

Q. Isn't it possible they may have all granted you the request?

A. No. That is definite.

Q. You testified yesterday you abandoned the practice of playing pictures on Saturday opening at sometime, because they all uniformly took away from you the right to play pictures on Saturday?

A. Yes, sir; that is correct.

Q. When did that abandonment occur?

A. It was sometime, I think, in 1950. I am not sure of the dates, but I can check them for you.

Q. And you are positive of that?

A. Yes, sir; I am pretty sure.

Q. They all uniformly took it away from you?

A. All but Loew's Incorporated.

Q. All but Loew's?

A. As to Paramount, there is a possibility Paramount did not. Outside of that, I am positive everybody else took [fol. 517] it away from me.

Q. Now, Mr. Myerberg, in seeking the uniform matters from each of these distributors, you were not seeking to enter into any conspiracy with any of them, were you?

A. I couldn't enter into a conspiracy with myself, Mr. Raftery.

Q. I asked you if you were trying to enter into a conspiracy with these defendants?

A. I was one person seeking a uniform thing, as you say, from all of these people. I don't see how I could enter into a conspiracy on that.

Q. You either were or you were not?

A. I was not.

Q. You were not trying to be a conspirator to take something away from your competitors by making these agreements of clearance, or runs, or any of the other matters we have been discussing?

A. No, sir; because it has been quite clear that I did not exclude other theatres in the City of Baltimore from the same thing that I had. That was made clear.

Q. At any rate, in this picture business you have many uniformities, have you not?

A. You have some.

Q. Well, you have many?

A. Well, if you will list them, I will go on. I can't say. There are some. I will say that.

[fol. 518] Q. And these uniformities that have become business practices in the industry have not been the result of any conspiracy between any exhibitor or any distributor?

A. They certainly have, sir, but the uniformity is such that it builds a fence around the downtown area and the people in that area, creating a uniform business practice in that connection and making it very hard, making it almost impossible for people to go into the free enterprise system in America. I say that is wrong.

Q. Now, don't you know as a man of some experience in the business, that the usual and the normal manner of showing a picture in any city is to show it on a first run basis in the downtown area?

A. That is the uniform way that the distributors use to completely control and dominate the first run situation in this country, yes, sir, I know that.

Q. You know that?

A. Yes, sir.

Q. You have been in New York City, have you not?

A. Yes, sir, quite a few times.

Q. I think at one time you testified on deposition you worked in the Paramount Theatre in Brooklyn; is that right?

A. No, I think I said I trained all personnel for there. I worked in the Paramount Theatre in New York City.

Q. Well, in the Paramount Theatre in New York you [fol. 519] had nothing to do with the management of the theatre, did you?

A. No, sir, only the personnel.

Q. The ushers?

A. That is correct, sir.

Q. And you trained the ushers when they opened the Brooklyn Paramount Theatre; is that right?

A. That is right, sir.

Q. Now, in New York City where are pictures generally exhibited first run in the great city of New York?

A. They are exhibited on Broadway.

Q. In a theatre like the Music Hall; correct?

A. That is correct.

Q. Or the Paramount?

A. That is correct.

Q. Or the Capital?

A. That is correct.

Q. Or the Roxy?

A. That is right.

Q. In some show case type of theatre in the Broadway area? Isn't that a fact?

A. The show case type of theatre, I don't quite understand, but in the Broadway area, I would say yes.

Q. But in a theatre located in the Broadway area; is that right?

[fol. 520] A. Yes. Another manifestation of the thing I was talking about before.

Q. And that picture is not exhibited at any other theatre in the city of New York while it is having its first run?

A. And not within a radius, I think, of 40 miles of New York. In those days; I don't know what the clearance is today, Mr. Raftery.

Q. And there is a tremendous amount of advertising done on the opening of that first run; is that right?

A. Yes, there is a large amount of advertising done.

Q. And that run is used to establish the value of that picture for the whole competitive area; is not that right?

A. That may be or may not be so, sir. I don't agree with that at all.

Q. You do not?

A. The fact is you had several pictures playing in New York by these defendants, playing multiple first run, I think Duel In The Sun was one, but there are several pictures.

Q. Now, Mr. Myerberg——

The Court: Let the witness answer the question. Of course I think a lot of this is surplusage because the wit-

ness has already given his views on this. You are just repeating it to him, the same principle that he has over and over again said that he is opposing, and you are just posing [fol. 521] again the same pictures, so to speak, that he has testified time and again as to those. I think it is repetitious and I think it is unnecessary repetition. In other words, he has made it clear that he opposes this in Baltimore, he opposes it generally. He said that, but what is the use of carrying him to New York and asking him to say it over again? Do I understand you correctly?

The Witness: Yes, sir.

The Court: All of this he has testified to.

Mr. Raftery: I do not recall him testifying to the effect generally.

The Court: Well, he has not by name of the theatre. He has not specifically. Go ahead, sir, if you want to for a limited period, but I think I have to keep this case within proper bounds. We cannot cover the entire gamut of the moving picture world in this one Baltimore case.

The Witness: May I say something that will clear this up? I think I said a number of times the thing I am objecting to is the elimination of the possibility of any independent exhibitor receiving access to first run pictures located outside of the downtown area of any city. I said of any city, including Baltimore.

The Court: Well, I understood that is what you said in your testimony the past few days.

The Witness: Yes, sir, I said that.

[fol. 522] Mr. Raftery: Well, I won't press it at this time.

By Mr. Raftery:

Q. Now, you testified that the drawing population in your area was 105,000 individuals as of February 1949; is that right?

A. Yes, sir.

Q. Now, of that 105,000——

A. No, sir, let me correct that. I think I said that was the time we started the construction in 1947. I do not think I said 1949. If I did, I am mistaken.

Q. How about 1949 when you started this theatre?

A. I started the theatre in 1947, sir, not 1949.

Q. I mean when you started operating the theatre.

A. When we started operating the theatre they probably had increased to probably 112,000 or 114,000.

Q. Now, in that number did you include children under the theatre age and adults over the theatre age?

A. We included children under the theatre age, but I do not think there is an adult, unless they are infirm, who is over the theatre age.

Q. I will accept your modification, you include the infirm.

A. Those not in homes, yes. This is a Health Department survey we used, and I imagine they included every head in the area.

Q. So, then, your theatre potential for patrons would [fol. 523] be reduced below the figure of 112,000 or 115,000 by the number of those children able to go to the theatre or too young to go to the theatre?

A. I would say yes. I would say that is fair.

Q. Can you estimate what percentage of 112,000 are included in that category?

A. I don't think it would be very much. I will even say it was 5,000.

Q. 5,000. Now, you testified yesterday that you had anticipated grossing on Samson and Delilah in excess of $80,000 if you had been awarded the picture; is that a fact?

A. Yes, sir.

Q. Now, how many people would you have had to play to in your theatre at those high admissions of $1.00 net and 75 cents to gross $80,000?

A. Between 80 and 90 thousand people.

Q. In the Crest Theatre?

A. Yes, sir, over a period of many weeks.

Q. And you draw only from that limited area?

A. Well, if I played the picture day and date with downtown, I would only draw from that particular area, that is correct, sir.

Q. And you told us yesterday that whether you played day and date or played exclusive, it would not affect your gross receipts; is that right?

[fol. 524] A. I said it would not affect it to any appreciable amount.

Q. Well, do you want to pick a percentage?

A. No, it would be pure conjecture, sir.

Q. Now, you said you had some figures on Samson and Delilah on which you estimated in excess of $80,000 gross box office take. Have you those figures available?

A. I told you yesterday, Mr. Raftery, I would be very happy to find them for you. They were in pencil in my personal files. If you want them presented and my counsel requested of me, I would be glad to furnish them to you.

Q. When you made a bid on any other picture, did you have figures upon which you estimated your gross before you made the bid?

A. I don't think so, but we felt we knew approximately. Now, that isn't an exact business, as you well know, Mr. Raftery, we try to project these things to the best of our knowledge.

Q. Now, you made other bids generally through Mr. Rome; is that a fact?

A. Some were through Mr. Rome after I had engaged him as our attorney, after we had gotten not even the courtesy of some answers to some of our bids and some of them, I think, I made myself.

Q. You did make a bid on some Columbia pictures, did [fol. 525] you not, through Mr. Rome?

A. Yes, sir.

Q. Now, on December 20, 1949 Mr. Rome, on your behalf, made a bid for the picture Jolson Sings Again.

A. Yes, sir.

Q. Do you recall what run he bid for and what guarantee he offered, against what percentage?

A. I think the percentage was 40% first run Baltimore. I think it was either 10,000 or 12,000 guarantee.

Q. Now, wasn't it for an exclusive first run exhibition in Baltimore? (Handing exhibit 30 to witness.)

A. Yes, sir, that is what it says.

Q. Which meant that you would play the picture to the exclusion of all other theatres in the City of Baltimore; is that right?

A. We had been told at that time and continuously by the distributors that they would not go into day and date policy. We were trying to bid on a picture anyway they wanted us to so we could get the picture. I would have

played a picture exclusive or day and date. I think I made the offer to you if Fox wanted me to play day and date in my theatre that I would put up a certified check for it. There is no doubt in my correspondence before this date; there is no doubt in my correspondence before 1948 I was asking for day and date first run.

[fol. 526] Q. Now, would you have bid the same guarantee $10,500 for day and date as you did for an exclusive?

A. Yes, sir.

[fol. 527] Q. You would?

A. Yes.

Q. Now, I show you—before I get to that, did you have any idea what you would want to gross on that particular picture when you guaranteed $10,500?

A. I felt as if we knew we were close enough to pay the guarantee and come out with a profit.

Q. How much did you figure?

A. At this time, I don't recall, but we figured Jolson *Plays* Again was a sequal to The Jolson Story, which had grossed a lot of money, and we probably expected to gross, I would say, $60,000 over a long period of time.

Q. Was your guarantee percentagewise a lot lower than the guarantee you gave on Samson and Delilah?

A. Yes, sir, because we felt that Samson and Delilah was less of a gamble than this picture. We know that sequels do not show as well as original pictures.

Q. So you expected grossing either fifty or sixty thousand dollars at regular admissions?

A. Somewhere—between, I would say, fifty and sixty thousand at downtown admission prices.

Q. How many people would you have to play to in the Crest Theatre to gross that kind of money at regular admission prices?

A. About 50 or 60 thousand people, about 60,000, I would [fol. 528] say.

Q. What is the greatest number of patrons you have played to in any week since you have operated the Crest Theatre?

A. Between nine and ten thousand people.

Q. Between nine and ten thousand?

A. Yes, sir.

Q. I show you Plaintiff's Exhibit 31, a telegram from Mr. Rome to Columbia Pictures. Do you remember that bid?

A. Yes, sir; I do.

Q. That is on the picture called All The King's Men?

A. Yes, sir; that is correct.

Q. And that is a picture that won the so-called Academy Award for that year; is that right?

A. Yes, sir.

Q. What did you bid on that picture?

A. $7,000 against 40 per cent of gross for extended first-run, and an alternative bid of $4,000 on a 40 per cent of the gross extended day and date with downtown.

Q. So, on an exclusive run, you bid $7,000 guarantee, and on a day and date you bid $4,000?

A. That is correct.

Q. How do you explain that answer?

A. As I said to you in my original testimony, we had been open almost a year, and were desperate. I would [fol. 529] bid anything in any way except in excess of what I could pay for and in excess of what the theatre could do. I would put in any type of bid that I thought would be attractive to them if they wanted it, and which I could come out with, and didn't have any other way. I made it the other way. This is the only bid I made this way.

Q. Why did you bid $7,000 guarantee for exclusive, and only $4,000 for day and date?

A. For the reasons I have stated now in my testimony. It was just another method that I tried to use to try to convince these people to give me a picture.

Q. Let's try it another way. If you received it on exclusive, how many people did you anticipate you would play to on an exclusive run at that particular theatre?

A. About 20,000 people.

Q. Now, if you got a day and date, how many people did you expect to play to?

A. The same number.

Q. Why didn't you bid $7,000 on a day and date as well as $7,000 on an exclusive?

A. I did on every other picture that I bid on. This is just another manifestation of trying to do anything, in sub-

mitting these bids, in any way that I thought would be more attractive to them, and I asked Mr. Rome to send this wire. [fol. 530] Q. And that is your only explanation of the difference between $7,000 and $4,000?

A. That is correct.

Q. Isn't it a fact that you were unwilling to gamble more than $4,000 on a day and date, as against $7,000 on an exclusive?

A. No, sir; and I will return to the offer I made to you for Diplomatic Carrier.

Q. I do not sell pictures, I am sorry.

You will admit, Mr. Myerberg, that when you make a bid or an offer, the sum that you guarantee in your mind bears some relation to what you expect to gross on the engagement?

A. Yes.

Q. And, as a general rule, the higher you anticipate the gross, the higher will be the guarantee?

A. Not necessarily. There are some instances—I can go back—we have had so many conferences on these things in the past few days, and there have been so many figures in my mind—I recall the bid on these pictures was quite frequently based on returning as much as 70 per cent of the gross to the film company, sometimes, I would say, 50, sometimes 60, and as much as 70. Where I bid $10,000 for a picture, we think, quite frequently, that we would have to take in, probably, $17,000 to $20,000, to come out all right, returning to the distributor 50 to 55 to 60 per cent; and, [fol. 531] again, the gross is not the controlling factor. It is the percentage you can afford to pay out of that gross for a film.

Q. Let me go back and ask the question again:

When you make a bid, any bid, or an offer, in competitive negotiations, which contains a guarantee, the amount of that guarantee, in your mind, bears some relation to what you expect to gross on the engagement of the picture?

A. Yes, sir; only, in the respect that I have just explained, as to what percentage you expect to pay out of that gross for the picture.

Q. You don't expect to pay 100 per cent of the guarantee for gross, do you?

A. Sometimes it does.

Q. And sometimes 120 per cent?

A. Sometimes, it does happen.

Q. And, when you overbid, that is what happens, is it not?

A. No, I wouldn't say when you overbid. As I said before, this business is not a business of tangibles; it is a business of intangibles. You may think something is going to meet the public fancy, and it does not; but that is only one picture.

Q. And many times, a picture that will have a vogue in one neighborhood will not have a vogue in another?

[fol. 532] A. That is correct.

Q. And a picture that will have a vogue downtown may not have a vogue in the neighborhood?

A. No; I think you are going a little far afield, Mr. Raftery. I think pictures, the normal run of pictures that do business in Baltimore, will do business in Kansas City, Los Angeles, and every other place. If you have the right product, it will do business anywhere.

Q. In other words, you are talking about the top pictures?

A. I am talking about not only the top pictures. There are some pictures, that are not considered top pictures that will do the same thing.

Q. But, sometimes, occasionally, a picture not considered a top picture will meet with universal favor; isn't that a fact?

A. Quite frequently; yes.

Q. And sometimes a very expensive picture, that is advertised big, and everything, will not meet with universal favor?

A. No; it will not.

Q. In other words, it is a matter of the taste and fancy of the audience, and the last reaction as to the success or nonsuccess of a picture?

A. That is correct.

[fol. 533] Q. It is an intangible; isn't that a fact?

A. Yes, sir.

Q. Now, Mr. Myerberg, when you built your theatre, the

Crest, isn't it a fact that you were aware that pictures played first run in the City of Baltimore in various downtown theatres operated by various exhibitors?

A. Yes; I knew that.

Q. You knew about Keith's Theatre?

A. Yes.

Q. That was operated by an independent named Schanberger?

A. It was operated by Mr. Schanberger, who, for 20 years, as I have testified before, played Universal and half Paramount, and no other pictures except once in awhile some independent production outside of these eight defendants.

Q. Who operated the Hippodrome and Town?

A. Mr. Rappaport, who split the Columbia and RKO product between those two theatres.

Q. And he was an independent exhibitor?

A. Independent in the sense of being independent; yes, sir, owning two theatres.

Q. But he belonged to the same independent association that you do?

A. So does Loew's Incorporated.

[fol. 534] Q. But he is generally considered in the business an independent exhibitor; is that right?

A. Yes, sir.

Q. Now, the New Theatre is operated by whom?

A. Mr. Mechanic.

Q. And he is an independent exhibitor?

A. Yes.

Q. And you have the Stanley Theatre, operated by Warner Bros. circuit management, one of the defendants in this action?

A. Yes, sir.

Q. And you have the Century and Valencia?

A. Yes.

Q. And those were operated by Loew's Incorporated, another defendant in this action?

A. Yes.

Q. You knew that each of these eight distributor defendants licensed their pictures to this group of theatres

in the manner you have described, with 21 days clearance over all theatres located in and around Baltimore City?

A. Yes, sir.

Q. And that had been, as you put it, the custom for many years?

A. That is correct.

Q. Now, you also knew that in the neighborhoods there [fol. 535] were approximately 22 theatres—I think that was your minimum—that operated on an availability or run of 21 days after first run; in other words, first neighborhood run?

A. At that time I didn't know the number, but I knew there was quite a number.

Q. I think you testified to 22 to 30?

A. I said I know now there are 22 to 30 that play at the present time. How many were playing at that time, I don't know.

Q. Forget the number. But the first neighborhood runs usually played on a day and date basis; is that right?

A. Among those theatres that were not in substantial competition; yes.

Q. And some that were in substantial competition?

A. I didn't know the number.

Q. I think you have testified that clearance is an important factor to each exhibitor; isn't that a fact?

A. Yes, sir; clearance amongst theatres that are in substantial and not in substantial competition; yes.

Q. In your complaint, in the second cause of action, I think you are claiming some damage because of some alleged clearance discrimination as between your theatre and the Avalon?

A. The Avalon, the Pimlico, the Pike, and the Uptown. [fol. 536] Q. In other words, you feel that your theatre, assuming it is playing on a neighborhood day and date run, should have clearance over the Uptown and Pimlico and Avalon and Pike?

A. No, sir; that is not what I said. I think I testified at quite some length to that. I said I felt competitive negotiations should have been entered into, and that the theatre winning the competitive negotiation should have clearance over the other theatres. I did not single my

theatre out, Mr. Raftery, and say I wanted it over everybody else.

Q. Let's assume that you have bought a first neighborhood run for that area. Isn't it your feeling that you should have clearance over the Uptown, the Pimlico, the Avalon, and the Pike?

A. Only if the other theatres have had access to that picture, and I have won out in a fair competition.

Q. On competitive bidding?

A. Yes, sir.

Q. Or competitive negotiations?

A. Yes, sir.

Q. But, at any rate, if you get the first run in a competitive area, it is your feeling you should have clearance over the theatres you have just mentioned?

A. That are in substantial competition to me; yes, sir.

[fol. 537] Q. Now, you know from your experience in the business that every exhibitor tries as far as possible to preserve the run or clearance that he has been playing in the past. Don't you know that?

A. No, sir.

Q. They readily give it up?

A. No, sir; I don't think they would readily give it up; but if there is a theatre in substantial competition to them, that quite a number of exhibitors are willing to go into competitive negotiations or split the product.

Q. Take the Uptown Theatre, which is in very substantial competition with you, is it not?

A. To the extent of about 60 per cent of our business; yes, sir.

Q. And the Uptown was in that neighborhood when you went in there, was it not?

A. Yes; it was.

Q. It is a fine theatre?

A. A very nice theatre.

Q. Well-managed?

A. Well-managed; yes.

Q. And operated by Mr. Garman?

A. Yes, sir.

Q. When you went into the area, you also had the Ambassador Theatre to the south of you, or would it be south-
[fol. 538] east?

A. It would be west.

Q. Southwest of you; is that a fact?

A. Yes, sir.

Q. And that theatre is in competition with you?

A. We have never asked for clearance over the Ambassador Theatre on second run 21 day pictures. We are not asking that they be included in our bidding. We only consider them to be in competition to us if we have day and date with downtown.

Q. As a matter of fact, Mr. Myerberg, in your daily box-office statement, you list the Ambassador as one of your competitive theatres, don't you?

A. No, sir; I just list the Ambassador to show what film they are playing. We also list other theatres, the Senator, which is considerably further away from us; that is not for the purpose of competition, no, sir.

Q. You don't consider the Ambassador in competition with you?

A. We haven't, on a 21-day policy; no, sir.

Q. You don't think the opening of your theatre took any customers away from the Ambassador Theatre?

A. The opening of any new enterprise will take some business away from somebody.

Q. And you did take customers away from the Ambassador?

[fol. 539] A. It was not our intention to open on a 21-day policy, and had we gotten the policy we deserved in the area, if we had the access to first-run pictures, I think we would have helped the Ambassador Theatre and helped the Uptown; but the way it was, it hurt everybody, including me.

Q. Do you compete directly with the Pimlico Theatre?

A. Yes, sir; we compete with the Pimlico Theatre.

Q. And the opening of your theatre took some customers away from that theatre?

A. It is quite possible.

Q. And you competed with the Gwynn?

A. You are getting down into the theatres, Mr. Raftery,

that I don't think are in the class of the Uptown, the Crest, or the Ambassador. You are getting down to the houses that have been action houses, and houses that have played double-features, and houses of very poor appointments.

Q. And that is how you classify the Gwynn?

A. Yes, sir.

Q. The Pike?

A. The Pike has always enjoyed—the Uptown has always enjoyed 14 days clearance over the Pike, so I don't see where that has affected the situation at all; but, but as I say, again, it was not our intention to affect anybody.

Q. You take clearance over the Pike?

A. The clearance given to me over the Pike has been [fol. 540] given to me. I never asked for clearance.

Q. As a matter of fact, didn't you have a dispute about one of the films, over the amount of clearance you had over the Pike Theatre?

A. Yes, sir; after it was reached in the first contract, and I had 14 days, and it was eliminated after.

Q. And they cut it to 7 days?

A. Yes.

Q. And you protested?

A. Yes. I don't think—I think that is a mistake, Mr. Raftery. They put it to 7. I didn't protest about that. I think they took it out entirely and played the picture at the Pike, day and date, a Paramount picture.

Q. But, at any rate, you took clearance over the Pike, which is five miles away from your theatre; is that right?

A. No; that is not right.

Q. How far is it?

A. A little under three; about 2½ miles.

Q. But you took clearance over Reisterstown?

A. No, sir.

Q. And yet you do draw from that area; is that right?

A. I think we do.

Q. But you don't take any clearance?

A. No, sir.

Q. Does that theatre play day and date with you?

[fol. 541] A. Day and date, and ahead of me.

Q. And still you think you draw from that area?

A. We draw some patronage from that area; yes, sir.

Q. And the 100,000 or 112,000 includes patrons from that area?

A. No, sir; I did not include in our 125,000 computation any people from the Fourth District, which is Reisterstown; the 9,000 people that live out in that community were left out entirely.

Q. Well, now, to get back to clearance, isn't it a fact, Mr. Myerberg, that every exhibitor, no matter what his run is, will protest if any distributor were to take away either his run or his clearance and give him an inferior run?

A. If that is done, and it is not in substantial competition, yes; but, with theatres in substantial competition, no.

Q. You don't believe an exhibitor who has clearance would protest if the distributor attempted to take away any part of the clearance or his run?

A. Mr. Raftery, I cannot speculate. If you want me to, I can. I cannot speculate on what somebody else might do. I can tell you what I would do, under the situation and under the circumstances. This is speculation and, if you want me to continue with it, I will be very happy to.

[fol. 542] Q. Didn't your counsel put in evidence some letters in which it was stated that if the run were taken away from the Uptown Theatre and given to you at the Crest, that Mr. Garman was going to bring a lawsuit? Do you remember that letter?

A. A letter from Paramount; that is right.

Q. And isn't it a fact, and isn't it common knowledge, if a distributor tries to take a run away from any theatre, the theatre from whom you have taken the run away is going to sue you, and if you don't take it away, the man who wants it sues you?

A. No, sir; you are confusing the record. That is not correct. But that letter said—I would like to get the letter out.

Q. Go ahead.

A. What that letter said was after Mr. Garman, if Mr. Garman was made to bid or compete in that area, he would sue the company or threaten to sue the company, if the pictures were being taken away from him. He had access

to the pictures, the same as I did, and that isn't what the letter said; so your statement is not correct. If you have the letter, you will see I am correct.

Q. Before you came into the neighborhood with the Crest Theatre, Mr. Garman had a first run on these pictures [fol. 543] at the Uptown Theatre; isn't that a fact?

A. Yes. I don't think anything is meant, Mr. Raftery, to preclude anybody from going into business in a country of free enterprise, and in America that still exists; and, by God, I hope it continues.

Q. And you don't care, when you open that Crest Theatre, you don't care how much you hurt Mr. Garman, or the Avalon Theatre, or the Uptown Theatre?

A. Of course, I do. I had no intention, as I stated before, to hurt anybody, and I don't want to hurt anybody.

Q. Now, you talk about this day and date first run. Isn't it a fact that if the distributors had given you a first run, each of the distributors at the same time would have been required to take a clearance away from every downtown theatre in Baltimore?

A. No, sir. No, sir.

[fol. 544] Q. How do you explain that answer?

A. They would not. Clearance is unjustifiable where theaters are not in substantial competition. Now, if the downtown theatres thought, or if the distributors thought I was in substantial competition, and as they have told me a number of times, it is their burden to prove that if they felt I was in substantial competition, all they had to do was to make those pictures available to me first run exclusive in Baltimore. That is all I was asking, and I was not asking for them to take clearance away from anybody else. I wasn't asking for anything but for me to have pictures first run in Baltimore. If that is what they wanted, at least they could have let me bid on them or have access to them, but as I claim, I wasn't in competition with them. They could get both rentals. I would buy the picture day and date with downtown.

Q. Isn't it a fact—and I ask only about day and date—if each of the eight distributors uniformly and at the same

time acceded to your request for day and date first run with the downtown theatres, that the effect of that would be to uniformly take away from all the downtown theatres at the same time their 21-day clearance?

A. Mr. Raftery, I repeat again what I have just said, that both these things have to be taken into consideration at the same time. I was saying here I do not feel as though [fol. 545] I am in substantial competition with downtown. However, if you feel as though I am, the only thing I want to do is to have access to first run pictures. If I can afford to pay the rentals, I want them, if I cannot, then I don't get them.

Q. You have testified, not once but several times, that at no time did you want an exclusive first run, that what you wanted was a first run day and date with downtown.

A. It didn't seem to make any difference what I wanted, Mr. Raftery.

Q. Didn't you testify to that?

A. Yes, sir, that is correct. I just testified to it again, sir.

Q. I am simply asking you—and I ask for a yes or no answer if you can make it—if it is not a fact that the effect would be that if each of these distributors uniformly and at the same time granted your request, they would automatically take away from every downtown theatre the 21-day clearance that those theatres have?

A. My same answer holds, Mr. Raftery.

Q. Can't you answer yes or no?

A. No, sir, because they are both together, they are Siamese twins. I couldn't separate them.

Q. Would you admit they would be left without clearance downtown?

A. No, sir, they would have clearance with any theatre [fol. 546] in substantial competition to them.

Q. Would you admit they would have no clearance over the Crest Theatre?

A. They would have no clearance over the Crest Theatre, that is correct.

Mr. Raftery: Excuse me one minute, Your Honor.

By the way, may I have the record page 383?

By Mr. Raftery:

Q. Do you remember testifying—I think it was yesterday morning—:

"Q. Did Fox license you pictures by competitive bidding?" Do you remember testifying on that subject yesterday?

A. Were they 21-day pictures, sir?

Q. Yes.

A. Yes, I remember testifying something about that.

Q. And I think you testified Fox refused to license you any pictures on competitive bidding on a 21-day run.

A. Yes, sir.

Q. And you also said there was a letter from Mr. Norris, a telegram, in which he said they would prefer to have a status quo. Do you remember that?

A. Yes, sir.

Q. You do not remember the time of that letter?

A. The telegram, I think, is in evidence, sir. We can get it out. I think it was 1950, sometime around there.

Mr. Raftery: I wanted to ask Mr. Boyd if it will be all [fol. 547] right if Mr. Boyd reads these letters and offer them. I want to rest a second, if I may. It is merely to read the letters. Will that meet with Your Honor's approval?

The Court: What is the subject?

Mr. Raftery: It is on this competitive bidding.

I will offer in evidence a letter dated December 15, 1948 addressed by Harry Myerberg to Twentieth Century-Fox Film, a letter dated December 27, 1948, addressed to Myerberg by Fox, a letter dated December 29th, registered mail, from Theatre Enterprises to Norris, a letter dated January 1, 1949 from Twentieth Century-Fox to Myerberg, a letter dated January 6th from Theatre Enterprises to Mr. Norris, and I merely ask if it would be all right if Mr. Boyd, instead of myself, read these to the jury.

The Court: Oh, yes.

The Clerk: Are you offering those as defendants' exhibit 1?

Mr. Raftery: Yes, 1, 2, 3, and so forth. You better use numbers because we might run out of the alphabet.

May I be excused for one minute?

The Clerk: These will be defendants' exhibits 1 to 5, inclusive.

(Letter, December 15, 1948, Harry Myerberg to Twentieth Century-Fox Film, was marked Defendants' Exhibit No. 1.)

[fol. 548] (Letter, December 27, 1948, Twentieth Century-Fox to Harry Myerberg, was marked Defendants' Exhibit No. 2.)

(Letter, December 29, 1948, Theatre Enterprises to C. G. Norris, was marked Defendants' Exhibit No. 3.)

(Letter, January 1, 1949, Twentieth Century-Fox to Harry Myerberg, was marked Defendants' Exhibit No. 4.)

(Letter, January 6, 1949, Theatre Enterprises to C. G. Norris, was marked Defendants' Exhibit No. 5.)

Mr. Boyd: Your Honor, I want to read to the jury Defendants' Exhibit No. 1, which is dated December 15, 1948. It is addressed to Twentieth Century-Fox Film Corporation in Washington, attention of Mr. Norris.

"Gentlemen:

"It is our understanding that your company has taken the position that the Crest Theatre will not be permitted to competitively bid for your pictures first run City of Baltimore either on an exclusive or day and date basis. As you know, it is imperative that we open the Crest Theatre without further delay. We are at this time accepting your offer permitting us the right to bid on your pictures first neighborhood run in this area.

"Please understand that our acceptance of your offer relative to neighborhood run pictures for the Crest Theatre is not a withdrawal of our original request for first run pictures City of Baltimore, contained in our letter of [fol. 549] October 12, 1948.

"Kindly send as soon as practicable all of the information necessary regarding pictures available for the Crest Theatre on a first neighborhood run basis.

"Very truly yours,

"Theatre Enterprises, Inc.

By "(Sgd) Harry D. Myerberg."

That was sent registered mail.

Defendants' Exhibit No. 2 on the letterhead of Twentieth Century-Fox Film Corporation, dated December 27, 1948, and sent special delivery, addressed to Mr. Harry D. Myerberg, care Theatre Enterprises in Baltimore.

"Dear Mr. Myerberg:

"Our wire of the 24th listed availability date for certain pictures and requested you to submit your offer for any or all of them if you are interested in using them first run in the Crest Theatre zone. We explained that your offer should include the play date together with terms which should specify the amount of guarantee with the percentage of gross receipts which you want to offer for the pictures. By guarantee we mean the amount of money you are willing to guarantee us for the engagement.

"Very truly yours,
"Twentieth Century-Fox Film Corporation,
"(Sgd) C. G. Norris, Branch Manager."

Mr. Robinson calls my attention to the fact the letter of December 29th is dated 1949, which is obviously a [fol. 550] typographical error. It is exhibit No. 3 and is dated December 29, 1948, and is addressed to C. G. Norris, Branch Manager, Twentieth Century-Fox Film Corporation in Washington, registered mail.

"Dear Mr. Norris:

"In answer to your letter of December 27th the following has not been clarified: (1) What is meant by first run Crest Theatre zone? (2) What area does it comprise? (3) Is that a request by your company for competitive bidding on your pictures? (4) If so, with what theatres are we bidding and are the terms requested from us as to percentage of gross and guarantee, the same as you requested from all other bidders?

"Your immediate answer to the above would facilitate the submitting of our bid immediately, as it is imperative that we open the Crest Theatre without further delay."

And on January 1, 1949, Defendants' Exhibit No. 4, on the letterhead of Twentieth Century-Fox Film Corporation, addressed to Mr. Myerberg, is as follows:

"During our telephone conversation Wednesday afternoon, I explained in complete detail all the questions which you asked in your letter of December 29th. Also during this conversation you advised me that your theatre would not be open until about the second week in February, and accordingly you would be unable to negotiate for any pictures [fol. 551] prior to that time.

"Very truly yours,
"Twentieth Century-Fox Film Corporation,
"By (Sgd) C. G. Norris."

And Defendants' Exhibit No. 5 is dated January 6th, 1949, addressed to Mr. Norris at Twentieth Century in Washington.

"Dear Mr. Norris:

"In answer to your letter received in our offices January 6, 1949, the following is my conception of the meaning of our conversation of December 29, 1948.

"We are competitively bidding for first subsequent run pictures against the Uptown Theatre. Although the Crest will not open until the second week in February, we are now negotiating for all pictures which will break first subsequent run City of Baltimore on or after the 12th day of February, 1949.

"Very truly yours,
"Theatre Enterprises,
"By (Sgd) Harry D. Myerberg."

By Mr. Raftery:

Q. Now, after you received this offer of competitive bidding from Fox, did you avail yourself of it?

A. As I recall, Mr. Raftery, when I went to buy pictures from Fox on competitive bidding, the Fox no longer sold me on that basis. I think the first picture that went with the theatre went in on a day and date basis with the [fol. 552] Uptown Theatre.

Q. As a matter of fact, didn't you tell Mr. Norris that at that time you did not wish to go into a competitive bidding policy against the Uptown?

A. No, I think the conversation with Mr. Norris may have been that unless he included the Avalon Theatre in the bidding and made the bidding fair, like I was requesting at that time of Metro and other people, that I could not bid against the Uptown without the Avalon being included with the Uptown for a clearance over the Avalon and we having none, inasmuch as the same owner owned both theatres.

Q. You think the bidding fell down solely over the Avalon clearance; is that right?

A. I do not recall, Mr. Raftery.

Q. You really haven't any memory on it?

A. No, I have that much of a memory on it, but I think it fell down because Fox did not want to sell me on competitive bidding because, if you will go into your records here, you will find that the subject was broached again about competitive bidding, and they refused to bid. If they were sincere in 1949, why weren't they sincere in 1950?

Q. As a matter of fact, didn't you and Mr. Norris get into a real argument in his office sometime in the summer of 1950, at which time you told him you did not want a competitive bid on his pictures, and he asked you to get out [fol. 553] of his office? Isn't that a fact?

A. No, sir.

Q. You had no altercation of any kind or character?

A. I had some discussions but no discussion of that type, no, sir. I never had any discussion of that type with any man in Washington.

Q. How about Mr. Daransol? I may be wrong about who had the argument with Mr. Norris. Could it have been Mr. Daransol?

A. Not in 1950, because—it may have been the latter part of 1950, not during the time we are speaking about. I would say in the latter part of 1950 I turned the booking and buying of the theatre, mostly of the booking, the buying, over to Mr. Daransol, that is correct. What conversation he may have had with Mr. Norris, I don't know. None was reported to me to that effect.

Q. So, at any rate, in 1948, before you opened the theatre, Fox did offer you competitive bidding as against the Uptown?

A. Yes, they did. But then the actual practice of it, it never came off.

Q. Before we went to the Fox matter we were discussing the elimination of clearance on the downtown theatres by your going day and date first run at the Crest Theatre; is that right? Do you remember we were talking about that? [fol. 554] A. We were discussing a day and date or exclusive run, yes, sir.

Q. Now, let's see what would happen if you were to license a picture day and date at the Crest Theatre with the downtown theatre for first run. Now, as I understood your testimony yesterday, your theatre, because of its lower overhead and its superior parking, could play a picture longer at the Crest Theatre than the theatre downtown could play?

A. I said most theatres downtown.

Q. Most theatres. Now, let us put the "most" in. Which ones?

A. I would say practically all with the exception of the Mayfair Theatre, possibly the Valencia. I don't know how Loew's Incorporated divides their expenses between Century and Valencia, but I would say all with the exception of the Mayfair and maybe the New Theatre.

Q. Now, the Valencia?

A. Yes.

Q. The Valencia seldom, if ever, plays a first run top picture; is that a fact?

A. It plays a move-over policy, which is considered first run, yes, sir.

Q. I mean as the initial run. The opening run is generally at the Century?

[fol. 555] A. The opening run is generally at the Century and moves over to the Valencia, yes, sir.

Q. And occasionally it is what you call, termed the other day a slough picture first run?

A. Correct.

Q. Now, let us leave the Valencia out temporarily. Now,

you say the Mayfair could play as long as you could. Is that correct?

A. That is not the question asked, Mr. Raftery. You asked me as far as the expenses of the theatres were concerned. Did I understand the question correctly?

Q. Perhaps you understood the last part.

I think you testified yesterday that at the Crest Theatre you could play a first run picture for a longer engagement than the downtown theatres. Did you not so testify?

A. Yes, sir.

Q. Now, in those downtown theatres I presume you mean the Century, the Stanley, the New, the Keith, the Hippodrome, and the Town, those six.

A. Yes, sir.

Q. Now, suppose—by the way, you have no interest there as Mr. Myerberg or Theatre Enterprises or Penn Construction, in any of those theatres?

A. Downtown?

Q. Yes.

[fol. 556] A. No, sir.

Q. There is no common ownership?

A. No, sir.

Q. You are just in competition with them?

A. No, sir, we are not in competition with them, not substantial competition.

Q. Anyhow, you will concede you are in competition in your effort to acquire first run pictures. Put it that way, because I do not want to get you away from your basic theme.

A. No, sir, we are not in competition with them at all.

Q. You are not in competition either in buying pictures or in exhibiting them?

A. No, sir. That is my opinion, yes, sir.

Let me add the word "substantial" again, Mr. Raftery.

Q. You have selected what we term in the trade as the guinea pig picture for this law suit, "The Stratton Story; is that right?

A. Yes, sir.

Q. How did you happen to pick The Stratton Story instead of any other picture which played out at your theatre?

A. Because that picture, as I tried to explain before, [fol. 557] played clear in my area. I meant by that we played it before the Uptown, Avalon, Pimlico and Pikes. And in judging the potential of the area, I thought it was only fair to take a picture that played clear in the area and not in competition with those other theaters day and date.

Q. Now that picture had its first run downtown at the Century Theatre; is not that a fact?

A. Yes, sir.

Q. And had a tremendously successful engagement there; isn't that a fact?

A. I understand it was a successful engagement.

Q. Don't you remember the publicity campaign put on with that picture?

A. I don't think too much was done in Baltimore, sir.

Q. You do not?

A. No, sir, not that I recall.

Q. You do not remember the tie-up that was arranged between the picture and your local baseball club, the "Baltimore Orioles"?

A. It may have been done, but I do not recall it.

Q. You do not recall it?

A. No, sir.

Q. It was well-advertised and well-publicised.

A. The picture did very well, I understand.

Q. Then it moved to the Valencia?

[fol. 558] A. That would be the normal procedure, yes, sir.

Q. Then it played the Parkway?

A. It played exclusive run at the Parkway.

Q. Then it played out your way?

A. That is correct.

Q. Then the run at the Parkway did not affect your Crest in any way, did it?

A. I don't think so.

Q. So, you selected The Stratton Story. Now, let us assume the cycle of The Stratton Story is now available for release in Baltimore?

A. Yes, sir.

Q. And, as I understand, you desire to play a picture of

that high quality, which we are assuming for the question, day and date at your theatre with some theatre downtown?

A. Yes, sir.

Q. Now let us assume the Stanley Theatre makes a first run day and date arrangement for the exhibition of that picture and you have a day and date arrangement for the exhibition of that picture. Now, can you tell us, according to your manner or method of how you think pictures should be distributed, how would that day and date exhibition come off?

A. Mr. Raftery, let us clear up one thing. That isn't my method of distributing pictures you speak of day and [fol. 559] date, as I have stated before——

Q. Please. Let us eliminate that from the question. I didn't mean it that way. I didn't have any thought in it other than to find out if you license your pictures for day and date at the Crest and if Warner licenses it for day and date at the Stanley, tell us about the first run, how would it operate?

A. I don't quite follow you, Mr. Raftery.

Q. How many days would you play the picture?

A. I have always been willing to set a minimum figure, and until the gross reached that minimum figure, I had to play the picture.

Q. Right.

A. Regardless of what that figure was. It was mutually agreed with the distributor, no matter if the figure was 4,000, 5,000 or 2,000, until the gross reached that minimum, we could not pull the picture.

Q. Let us assume you had exactly the same type of contract with Warner's at the Stanley, that they would have to hold the picture until they reached that stop?

A. Yes, sir.

Q. Now, you told us yesterday that you could play longer out at your theatre because of your low rental; is that right?

A. That is right.

[fol. 560] Q. Now, the Warner Theatre is a great, big, beautiful theatre, isn't it?

A. It is a great big theatre, yes, sir.

Q. Well, we will leave out "beautiful."

A. Well, it was considered beautiful about 25 years ago. I think our theatre is in every way comparable to it or better than it.

Q. Except the Warner Theatre is just about twice as big as yours, seatwise?

A. I think it is to its disadvantage rather than its advantage.

Q. Please. It is twice as big, seatwise?

A. Oh, yes, it is twice as large.

Q. Now, suppose your picture The Stratton Story, Jr. had not reached your stop figure and you hold it over for a third week, and the Warner house played it the first week at the stop for each first, but on the second had exhausted its audience and they pulled the picture, as they had a right to do, you would continue to exhibit out there not on a day and date, but as far as that week was concerned, an exclusive; is that right?

A. First, if you are asking me to speculate with you what I would do if I managed the Stanley Theatre, I can do that. If you ask me to speculate how a picture would play and what would happen under a specific condition, it is [fol. 561] speculation, I will speculate on that. I would hold that picture just as long as it didn't reach the minimum figure.

Q. Right. And because of your low overhead it might be out there four or five weeks; is that right?

A. It would be out there until that minimum was reached.

Q. Right. And yet it is finished downtown; is that right? That is the assumption?

A. No, it could move from downtown to another house like Loew's does. It could go into a number of other things. It could go into engagement downtown. It could go into second run in a particular area, it could do a number of things in that particular area outside of my area, the area not in substantial competition to me. There are a number of things it could do. There are a number of things that could happen.

Q. Let us assume again that the Boulevard Theatre had bought a 21-day availability on that particular picture off

which engagement, with that 21-day start, to run off the Warner's or off yours.

A. The Boulevard Theatre is not in substantial competition with us. It should run off whatever theatre it is in substantial competition to, and if it was in substantial competition to Warner's, it would run off them. If it wasn't in substantial competition with us, it could play day and date.

[fol. 562] Q. Now, the Uptown has a 21-day availability. Now, what would happen in that case?

A. It would be in our area. It would run off our availability if they wanted to play the theatre.

Q. It is a picture in public demand. Now, isn't it a fact for years the Uptown and the Boulevard have been playing on a 21-day availability in the City of Baltimore?

A. Yes.

Q. So you would have in this particular instance a 21-day availability to the Boulevard off Loew's and about a 42-day availability for the Uptown off your theatre?

A. That is not what I said, Mr. Raftery. I said if the Boulevard Theatre was in substantial competition with the downtown area it would play behind—if they so desire—if they were not in substantial competition it would have the same rights, playing the picture when I played it. They are not in substantial competition to me. I can't speculate what the owners of the Boulevard Theatre would want to do with their theatre. I won't speculate about that. I won't speculate whether Mr. Garman played 21 or 42 day pictures I don't know. It is quite possible that Mr. Garman would go into competition with the pictures I play. I cannot readily see that.

Q. Let's leave your theatre out of it and leave the downtown out of it and just look at the Uptown and the [fol. 563] Senator. Wouldn't the change that you are proposing in the system, method or manner of distribution in Baltimore result in putting the Uptown in a 42-day position as regards the Boulevard and giving the Boulevard a 21-day position as regards the Uptown?

A. No, sir, I don't think so. I can't see that at all. This is pure speculation of what may happen or may not happen.

You haven't broken the city down to zones who is in substantial competition and who is not. There are many things that must be brought out, Mr. Raftery, if you want to bring them out. It is all speculation. If you want to continue to speculate, I will continue to speculate.

Q. Is it more speculation or less speculation then what you would have grossed on Samson and Delilah?

A. I would say Samson and Delilah gross was speculation, yes, sir, as any picture gross is speculation.

Q. Now, changing the relations between downtown and the Crest Theatre, I think you just now mentioned cutting the city into zones. What did you mean by that?

A. Into the areas of substantial competition that any group of theatres fell in.

Q. How would you zone the city to take care of that situation?

A. Well, I wouldn't zone the city anyway, Mr. Raftery. I am only interested in my area. I am not going to zone the [fol. 564] city in any way. I think, however, there are one or two other theatres in other areas that could play day and date with downtown. If you want to go into that speculation we can do that. I think the area around the Northwood and around the Boulevard and the Senator and things of that sort.

Q. Well, let us start with Edmondson Village. What theatres would you put in competition with the Edmondson Village Theatre?

A. I can't put any theatres in competition with it. The only thing I can do is to mention theatres in that area. They are the Edgewood Theatre, the Westway.

Q. The Alpha?

A. The Alpha, in Catonsville, the Irvington Theatre and the Astor Theatre, probably, and I may have missed one. I don't know.

Q. In other words, you would put all those theatres that are located between Frederick Road and what is the name of that parkway?

A. Gwynn's Falls Parkway.

Q. Gwynn's Falls Parkway. And as far west as the city line on Edmondson?

A. I haven't made a study of that, sir.

Q. You haven't. You are not familiar with that area?

A. I am familiar with it, but I haven't made a study [fol. 565] of just how far that would go. I would be glad to go into it with any distributor who wants to.

Q. Let us go into it here. You have the Edmondson Village Theatre. We will assume for the sake of example that that is the number one theatre in that area. Is that the way you classify it?

A. It would be a theatre that could have access to first run pictures.

Q. That theatre got the same prize you did?

A. It is the newest theatre. I do not say the Crest Theatre is the only theatre in my area to play first run pictures, nor do I say the Edmondson Village Theatre in that area should be the only one to play first run there. Access to the pictures was to be made available to those who wanted it.

Q. Let me go back. The Edmondson Village Theatre got the same prize from Jay Emmanuel magazine, you call it an "Oscar," the year after you got yours; is not that correct?

A. I understand that is correct.

Q. And since it opened, it has been playing generally first neighborhood run over there; is that a fact?

A. Yes, sir.

Q. And you say that is a theatre which in your opinion could play day and date with your theatre and with first run downtown on the same picture?

A. That is an area that I said—not an area, but [fol. 566] a theatre in an area that I didn't consider in substantial competition with downtown.

Q. How far is it from Edmondson Theatre, we will say, to the Hippodrome Theatre?

A. I would say about 4, 4½ miles.

Q. But it is nearer than your theatre to downtown?

A. Yes, sir.

Q. Now let us take another area. You mentioned the area of the Northwood. That theatre was built the year after the Edmondson, was it not?

A. Sometime around that, yes, sir.

Q. And that theatre also got the prize from Jay Emmanuel magazine for being a fine theatre?

A. Yes.

[fol. 567] Q. Now, what theatres do you group in the competitive area with that theatre?

A. I would say, all theatres located east of Roland Avenue, and whatever boundaries, I wouldn't know.

Q. But you feel that some theatre, whether it is the Boulevard, the Senator, or the Northwood, could play day and date with your theatre, the Edmondson Theatre, or a theatre in that area, and with a first-run downtown theatre, on the same picture?

A. That is correct.

The Court: Now, this seems to me to be just repeating over and over again what the witness has tried to say, and his counsel has said, about three days ago, isn't it, Mr. Rome?

Mr. Rome: Yes, sir. I think we have attempted to bring that out, sir.

Mr. Raftery: If Your Honor please, this line of introduction will be keyed into our case, if we have to come to it, and we will show the impossibility of any such system; and, in order to do it, I have got to get into the record these various competitive factors.

The Court: You must not think about the record. I am thinking about how the trial of this case before this jury, Mr. Raftery—that is what we are concerned with.

Now, as I understand this witness, for the last [fol. 568] three days he has been repeating and repeating, subject to your so-called cross-examination, what he said at the first day; and all I am trying to do is keep this case within limits, and not have us go over the same thing.

As I understand it, this witness has said, over and over again, that his contention is that it is unfair trade practice, it is unjust discrimination, to confine this first-run practice, or day-and-date practice, to the downtown area, to the exclusion of his own theatre and those that may properly be put in the area of competition with his theatre; and, likewise, he says that it is unfair trade practice and unreasonable restraint of trade not to do the same thing if you have

a similar situation in Edmondson Village, or over on the York Road, or wherever it may be; and he says he has not worked out exactly what theatres may be put into those groupings of substantial competition. But, if the principle which he contends is—the correctness of which is to be decided later—he has not worked that out. Am I correct in summarizing what you have said?

The Witness: Perfectly right, sir.

The Court: It seems to me that this witness said, about three days ago, and this witness has been on the stand—I am not saying this to relieve this witness—if he should be subjected to long cross-examination, why, then [fol. 569] that is your client's right, and it may be proper for a particular witness; but it is the Court's duty to keep this case within bounds, and I do not see that a single new thing has been developed in the last 24 hours by your cross-examination.

Now, I may be entirely wrong, but that is the way the Court views this, and it has to call attention to the fact that we just cannot keep going over and over the same testimony, and eliciting from the witness the same answers, although the question is put in a little different form so that perhaps he has to elaborate a little bit, or bring in another theatre, or another figure.

Now, that seems to me to be an absolute fact, Mr. Raftery, that what has been developed today, everything that has been developed today, and part of yesterday, has all been covered over and over and over again?

Mr. Raftery: If Your Honor please, I do not agree with Your Honor on the issue. All we are——

The Court: I am not talking about the issues. I am just trying to explain what this witness has said is his position. I am not talking about issues now. I am talking about the right to keep repeating and eliciting from the same witness the same thing, only in a little bit different language.

Mr. Raftery: I do not believe I have elicited [fol. 570] anything from this witness in a little different language, such as Your Honor suggests. All we have to establish is that any theatre that is sold downtown is in substantial competition either with his theatre or with any

other theatre located elsewhere, to justify the granting of first-run clearance to any exhibitor in the city.

Now, if Your Honor please, what I am trying to establish, that if you carry this man's theory around the City of Baltimore, you are going to cut off from the audience of the downtown theatres at least 50 per cent of their potential customers, and that is all I am trying to establish.

The Court: You are entitled to try to establish that, but you are not doing that with this witness. You are just getting him to restate what his position is.

Mr. Raftery: No; I am not, Your Honor. I am trying to get him to tell me which of the other theatres in the city, this circumference, are entitled, in his opinion, to show first-run pictures day and date with the downtown theatres.

Now, that has not been shown. If I establish that fact, and I am able to show later that every one of those theatres is in substantial competition with downtown, and they are going to take away from the downtown theatres a big, substantial part of the downtown theatre audiences, and thus destroy the business of the downtown theatres, I [fol. 571] think I have accomplished sufficient.

The Court: You are arguing the case now. I am talking about the repetitious character of your questions. The witness has stated his position, and he certainly stated his position, as I recall it, three days ago, in answer to questions, and in exactly the same way that he is stating it now, only you are breaking it down into different theatres.

Mr. Raftery: Yes; that is the only way I can break down the population segment. It is the only way I can break down, to get before Your Honor and this jury the draw on the downtown theatres from Baltimore City and Baltimore suburbs.

The Court: But the point has been admitted by this witness——

Mr. Raftery: I don't think so. He has admitted it generally, but we just cannot take a generalization and say Edmondson Village represents X per cent of the population. We have to show what comes from Edmondson Village, and the competitive area he sets up.

The Court: Why don't you show it by your own witnesses?

Mr. Raftery: I have to lay a basis for my own witnesses. That is the purpose of it.

Now, with regard to the uniformity part——

[fol. 572] The Court: Mr. Myerberg stated, if I understand correctly, that while he is familiar with these other areas that you have been dwelling on, he has made no study of them. He is interested in his own theatre, and interested in those in substantial competition with any in his area. If you have witnesses from the other areas, put them on. Don't keep asking this witness to give you general statements about the other areas.

I think I am correct. Mr. Myerberg, didn't you once or twice this afternoon say you only had general knowledge of the other areas?

The Witness: Yes, sir.

The Court: And that you were speculating as to some of the theatres, the status of the theatres in the other areas, and with whom you would be in competition?

The Witness: Yes, sir; I did.

The Court: It is just going over something over and over again. If you have witnesses who live in Edmondson Village, or who operate theatres out there, put them on, or, if you have them from the York Road, put them on.

Mr. Raftery: I respectfully submit that as regards the suggestion that I have been going over and over, this afternoon I have put in direct evidence rebutting the Fox charge, of not giving competitive bidding. I have put in direct evidence on the uniformities that this man has [fol. 573] asked for, in contrast to the uniformities he complains of. Yesterday, I put in direct evidence that this gentleman did not concoct the damage theory in this case, or the figures, and that it was done by Mr. Rome.

I submit I have moved with as much expedition as I know, in an effort to finish the cross-examination this afternoon. I told Your Honor yesterday that I thought I would take a day. We worked yesterday well into the night, and all morning, with the view of narrowing this cross-examination, and I feel confident I am going to do it, and finish this afternoon.

This witness was on the stand 2¾ days, and I had him

three-quarters of an hour yesterday afternoon, and an hour-and-three-quarters today.

The Court: The test is not the time. We do not test the procedure by whether the direct examination took longer than the cross, or vice versa. It is a question of what is relevant or what is repetitious, and what the jury ought to be spared in having so much cumulative repetition. That is the question.

Mr. Raftery: That is a point on which I respectfully differ with the Court. We are trying to avoid repetition. That was the purpose of our work last night.

By Mr. Raftery:

Q. I will ask you this one question, and leave this subject: Isn't it a fact that if the distributors [fol. 574] had granted you either an exclusive first-run or a day-and-date first run, it would result in a radical departure from the manner and method of distributing pictures and exhibiting pictures in the City of Baltimore?

A. I don't like to repeat myself, sir, but I have gone over this matter before, Mr. Raftery. The fact that someone was permitted to enter free enterprise, put up their money, on an idea, and make that idea work, has been the strength and basis of our country. It is true that sometimes, in a given area, this may be a little departure, but I think we have tried to show, and I am sure Mr. Rome is much more capable than I am of showing it, that this is a national pattern, Mr. Raftery, to exclude, as His Honor has said, and as my testimony showed, a theatre which is located out of the downtown area, from access to first-run pictures; and I think I have stated that a number of times.

Q. And, you are not interested as an individual, or as an officer of the corporation that is plaintiff here, in what damage, if any, would result to the first-run downtown theatres, or to the neighborhood theatres in opposition to you, if you had your way, of day and date first-run, or exclusive?

A. I am very concerned with anyone in business, that they should not lose by any act of mine. Now, if some act of mine, made unconsciously, might cause them harm, I am [fol. 575] extremely sorry, but I do not think this act would

cause harm to anybody. I think it would help a number of people.

Q. But you, personally, are not concerned?

A. I am very concerned, Mr. Raftery.

Q. Whether it does any damage to the downtown theatres?

A. I am very concerned.

Q. Now, you testified here yesterday that you were prevented by these distributors from opening pictures at your theatre on Saturdays. Is that right?

A. From some of them; yes, sir.

Q. Now, do you know how many pictures of the defendants in this action you played at your Crest Theatre during the damage?

A. How many pictures?

Q. Yes.

A. No, sir. I can give it to you, but I haven't counted them.

Q. You played pictures from Loew's; is that correct?

A. Yes; I did.

Q. Now, as regards Loew's, you say you had no complaint about Loew's, about letting you open on Saturday?

A. No, sir; I didn't.

Q. I am going to give you some figures, and ask you if you will check them against your play-off sheets, because [fol. 576] I don't suppose you have the play-off sheet here. According to the records, you played 31 Loew pictures in the period commencing with February 26, 1949, and ending on March 20th, 1950. You played 16 Paramount, 6 United Artists, 26 Warner's, 21 Columbia, 7 Universal, 5 RKO, 24 Fox, 3 Republic, 3 Eagle Lion, one Equity, two Film Classics, and one Screen Guild; and I ask you to check the following figures:

Saturday openings from each company during the same period: Loew's 14; Warner's 3; Paramount 4; United Artists 3; Columbia 4; Eagle Lion one; or a total of 29 Saturday openings in that 54-week period.

I ask you also to check the following Sunday openings: Fox 13; Universal one; Loew's 2; Columbia 2; Warner 3; Paramount one; RKO 2; Republic one; or a total of 25.

Now, I ask you to check the following:

Mid-week or short half playing time. By the way, you understand what I mean by mid-week or short half?

A. I don't know whether you are including or excluding Saturday.

Q. No Saturdays. Monday, Tuesday, Wednesday, Thursday and Friday.

A. You mean one day or three days?

Q. Could be one, could be three, could be four, but mid-week days. Loew's 15; Warner 20; Paramount 11; Columbia 15; Fox 11; RKO 3; Universal 6; United Artists 2; [fol. 577] Republic 2; Eagle Lion 2; Equity one; Film Classics 2; Screen Guild one; or a total of 91 pictures played short-half or mid-week. So, you understand now, Mr. Myerberg, you have 29 that played Saturday opening?

A. Not speaking of the number of days, but just the opening date?

Q. There are 25 that played Sunday opening.

A. Do you want the complete run of those pictures?

Q. Not the complete run.

A. If you want me to check the complete run of my figures——

Q. Yes.

A. ——if you want the gross on those, and anything else, or just the run of the picture?

Q. No; I think you testified that sometime during the damage period, or that 52-week period, you abandoned the plan of playing pictures opening on Saturday?

A. I said it was during that period, or after that period. I think that is what I said. I don't remember, but I think that's what I said.

Q. I have just the play-off for the period covered by this lawsuit.

The Court: What is the purpose of this testimony?

Mr. Raftery: It absolutely refutes what he said yesterday, and Your Honor asked him questions about it.

[fol. 578] The Court: Refutes him on what?

Mr. Raftery: He said one of the discriminations was that these defendants would not let him open pictures on Saturdays; and here we have 29 out of 54 weeks where he opened the pictures on Saturday. I do not want to take

unfair advantage. I am asking for them to check their own records.

The Court: I just asked the purpose of it. Go ahead.

By Mr. Raftery:

Q. On March 11, 1950, just before you began this lawsuit, you played a Metro or Loew picture called Malaya, and opened it on Saturday, with a Saturday-Sunday-Monday-Tuesday, or 7-unit run; do you recall that?

A. I recall playing the picture. I don't remember the date it opened, but I said that Metro, I think, in my testimony, they gave me a Saturday opening, and never took it away from me. I said certain companies gave it to us, to begin with, and then took it away from me.

Q. Let's take Saturday, February 25th. You opened a Columbia picture, Jolson Sings Again. You played that Saturday, Sunday, Monday and Tuesday, 7 units of playing time; do you remember that?

A. That is quite possible.

Q. And Columbia was not one of the companies you mentioned gave you that right?

[fol. 579] A. Mr. Raftery, there has been so much testimony I have given here, I would have to check the record. I think that I said something about Columbia may be one of them that discontinued it, somewhere in the testimony; I honestly do not recall.

Q. And On The Town also played the next Saturday?

A. I said Loew's never took it away.

Q. And the Saturday before, you had a Paramount picture, The Great Lover, opened on the 11th?

A. I think I mentioned that picture, that Paramount was one of the companies that permitted me to play on Saturday.

Q. But you haven't abandoned any policy of opening on Saturday?

A. I think I have followed that through. You will find we abandoned the policy on Saturday. I did not give you the exact data, because I don't remember. If you want me to check it, I will look it up and give it to you.

Q. Let me finish the question. At the time you started

this lawsuit, you had not abandoned any policy of opening pictures on Saturday?

A. With those companies permitting me to open them, no; and I don't think I ever testified I have.

Q. So, on that list I read to you, I wish you would check this also. Loew's, Warner's, Paramount, United [fol. 580] Artists, Columbia, and a company which is not a party but has been mentioned in the deposition, Eagle Lion,—you played Saturday pictures from every one of those companies during this year we have been inquiring about?

A. That is quite possible.

Q. Now, you remember your testimony yesterday; you said that all the companies uniformly gave you the right to open Saturday, and uniformly took it away. Do you remember testifying to that?

A. Yes, sir; I remember that.

Q. Do you remember testifying yesterday, in regard to the Parkway Theatre, that on United Artists, Universal, and Loew, or Metro, you were forced, at the Crest Theatre during this period, to play all pictures with a 7-day clearance in favor of the Parkway Theatre? Do you remember that?

A. No, sir; I didn't say "all pictures"; I said, I think, that those pictures that played the Century Theatre, moved over to the Valencia, and went to the Parkway, on those, I have had 7 days, that is correct—after the Parkway Theatre.

Q. And then you said: "Yes; United Artists has a clause in its pictures that play the Parkway Theatre, that we must play 7 days after the Parkway; and on those pictures, in Universal, those pictures play the Loew Theatres, and consequently are moved over to three Loew's downtown, [fol. 581] the three runs in the Loew's Theatre, not downtown—two downtown—and then the Parkway Theatre, those are also 7 days after the Parkway Theatre."

Do you remember making that statement?

A. Yes, sir.

Q. And do you remember His Honor asked you if it was not a fact that you could be held up almost indefinitely by the Parkway Theatre, having this intervening run of these

pictures, and you said it would be possible but not probable. You could be held up 60 days, but that was not the rule. Do you remember that?

A. Yes, sir.

Q. How many Universal pictures did you play during this whole period at your theatre?

A. I don't know, sir. I would look it up for you.

Q. Subject to your verification, you played six pictures from Universal in the Crest Theatre during this whole period. Does that coincide with your recollection?

A. I don't recall, sir, but I can look that up.

Mr. Rome: I am sorry to interrupt you, but your figures show 7 opening on Saturday, and 6 opening mid-week, and one opening on Sunday.

Mr. Raftery: You add them, but I just looked at the figures. I thought you had the totals there.

By Mr. Raftery:

Q. Fourteen Universal pictures?

[fol. 582] A. Yes, sir.

Q. How many of those 14 Universal pictures played the Parkway Theatre, if you know?

A. I don't know.

Q. Would it surprise you to know that not a single Universal picture that you played during the whole period ever had a run at the Parkway Theatre?

A. I know there have been pictures that played the Parkway Theatre, that we have played, but the exact period of time I don't recall. I can look that up, if you like, and get the exact time.

Q. Will you check the figures all the way down to November 7, 1951, right after the lawsuit was filed?—and I ask you to ascertain whether it is not the fact that up until that date, not a single Universal picture which you played had a run at the Parkway Theatre.

A. It is quite possible that a picture had played the Parkway Theatre. The Universal pictures played the Parkway Theatre during that time in which we did not play it; that is quite possible. I can check that for you.

Q. How many United Artists pictures did you play?

Mr. Berenholtz: Two mid-week, three Saturday—I think it is six.

By Mr. Raftery:

Q. Six pictures. Two of those, of United Artists, you played as a double-bill, Home Of The Brave, and Denver- [fol. 583] something—do you recall that?

A. I don't recall, honestly.

Q. Two of the pictures you played, The Champion, and Home Of The Brave, had a run at the Parkway Theatre, and the other four did not. Will you check that and see if I am not correct?

A. Yes.

Q. Do you know where The Champion played first-run downtown?

A. I think I testified before, it played at the Mayfair Theatre.

Q. Where was Home Of The Brave played?

A. I don't recall, sir.

Q. Will you check and see if it played at Keith's?

A. Yes.

Q. No run at the Valencia or Century, but one at the Mayfair, and the other at Keith's. Will you check that?

A. Yes, sir.

Q. On your 21-day availability, you have available to your theatre the product of all these eight companies on some runs; isn't that a fact?

A. On some runs; yes.

Q. And a picture which you play at the Crest Theatre is the same identical picture in form which plays at a downtown first-run theatre; isn't that a fact?

[fol. 584] A. Yes; I think that is a fact.

Q. And the only difference is the clearance; isn't that a fact, as far as run is concerned?

A. Clearance, and admission price; yes, sir.

Q. Now, on admission price, the downtown theatres get 70 cents net, don't they?

A. Yes, sir; and some of them get 65, but you can say 70 cents.

Q. And, out at your theatre, your patrons pay 40 cents net?

A. Well, let's go back on that. If you are talking of the time of the suit, I think the majority of the theatres downtown were getting 65 cents, and we were getting 40. The theatres downtown now get 70, all but, I think, Loew's, maybe the New Theatre still gets 65, I don't recall. Loew's gets 65, and we get 50 cents, including tax. All these figures include tax.

Q. So that the net admission price, or the gross admission price, there is a differential between 25 and 30 cents as between downtown and a theatre like yours?

A. Yes, sir.

Q. So, any patron in your neighborhood who wishes to see a picture that is being exhibited downtown, only has to wait to get the advantage of that reduced price; isn't that a fact?

[fol. 585] A. No, sir; I don't think you are stating the case properly. I think we go back to Mr. Lichtman's statement.

Q. I want your statement.

A. I will give you my statement, and it is based on high executives in the business; and I think they are a better authority than myself,—that a picture put in moth balls after a run in the downtown area, and then taken out, and served up to the public at a time when a new picture is being announced, minimizes the effect of that picture in the neighborhood; and I think that is the fact. It is my opinion, also, that it is a fact.

Mr. Raftery: I submit that is not responsive. I asked the witness a simple question, if a person living in his neighborhood—and I am repeating the question—wants to see a picture that is shown downtown at 75 cents, and if he wants to see it at 40 cents, or a cheaper admission, he can see it at the Crest Theatre, or any theatre in that competitive area?

The Court: I think the witness has tried to answer.

Mr. Raftery: He did not give me any answer at all.

The Court: Read the answer, please. Witnesses are not compelled to answer the way you think they should answer, or Yes or No. Read the answer.

(Answer of the witness repeated by the Reporter.)

[fol. 586] Mr. Raftery: The question I asked him, if a patron living in his area wanted to see a picture at a cheaper admission price, all he had to do was wait until that picture was exhibited at that theatre?

The Court: I think what the witness is trying to say, it is not human always to wait. He is trying to say it is not human, it is not normal always to wait. They want to see it at the same time others see it. I assume that is what you are trying to bring out.

We will take a recess here, Members of the Jury, until ten o'clock tomorrow morning.

(Whereupon, at 4:10 o'clock p.m., an adjournment was taken until Thursday, May 15, 1952, at 10:00 o'clock a.m.)

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[fols. 587-589] Reporter's Certificate to foregoing transcript omitted in printing.

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[fol. 590] **Transcript of Proceedings—May 15, 1952, 10:00 A.M.**

The Court: Members of the Jury and Counsel, we are ready to proceed.

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Thereupon HARRY D. MYERBERG resumed the witness-stand and, having been previously sworn, testified further on behalf of the plaintiff, as follows:

Cross-examination (Resumed).

By Mr. Raftery:

Q. Mr. Myerberg, I asked you last night if you had checked your records of play-off at the Crest Theatre for the 12 months. Were you able to do so?

A. Yes, sir. I have the figures right here.

Q. Will you give me the exact figures, so that we will have them correct?

A. We find the figures to be substantially like the ones you presented to us last night, with a few exceptions. They were not substantial. With the exception of RKO, it gave us one picture when we first opened on Saturday. The picture was Enchanted. After that period of time, they refused Saturday openings.

I did find one Fox picture Saturday; but that was a one-day play date and was a revival picture. It was not a new picture. It was just a one-day play date. I don't think that could enter into what you are talking about.

Q. So, instead of 29 Saturday openings during that [fol. 591] period, there were 30? I am adding Enchantment only.

A. So far as I could, I tried to give the entire period. I have gone through to the 20th of February, 1950.

How far did you go?

Q. The last picture I had was Malaya. I think that was February 20th.

Mr. Rome: March 11th.

The Witness: There was a few weeks difference in there.

By Mr. Raftery:

Q. We can substantially agree that you played 30 Saturday openings during that period? Is that right?

A. Well, between 26 and 30, yes, sir.

Q. You were also going to get me the figures you used to estimate that you would have grossed in excess of $80,000 on Samson and Delilah. Have you those figures?

A. I have. I thought I brought them with me, but I do not have them. I have them on a piece of paper. I remember them pretty nearly.

Q. Tell us what they were.

A. I was mistaken on the $80,000 gross. That was in error. The figures are broken down in this manner: we figure we would have approximately $50,000 for Samson and Delilah; we would pay $35,000 film rental; our expenses, as I have stated before, were approximately $2,400 [fol. 592] under our first-run policy. On the five-week run that would have been approximately $12,000. $12,000

added to $35,000 would have been $48,000, or, rather, I mean, $47,000,—giving us a $3,000 profit on $50,000.

Q. Didn't you testify yesterday and the day before that you expected an eight to ten-week run on Samson and Delilah at that theatre, and expected to gross, on an eight to ten-week run, in excess of $80,000?

A. You asked me what my figures showed, Mr. Raftery, and I am telling you what they show. It is true I did say eight to ten weeks, at $80,000. We expected, possibly, to stretch it through that period of time. But on a five-week basis, as are shown on my figures, I was able to show a profit on $50,000. How much more than that we would have played, I don't know. I did say eight to ten weeks, at $80,000. That was from memory. You asked me to look it up, and I have looked it up; and those are the figures.

Q. In the exhibit that you put in that was prepared by Mr. Isaacs, your average weekly expense, as I recall it from your own testimony, was somewhere between $1,900 and $2,000?

A. Yes, sir. That is under the 21-day policy, not under a first-run. I think the question was asked me as to what increase it would be, and what I considered the expense on a first-run policy would be. I said there was a projected [fol. 593] statement we had made that showed around $2,400 weekly expense before film, on a first-run policy.

Q. And that was adding, as I understood your testimony the other day, approximately $600 a week in advertising your first-run picture? Is that correct?

A. For advertising and, I think I said, additional ushers that we might need.

Q. You said your advertising would be increased from $500 to $600 a week? Do you remember testifying to that?

A. I think I said something like that, yes, sir.

Q. Do you remember being examined on your deposition by Mr. Watkins as to what your advertising figures would be if you won a first-run picture?

A. I remember the question on it, but I do not recall what was said.

Q. Don't you remember testifying that your advertising increase would not be less than $100 a week, no more than $200 a week?

A. I don't recall.

Q. You don't recall?

A. No, sir.

Q. Now, I asked you to produce the notes that this gentleman (indicating) dictated, and which you were kind enough to let us make a copy of. I hand you a document that has been given to me by Mr. Rome, and I will ask you [fol. 594] if you dictated that document to your secretary, or stenographer, or to somebody, and that was typed for you?

A. I would say "yes". This was probably dictated through a dictaphone, and was typed for me.

Q. When did you dictate that document?

A. Around the time of these different dates noted in here,—October 5, 1948, and so on. I may have made certain notes and dictated two or three at one time; I may have dictated them all at one time. Well, not all, but several at one time, or one at a time. I don't recall.

Q. It was dictated during late 1948 and early 1949, long before you testified either on the deposition or in this lawsuit?

A. They stopped December 2, 1948.

Q. December 2, 1948?

A. Yes.

Mr. Raftery: I am going to ask that these notes, dictated by Mr. Myerberg, be marked for identification only.

(Notes dictated by Mr. Myerberg, late 1948 or early 1949, were marked Defendants' Exhibit No. 6 for identification.)

By Mr. Raftery:

Q. Now, Mr. Myerberg, on the 22nd day of October, 1951, you were examined by Mr. Watkins in connection with the increased cost of operations of your theatre, if [fol. 595] you had a first-run policy in the Crest Theatre. I will ask you if you were not asked this question and if you did not make this answer. This is page 147.

"Q. Would its fixed charges have been higher or not, if you had been able to get first run day and date pictures?

"A. Not appreciably."

Do you remember being asked that question and making that answer?

A. Yes, sir.

Q. "Q. I realize it is difficult to fix it, but I wonder if you can estimate it?

"A. The fixed charges themselves would not be increased a great deal, only to the extent of additional advertising. I would say based on the gross, or based on that, it would probably be $100 or $200 a week, at the outside, depending upon the increase of the particular fixed charges, which would be almost directly due to the increased advertising that we would do on first-run pictures. I would say about 5 or 10 per cent."

Do you remember being asked that question and making that answer?

A. Yes, I do.

Q. Mr. Myerberg, when you went into the neighborhood where the Crest Theatre was located and opened up that [fol. 596] theatre, or started to, that corner was a vacant piece of property from Rogers Avenue down to the white house which is immediately south of your theatre? Is that right?

A. Yes, sir.

Q. And crossing the road, on Reisterstown Road, there was also a vacant piece of property where now you have a lunch wagon and a used-car lot?

A. Well, there is a used-car lot and a restaurant over there, yes, sir.

Q. At the time you started up there, the lunch wagon or restaurant was not there, was it?

A. No. There was commercial property directly opposite us, and houses behind that.

Q. But the property on Reisterstown Road, in the rear of the gas station corner, was all vacant?

A. I would say on the side of the gas station, between that and the next street was vacant.

Q. Going down Rogers Avenue towards the Ambassador Theatre, on the right, how far from that corner is the Western Maryland railroad crossing?

A. I have never checked it, but I would say between three-tenths and five-tenths of a mile.

Q. Immediately west of the railroad crossing, on the right, on Rogers Avenue, what was there then and what is there now in that locality?

[fol. 597] A. At that time, I think it was vacant land; now, there are homes.

Q. On the right-hand side of the street, immediately adjacent to the railroad crossing, is a fairly large patch of woods that was there then and is there now?

A. No, sir, not a fairly large tract of wood. I think there is some right-of-way that the railroad owns there, and almost up to the railroad, and I would say almost within a couple of hundred feet, there are homes.

[fol. 598] Q. Now, I think we are confusing each other.

A. I am talking about the north side of Rogers Avenue, west of the Western Maryland Railroad tracks.

Q. Isn't it a fact the first thing, then, is the cemetery?

A. No, the cemetery adjoins the houses I was just speaking of. That is still farther west, and the cemetery has a frontage on Rogers Avenue of, I would say, between 300 and 500 feet. I have never checked it.

Q. Well, there is a large cemetery there?

A. There is a large cemetery there, but I do not think a very large one, a new cemetery, put there in the last year or two, maybe three. I don't know how long it has been there.

Q. You go out Reisterstown Road towards Reisterstown, between your theatre and Pikesville there is a great deal of vacant land, is there not, on both sides of the road?

A. No, sir, I don't think there is a great deal of vacant land anymore. I think that area has been built up pretty well. I don't think there is a piece of land available except probably a small parcel, an acre or so, and there is one parcel I know of out there, I don't know the owner, which adjoins the Howard Johnson place, probably a 10-acre tract. Outside of that there is no available land in the area, sir.

Q. At any rate, you made a survey, you tell us, of that area before you built the shopping center and the theatre.

[fol. 599] A. That is correct, sir.

Q. And that survey indicated to you that you were in a fairly well populated area; is that right?

A. Yes, sir.

Q. And when you talk about the building on Reisterstown Road towards Pikesville you are talking about frontage on the road primarily, are you not?

A. No, sir, there is no property. I think, Mr. Raftery, to get the situation straight—I am very familiar with the area—there is no property between Reisterstown Road and Park Heights Avenue, going east, that is available, except probably a lot or two. You may find some small parcels around in there. That is solidly built up now from Rogers Avenue to Slade Avenue, which is in Pikesville.

On the east side of Reisterstown Road there is some commercial property, and up through Colonial Village, which is completely built, those houses just south of Colonial Village, that area is pretty well built up. As I say, there is probably one parcel in that entire area of 10 acres that is not built up.

Q. And at that point there is another shopping center?

A. Where is that, sir, in Pikesville?

Q. Halfway between Pikesville and your theatre.

A. There are some stores there, there are about five or six stores, yes, sir.

[fol. 600] Q. All set up off the road with parking facilities in there?

A. Yes, sir, the neighborhood there seems to support that, too.

Q. Everything there except a theatre in that area?

A. No, I wouldn't say that. There are about four or five stores, as I recall, a small amount of parking, but it is a nice, little center for what it is, and the neighborhood supports it.

Q. Now, you told Mr. Rome the other day when he put in your Isaac statement that the $6,900 charged for heating was a proper charge to the theatre only because for that whole year period you had three vacant stores in your shopping center.

A. No, sir, I did not say in the shopping center. I said in the theatre building itself. There were two stores originally in the theatre building, and we rented one as an entirety and the other we split in half and have two tenants in there, but for that period of time, yes, sir, those two stores were vacant.

Q. One now is a beauty parlor, is it not, on the right lobby?

A. Yes, sir, that is correct.

Q. And one or two stores on the left lobby that were finally rented sometime?

[fol. 601] A. Yes, sir.

Q. What are they?

A. One is a butcher shop and one is a dairy store.

Mr. Raftery: May I have the photograph of the theatre and the other one? (Exhibits handed to counsel.)

By Mr. Raftery:

Q. Now, aided by Plaintiff's Exhibit No. 26, which is marked, "Hilltop Shopping Center, Reisterstown Road and Rogers Avenue" I call your attention to the corner store on the first floor.

A. Yes, sir.

Q. When was that rented?

A. I do not recall, sir. I think it was sometime in the early part of 1949, but I can check my records on that.

Q. At any rate, that is an R.C.A. Service station, is it not?

A. It is R.C.A. offices and service station that handle the R.C.A. equipment, I think primarily television, in the Baltimore area, and handles the entire thing throughout Baltimore.

Q. It is not a commercial selling store, is it?

A. No, it is not a selling store.

Q. And all the service trucks——

A. And the——

Go ahead, Mr. Raftery, I am sorry.

Q. All the service trucks are generally parked on the [fol. 602] parking lot to the rear of that particular store?

A. Yes, sir, they are.

Q. What is in the next store?

A. There is a barber shop in the next store.

Q. That is right. And when did you rent that?

A. I think in 1947, sir, when the place was built, 1948. I don't know the exact date of these leases.

Q. That was rented when the theatre was opened?

A. Yes. I think all these were rented when the theatre was opened. R.C.A. may have been just before or just after. I don't know, sir.

Q. What is the next store?

A. A bakery.

Q. And whose bakery is it?

A. Holtzman's.

Q. And what is in the next store?

A. The next store is a child's wear store. They call it a "kiddie shop."

Q. A kiddie's apparel store?

A. An apparel store dealing in children's clothes and infants' clothes.

Q. What is the next one?

A. The next one is a television store, an appliance store that handles televisions and appliances.

[fol. 603] Q. When did you rent that to the appliance store?

A. I would say before the theatre opened, sometime, I don't know.

Q. Isn't that the place where the tailor was originally?

A. Not on this photograph, sir.

Q. I know not on the photograph. I say when your theatre opened, a pants presser or local cleaner or whatever you call him, had his store there?

A. If you want to call a cleaning and dyeing store and a store doing shoe repairing a pants presser, I think that is your privilege.

Q. I did not mean anything insulting about that term.

A. I didn't take it that way. I just was trying to clarify it.

Q. It was a local store that repaired shoes?

A. Same type of store you would find anywhere in the city, yes, sir.

Q. He went in there when your theatre opened, didn't he?

A. I think he was there before, but as I say, I have a complete list of the tenancy. If you would like to have it, I can present it to you.

Q. I am trying to do it quickly.

A. I am trying to do it quickly by giving you the list.

Q. At any rate, a presser, a tailor or shoe repairer did not make a success of it in the store; isn't that right?

A. That is correct.

[fol. 604] Q. And he moved out?

A. That is correct.

A. And then the household appliance store, selling televisions, washing machines and refrigerators, at a later date came in there?

A. No, sir. I think, as I recall it, the television and washing machine company had a smaller store next door and they were doing so well they wanted a larger store, and they moved next door.

Q. Who moved in where they were?

A. An antique, curio shop, that deals in fine antiques and curios.

Q. And gifts?

A. And gifts, yes, sir.

Q. What is the next one to that?

A. Eddie's Super Market, food market.

Q. And what is next to that?

A. Mandell's Restaurant.

Q. Now, Mandell's Restaurant, that opened up just about the time, or before the theatre opened?

A. I think it opened up before the theatre opened.

Q. Yes. And was there any change in that situation afterwards?

A. He had some difficulty at first there, and as we say in the moving picture business, changed his policy, and [fol. 605] now he is doing what I understand to be the largest single store food business of its type in the City of Baltimore.

Q. Yes. But he changed it from a restaurant to a delicatessen?

A. No, sir. That is not a correct statement. He changed it from a restaurant dealing in only high-priced foods to a minimum-priced food restaurant.

Q. Right. And he cut down the number of tables that he had.

A. Not appreciably, no, sir, because the counter he put in the front for take-out orders was taken out, as I recall it, from the lobby area he had in front, and it was not taken

out of the seating place. In fact, I think Mr. Mandell has greater than a capacity of 100 additional people than when he first went in, because he has taken the basement area of his store and converted that into a dining room, as well.

Q. At any rate, was any reduction given to him in rent?

A. No, sir.

Q. He is paying the same rent now he paid when he moved in?

A. I think he is, or I think an increase has just gone into effect. I don't know, sir. Again, I will have to look those matters up if you desire me to.

Q. We have another super market right next to that?

[fol. 606] A. The American Stores Company, an Acme Market.

Q. What have you next to that?

A. Next to that is the theatre building.

Q. And what is the first store in the theatre building?

A. A meat market.

Q. As a matter of fact, it is a kosher butcher, is it not?

A. It certainly is, sir.

Q. And then you have a dairy and "appetizing"?

A. I don't know what you mean. What was that last word?

Q. I don't know what it means. You may. There is a sign there that says, "Dairy and Appetizing."

A. I don't know what it means, either, sir.

Q. Isn't that what it says on the sign?

A. I have never seen it, sir. I have never taken notice of it.

Q. Now, this bakery is noted for having bagels and onion rolls?

A. Mr. Raftery, I think we could make this a little shorter, and I will tell you, the area surrounding the Crest Theatre, if you are trying to bring it out, I will bring it out directly. The area surrounding the Crest Theatre has a considerable Jewish population.

Q. Yes.

A. These stores you are talking about do cater to the [fol. 607] Jewish population. That is understandable, sir. And a great portion of the Jewish population in the City

of Baltimore do live from Park Circle to Pikesville on Reisterstown Road, Park Heights Avenue, Pimlico Road and the other streets in there.

Q. Certainly.

A. If you want to bring that out, let's bring it out and get over with it.

Q. You can see the stores there are primarily catering to a special class of population.

A. That, and I think there is also in that area, as I understand, one of the largest Catholic parishes in Baltimore, St. Ambrose. There is also one of the finest Protestant churches there on Belvedere Avenue near Park Heights Avenue. I think Rev. Smith is the Pastor there, and I think also, as I said, a good percentage of the population there are also Jewish.

Q. Right.

Mr. Myerberg, all I am trying to ask you is that your shopping center is not an over-all type of shopping center catering to every class of population for the needs of every class of the population. That is all I am trying to ask you.

A. I think it does, Mr. Raftery.

Q. Well, you haven't got a hardware store, have you?

[fol. 608] A. No, sir. There is a hardware store up the street about 100 feet or 150 feet, but not in there, no.

Q. You haven't a department store in there?

A. We have only so many stores, Mr. Raftery, that is all we have.

Q. There is no department store in there?

A. No, sir.

Q. That is all I want to develop on that.

A. All right, sir.

Q. Now, on the second store on the corner over the R. C. A., you had a store there that was vacant up until a few weeks ago from the time the development opened?

A. Yes, sir, I would say a couple of months ago. Now, there is a new development in there also. R. C. A. is moving out of that corner and the Western National Bank has an option on that corner for a bank, sir.

Q. For some few——

A. No, sir, the thing has been put up before the Banking

Commission and we expect them to be in there within a short time, within the next four or five months.

Q. You did finally rent that on the second floor?

A. Yes, sir, and we find any second floor in the City of Baltimore is difficult to rent, and we did rent it, yes, sir.

Q. What business is there in there?

A. I think you would call it a "reducing place," a place [fol. 609] where they have masseuses, and so forth. I would say a "beauty culture place," I think you would call it.

Q. If it is a reducing place, I might go out there.

A. It may pay you to do it, sir.

Mr. Raftery: I wish to offer in evidence, Your Honor, a letter written by Mr. Rome to Paramount Pictures under date of November 1, 1949, which is identical in form and substance to the letter—I think it is the Plaintiff's Exhibit 50—written by Mr. Rome on the same date to Fox Film. I won't read it because the jury has already heard the other exhibit.

The Clerk: Defendants' Exhibit No. 7.

(Copy of letter, November 1, 1949, Edwin P. Rome to Paramount Pictures, was marked Defendants' Exhibit No. 7.)

[fol. 610] Mr. Raftery: Mr. Rome, I call upon you to produce Paramount's answer to that letter, dated December 5, 1949, or in lieu thereof, allow me to use a copy.

Mr. Rome: Here it is.

Mr. Raftery: I offer in evidence letter dated December 5, 1949, produced by Mr. Rome, Paramount's answer to the letter of November 1st, 1949, which has just been marked in evidence.

(Letter, December 5, 1949, Paramount Pictures Inc. to Edwin P. Rome, was marked Defendants' Exhibit 8.)

Mr. Raftery: With Your Honor's indulgence, I would like to ask Mr. Boyd if he would read this letter to the jury.

The Court: Are you going to read both?

Mr. Boyd: No, sir.

The Court: The jury has probably forgotten the one to which the one you are going to read is a reply.

Mr. Raftery: I think it would be good, after this—I am going to try to get a stipulation from Mr. Rome that similar letters were written to some of the other defendants.

Mr. Boyd: I think Your Honor's suggestion is a good one.

The Court: You may summarize the first one.

[fol. 611] Mr. Boyd: Mr. Gibbons' letter refers, paragraph by paragraph, so it might be well to have some reference to it.

Mr. Rome's letter of November 1st, sent from his Philadelphia office to the Paramount Pictures, was the first one, which has been marked Defendants' Exhibit 7; and I will read Defendants' Exhibit 7:

"November 1st 1949

"Paramount Pictures Inc.,
"Times Square,
"New York 18, New York.

"Gentlemen:

"We have been retained by Theatre Enterprises, Inc., of Baltimore, Maryland, which operates the Crest Theatre at Reisterstown Road and Rogers Avenue, Baltimore. As a result of our study we have become fully acquainted with the efforts that have been made during the past year to obtain access for that theatre to your first run pictures, and also with the failure of those efforts.

"It occurs to us that, without at least experimenting with the exhibition of your pictures in the Crest on first run, it is not possible to say fairly and with justification that such a policy would be unprofitable for you. On the contrary, it would seem that the extraordinary growth of the area near the theatre, with its increasing population and expanding business enterprises, coupled with the [fol. 612] unique facilities offered by the Crest itself actually present an incomparable outlet for your product and hence a source of revenue far superior to any presently available to you in Baltimore. We are confident that experience would soon prove this to be true.

"We are aware that first run theatres are more usually in the so-called downtown shopping districts but we sug-

gest that there is nothing inherent in the industry or in the law that precludes a theatre not so located from access to first run product so long as other determining factors are duplicated. Thus, when a theatre is of adequate size, unquestionably suitably equipped and properly managed, in a thriving community from which it can draw on a large population, when it can charge the same admission price and pay comparable and potentially even greater film rentals, it is our belief that such a theatre is entitled to access to first run pictures. Certainly it is reasonable to request an opportunity to demonstrate whether or not this contention will be borne out by experience. In this fashion what has become a longstanding and troublesome difference of view could be readily resolved to the satisfaction of all.

"We urge you most earnestly to consider this suggestion in a favorable light. To experiment in this way cannot possibly react to your detriment since our client [fol. 613] stands ready to bid competitively for your product and, indeed, to offer any reasonable guarantee you deem appropriate. On the other hand, if we are correct your company will have another outlet in the City of Baltimore, and one which is generally conceded to be the finest and most modern theatre in the State.

"Your reply at an early date will be appreciated.

"Yours very truly,

"(Sgd) Edwin P. Rome."

Now, in order to have the reply to that letter, I will read Defendants' Exhibit 8, which is a letter from Thomas P. Gibbons, of Paramount Pictures Incorporated, Times Square, New York, addressed to Mr. Rome, "Re: Crest Theatre, Reisterstown Rd. Baltimore, Md.", as follows:

"Gentlemen:

"Reference is made again to your letter of November 1st in the above matter.

"Your opening paragraph indicates that you have made a study of and are acquainted fully with the facts of this controversy. In light of this, we feel that it will be unnecessary

to review them other than to mention again that the Crest is situate in a suburban area more than six miles from downtown Baltimore and has a seating capacity of approximately 1650.

"The request made in behalf of your client, to-
[fol. 614] gether with a few others of like nature, have necessitated the re-examination of basic economic principles on which the well being of all branches of the motion picture industry are founded. We have approached the problem presented with the idea of being ready and willing to accommodate ourselves to a basic change in the economics of the industry if good business judgment should warrant our taking such action.

"You suggest and urge that we conduct an experiment and play our pictures first run in the suburban Crest Theatre. In the second and third paragraphs of your letter, you advance several reasons why you feel that such an experiment should be made. Your argument would seem to assume that there is something improper in our conduct in licensing, and preferring to license, our pictures for first run exhibition in a large downtown theatre, instead of in a suburban house; that the downtown first run exhibitor has lost his right to protect his investment; that Paramount, as a distributor, has no right to distribute its pictures in such manner as it believes will best serve both its own and the public interest and that it should experiment as you suggest. We cannot concede the soundness of this argument.

"We have considered your suggestion and carefully reviewed all of the facts and factors involved. After
[fol. 615] due consideration, we have to advise that our prior decision remains unchanged; that it shall continue to be our policy and in the exercise of our sound business judgment, we feel the interests of both Paramount and the public will best be served by the continued exhibition of our product first run in the large theatres situate in the downtown business and shopping areas of a city, rather than in a theatre located in a suburban area, as is the Crest.

"There are several factors which enter into consideration and seem to indicate that the above decision is the correct one. That large first run theatres are situate in the downtown business and shopping areas is not the result of acci-

dent, but rather due to the careful consideration of various business factors, such as location, transportation, the audience, exploitation and prestige, among others.

"Every community, whether it is a city, town or village, has a hub which is the center of all activity. The city of several millions, such as New York, has its Broadway and the village of a couple of thousand has its Main Street, but whether it is Broadway, or Main Street, it constitutes the center of activity to which all persons come sooner or later for various purposes. In the large cities and towns the large first run theatres are located in the very heart of these centers where are to be found the great [fol. 616] masses of the population.

"All highways are designed to reach and all public transportation, subways, trolleys and buses lead to these centers of population.

"The audience of the downtown house represents a cross-section of the population. Some of the patrons come by auto or cab, others by subway, bus or trolley, still others on foot. It is comprised, at one time or another, of the amusement seeker and of the business man or woman, the resident and the transient.

"The large first run downtown theatres are operated under a very sizable overhead such as rental, extensive advertising, the maintenance of large staffs, etc. The operators of these theatres are willing to pay large film rentals. In order to enable them to carry the burden of such an operation, they must and do attract large audiences. The fact that the large first run theatres are situate in the centers of activity where are to be found the great masses of population is valuable not only from the standpoint of attracting first run patronage, but of even greater value from the standpoint of achieving wide spread publicity and prestige for a picture so as to arouse the interest of potential theatre goers where they will see the picture either on first or subsequent run. The industry recognizes that word of mouth exploitation is a most valuable factor [fol. 617] in attracting patronage. The audience at the large first run downtown theatre carries the message as to the entertainment value of the picture being exhibited to the far reaches of the city and beyond. This leads to the

building up of both revenues and public consciousness of the value of the picture which benefits in turn not only the distributor but also all exhibitors who show the picture on a later run.

"Lastly, our experience over a long period of years has convinced us to our complete satisfaction that suburban theatres could not possibly yield the revenue which large downtown theatres return on first run exhibition. In considering your request, our Sales Executives have weighed carefully the grossing possibilities of your client's theatre in light of its previously demonstrated earning capacity. On two separate occasions heretofore, your client made two very extravagant guarantees for the first run exhibition of two of our pictures. In order to justify the guarantees, the Crest would have had to increase its business some twelve and one-half times. Our Sales Executives feel that the amount of the increase involved is totally disproportionate to the actual possibilities. They feel further, based upon their many years of experience, that it is unfair to ask them to conduct the experiment which you urge when all factors are so definite and clear cut as [fol. 618] to indicate only one possible result, namely, a loss not only to Paramount but also to your client.

"In view of what has been said above, we have to advise that we must refuse your request for our product for exhibition first run in your client's Crest Theatre.

"Yours very truly,

"(Sgd) Thomas P. Gibbons."

Mr. Raftery: There are some other letters, the November 2nd letter, which have been marked in evidence now. Mr. Rome, you sent those letters to a number of the other defendants in this case; is that right?

Mr. Rome: Similar letters were sent by me to all the defendants in this action, but I would like to inquire of Mr. Raftery whether he is intending to read my reply to Mr. Gibbons' letter as just now read in order to complete the picture.

Mr. Raftery: I have no intention of reading your reply.

In the stipulation, you said all of them—you mean all of the distributors?

Mr. Rome: All of the distributors who are defendants; that is correct.

[fol. 619] Q. Mr. Myerberg, I believe you testified yesterday that you were very concerned,—and this is on page 574:

"I am very concerned with anyone in the business that they should not lose by any action of mine. Now, if some act of mine, made unconsciously, might cause them some harm, I am extremely sorry. But I don't think this act would cause harm to anybody. I think it would help a number of people."

Now, skipping:

"Whether it does any damage to the downtown theatres?

"A. I am very concerned."

Is that right?

A. Yes, sir, that is right.

Q. And you were equally concerned not to harm Mr. Garman, at the Uptown, or the operators of the Pimlico, or Avalon, or Pike, or Ambassador, or the Gwynn?

A. Yes. I said I have no desire to harm them. I think I also said I think the harm came about by your method of making me play pictures.

Q. Several times during this time you testified you wanted to keep open freedom of enterprise and competition, and everything of that character.

A. Yes, sir, I have.

Q. Now I call your attention to your deposition of October 22, 1951, particularly the morning session. First [fol. 620] of all, Mr. Watkins conducted that examination, did he not?

A. Yes, sir, as I recall, he did.

Q. And that morning session was your first appearance under oath to testify in this case? Is that right?

A. Yes, sir, that is correct.

Q. I read you from page 129, or, rather, I will ask you if you were not asked this question and if you did not make this answer. In fact, there are two questions and two answers.

"Q. From the point of view of exhibiting pictures at

the Crest, it would not make any difference to you whether it did or did not affect the downtown theatres?"

And then you asked a question:

"For a downtown run?

"Q. Yes, or theatre.

"A. No."

Were you asked those two questions, and did you make those two answers?

A. Mr. Raftery, I recall making that answer; but I think, if you will read the rest of the deposition pages through there, you will find you have taken out one or two sentences from many and made something of it. That was not my intention at all. My intention is still as stated.

Q. I will come to that after lunch.

The Court: No, don't come to it after lunch. [fol. 621] Read the whole thing. If the witness wants that read, I think he is entitled to it.

Mr. Raftery: Don't worry. I will read the whole thing.

The Court: No; don't read the whole thing, but read the whole answer.

Mr. Raftery: That is the whole answer, your Honor.

The Court: Well, the answer he is referring to.

The Witness: Your Honor, May I see the deposition?

The Court: Yes.

The Witness: I can probably point it out.

Mr. Raftery: Now, just a minute, please.

The Court: Give the witness the deposition.

Mr. Raftery: I will give it to him.

The Court: We have been all over this. We have been over it time and time again.

Mr. Raftery: No, we have not, Your Honor.

The Court: We have been over the same subject-matter. As I understand it, you are attacking his credibility.

Mr. Raftery: That is right, Your Honor.

The Court: You have a right to do that. Now, let him have a copy of the deposition so that he can follow it. That is only fair. It is only fair to let the man see the whole [fol. 622] document that you are reading from. He does not carry it in his mind.

Mr. Raftery: I welcome the opportunity of having the

whole document. Your Honor is laboring under a misapprehension that I did not read the whole question and answer; but I did.

The Court: I don't know whether you did nor not. He has said you did not; so let him have it.

Mr. Raftery: Turn to page 129.

The Witness: As I remember, sir, the question was asked in several different ways. Generally, I think I can find it here. It has been some time ago. But if my recollection is correct, I think I did say I was concerned,—somewhere in here—with the results of any businessman in the same business that I am in.

Mr. Raftery: May it please the Court, will the witness turn to page 129?

By Mr. Raftery:

Q. Now, follow me. Look at the second question on the page.

A. Yes, sir; I am coming to that.

Q. The question is:

"From the point of view of exhibiting pictures at the Crest, it would not make any difference to you whether it did or did not affect the downtown theatres?

"A. For a downtown run?

[fol. 623] "Q. Yes, or theatres.

"A. No."

Now, go back to that.

A. I haven't gotten to it yet.

Q. Oh, I thought you had.

A. No, sir, I have not. I am trying to find what I pointed out before. I don't know that I will have the time to do it, but I will, if I can.

Mr. Raftery: If Your Honor please, he has turned away from page 129. I merely want to ask him if I read the whole question and the whole answer on page 129.

The Witness: Mr. Raftery, I never questioned you as to whether you read the entire question and the entire answer.

Mr. Raftery: I think the Court thought so.

The Court: No; I didn't mean to give that impression. The point was that the witness said he would like to have a chance to have what was said followed up by his subsequent answers.

Mr. Raftery: I intend to go to that. But I have to do it page by page.

The Court: No; you don't have to do it so slowly. I think you are taking an inordinate amount of time on this.

Mr. Raftery: I do not agree with Your Honor on that. I think I have a right to impeach this witness.

[fol. 624] By Mr. Raftery:

Q. Now, I will ask you to turn to page 56. Do you have that?

A. Yes.

Q. The bottom of the page, the last question. Do you remember being asked this question:

"Do you consider the granting of clearance over the Crest on the competitive bidding pictures as a proper or improper practice?"

And you make this answer:

"We are speaking solely about the neighborhood run situation.

"Q. That is right.

"A. No, I do not.

"Q. Why do you consider it to be an improper practice?

"A. Because the Crest Theatre should play, being a theatre with a potentiality, with the greatest potentiality in the area, should have this clearance with all pictures.

"Q. Even without bidding?

"A. That is correct.

"Q. You say you think the Crest is entitled to play ahead of the other neighborhood theatres?

"A. That is correct.

"Q. Without competitive bidding?

[fol. 625] "A. That is correct."

I have read the entire question in each instance, and the answers. Were you asked those questions on that day by Mr. Watkins, and did you make those answers?

A. I think that was a confused answer. I made it. But, if I recall, in the afternoon session that answer was cleared up with Mr. Watkins to his satisfaction.

Mr. Watkins: That is not my recollection.

The Witness: That is my recollection. I think somebody went into that.

Mr. Raftery: Now that you have brought it up, there was an adjournment at noontime for luncheon.

The Witness: Yes; that is correct.

By Mr. Raftery:

Q. And you and Mr. Rome and Mr. Berenholtz left and went to lunch?

A. Yes, sir; that is correct.

Q. And then you came back, and Mr. Rome—not Mr. Watkins—asked you some questions, and you made some answers. Is that right?

A. It is my recollection that may be right. But—and let me explain that, Mr. Raftery—I am not a professional witness. This is the first time in my life I have ever been on the witness stand. Certain of these questions were posed to me, both in the deposition and at this time, and I think I am answering one way, possibly, and I am [fol. 626] answering another. There are a few questions where that may have happened. I have tried to keep the exact question in my mind. That is why, sometimes, I have to answer it rather slowly.

This particular thing, if you will read it, I think you will find is a confused answer. We clarified this answer in the afternoon session, that if theatres are in competitive bidding, they would have to have clearance one over another.

I was asking in my letters prior to the deposition that competitive bidding be instituted in that area. It showed in my letters what I meant. I did make the statement, which is true, which I think is a confused statement; but it was cleared up later in the deposition.

Mr. Raftery: If Your Honor please, I asked the witness no question. I move that the voluntary statement be stricken out.

The Court: You claim there are other statements that are inconsistent, made by you, perhaps, at a later session than the ones you rely on?

The Witness: Yes, sir.

The Court: And that your position now is, on the stand as you now testify, that you are not asking for other than competitive rights with respect to these priorities which you are seeking?

[fol. 627] The Witness: Yes, sir.

The Court: Is that your position?

The Witness: That is my position, sir.

By Mr. Raftery:

Q. And exactly contrary to the position you stated to Mr. Watkins in the morning.

A. I do not say that it is contrary to it; I say that it is a confused statement.

Q. To be one hundred per cent fair to you, I will ask you to turn to page 168.

A. Did you say 168 or 1958?

Q. Page 168.

A. Yes, sir, I have it.

Q. This is cross-examination by your own counsel, Mr. Rome, after lunch, on the first day of the deposition.

Mr. Rome: Not cross-examination at all, Mr. Raftery. It was simply an attempt to clarify something that had been, in our opinion, a confused statement in the record. That is all that was attempted to be done. It is not marked "Cross-Examination". Mr. Myerberg is the president of the plaintiff company. I do not understand how it could be cross-examination.

By Mr. Raftery:

Q. In the morning, you were examined by Mr. Watkins? Is that right?

A. Yes, sir.

Q. And Mr. Watkins was taking your deposition. In [fol. 628] the afternoon, Mr. Rome, your counsel, asked

you the following questions, and you made the following answers:

"Q. Mr. Myerberg, it is a fact, is it not, that you are in a competitive bidding situation with the Avalon and Uptown Theatres with regard to Metro and RKO pictures? Is that right?

"A. Yes, sir.

"Q. And it is a fact if one of these other theatres, Avalon or Uptown, is successful in obtaining a licensing from Metro or RKO pictures as the result of its bidding, that theatre is granted clearance over the Crest Theatre?

"A. It is.

"Q. In your view, is the granting of clearance to the Avalon or the Uptown Theatre under those circumstances in any way improper?

"A. No.

"Q. And that is your opinion, regardless of whatever statement may appear in the record of this deposition taken early *takes* today; is that a fact?

"A. Yes."

Is that what you were referring to as correcting what you said in the morning?

A. Yes, sir.

Q. You did not correct the statement that it made [fol. 629] no difference what happened to the downtown theatre, did you, so far as you were concerned?

A. I said, Mr. Raftery, that there is some place in this deposition an answer that I made that I say that I did correct. You are reading one portion of it, and not the others. I did not say you misstated my statement.

Q. This corrected your statement on competitive bidding, didn't it?

A. Yes, sir.

Q. But it did not correct your statement that it made no difference what happened to the downtown theatre, as far as you were concerned?

A. This particular question and answer did not; but there is one in this deposition.

Mr. Raftery: I will ask counsel to find it.

Mr. Rome: May I have permission of the Court to refer

to page 235 of the deposition, and again to page 245. Mr. Myerberg was then being examined by Mr. Raftery. If I may, sir, I would like that to be brought out at this point.

By Mr. Raftery:

"Q. Don't you believe that, as a man of many years in the business, as heard from your travels through Hoboken, Union City, and elsewhere, that if you were to put multiple runs in a city like Baltimore City, that the business of the downtown theatres would be seriously [fol. 630] affected by the business of these multiple runs?"

Mr. Rome: Will you give him a little more?

Mr. Raftery: Pardon me.

By Mr. Raftery:

"Q. Don't you believe that, as a man of many years in the business, as heard from your travels through Hoboken, Union City, and elsewhere, that if you were to put multiple runs in a city like Baltimore City, that the business of the downtown theatres would be seriously affected by the business of these multiple runs?

"A. I think the primary purpose of the distributor is to get revenue out of the picture. Whether or not another business opens and harms another business, is, of course progress in America, which we hope will continue, free enterprise. In the over-all picture, no, I think it would increase the revenue to the film companies considerably."

Then, there is also the further question:

"Let's take your philosophy and ask you this question: If that be the case, why shouldn't the Uptown play first run in that area out there, if it is doing just as good business as you are?

"A. There is no reason whatsoever.'

"Q. Day and date with you?

"A. No. I don't say day and date. I don't say that at all. I said there was no reason why they should not [fol. 631] play first run downtown Baltimore, in my opinion.

"Q. Then, if I understand your answer, if there is competition between theatres, they should not play day and date.

"A. Absolutely right."

And on page 245 there appears the following question by Mr. Raftery:

"You think if you were to play a picture first run at the Crest day and date with the Century, that it would help the play-off of that picture at Uptown and Avalon, and the other theatres mentioned?

"A. If you charged downtown admission prices it would."

The Court: Is that the passage you referred to?

The Witness: Yes, sir.

The Court: Go ahead.

[fol. 632] The Witness: And, further, sir, I do not recall, but I think there is a further passage in here which I may have answered even more directly than that.

By Mr. Raftery:

Q. Now, what do you claim Mr. Rome is correcting on your original statement?

A. Correcting my desire not to hurt anybody.

Mr. Rome: Excuse me, Mr. Raftery. There was one question and answer, sir, immediately before the one that I read, on page 245:

"Q. Have you any judgment or opinion on what the effect of multiple runs would be on these other subsequent run theatres?

"A. I think it may help them by bringing the force of the advertising into their immediate areas."

Mr. Raftery: That is all.

The Court: Have you any questions?

Mr. Rome: Yes, sir, I have a few, if I may, sir.

Redirect examination.

By Mr. Rome:

Q. Mr. Myerberg, there has been reference made to the Saturday opening of pictures in the Crest Theatre by Mr. Raftery as the result of which you checked your records last night; is that correct?

A. Yes, sir.

Q. Having checked your records, what did you find with regard to pictures being licensed to the Crest Theatre to [fol. 633] open on a Saturday?

A. We find that, as I had stated, out of the 26 pictures—Mr. Raftery has a couple more—opening on Saturday, 13 of them were Loew's pictures. Three of them were Warner's. That was the first three pictures that played the theatre. Thereafter, until recently, Warner's discontinued Saturday openings in the theatre. Four of the pictures were Paramount. Now, those three pictures from Warner's on Saturday opening were three out of twenty pictures that I played that year, opened on Saturday.

Paramount had four pictures open on Saturday. Columbia had three pictures that opened on Saturday, and as I said, they may differ one or two pictures with Mr. Raftery's list.

Q. Excuse me. It is a fact, is it not, you had testified earlier that Loew's had granted you Saturday opening assignments in the Crest Theatre?

A. Yes, sir, they had.

Q. And those formed the bulk of the pictures opening on Saturday?

A. 13 out of the 26 is certainly——

Mr. Raftery: I thought we agreed it was 13 out of 30.

The Witness: 13 out of 30 is correct, sir. I am sorry. And Warner's was 3 out of 23.

[fol. 634] Mr. Raftery: That is right.

The Witness: R.K.O. was one.

Mr. Raftery: Out of how many?

The Witness: Out of six. But R.K.O., if I wanted to play 15, would only permit that one to play the theatre. It was a question of policy being taken away from me.

Fox, on new product and on old product, has never opened on Saturday in my theatre until approximately a year ago, and then they did it for three pictures, discontinued it and then brought it back again on a Friday or Saturday opening date three or four months ago.

Universal never gave me the opportunity for a Saturday opening.

United Artists gave me two pictures and one of those two pictures was The Champion.

Up between the time we opened the theatre we played one picture—I think it was six months—on a Saturday, and then United Artists discontinued Saturdays with us.

The next picture I think was The Champion. I have my record here. I can go through it if you wish.

Republic, which is not a defendant in this case, opened no pictures with me. Eagle Lion, Equity, and none of the other companies have opened with me on Saturday. Those companies are not in this case, sir.

Now, as to stating that I had started the policy and [fol. 635] then discontinued because I could not get the companies to go along, I stated there were three companies that started. I was in error. There were four, sir, four out of the eight.

On April 24th, approximately two months after I opened the theatre, I went to a Sunday opening because at that time I felt I could not vaccil-ate between Saturday opening and a Sunday opening.

From that time until June 3 we stayed on a Sunday policy of 1949. We then, on June 4, played a Metro picture and we went into the Saturday openings wherever we could get them, because we found in the eight-week period from February 26th to the 24th of April, our per weekly gross was $2495. And the next seven weeks our weekly gross was approximately $200 less. So we assumed from that, after experiencing a 7-weeks' loss, we would go back and play the pictures as we could get them, on Saturday openings, because that was the best policy.

We then discontinued the Saturday openings because that became more and more difficult to get these pictures, some time in the early part of 1950. I do not have the 1949 book here. I could not find it last night, sir.

Then we started on a Sunday opening and continued that Sunday opening, I think, from April 16—how far before that, I do not know, sir, because our records are incomplete here for a period probably one or two months.

[fol. 636] Mr. Raftery: What period are we up to now?

The Witness: 1950; 4th of April, 1950.

Mr. Raftery: We are past the period we have been dis-

cussing. The period we have been discussing has been the period from the 26th of February, 1949, to March 20, 1950. That's the only matter we have been discussing here on play dates.

Mr. Boone: The original testimony, sir, as to which Mr. Raftery went back and questioned Mr. Myerberg, contains statements as to his ability to get pictures in his theatre on a Saturday opening, and Mr. Myerberg had made certain statements which Mr. Raftery was attempting to show were inconsistent with the facts, and we are attempting to bring out that they are exactly consistent with the facts, although as Mr. Raftery does say, it does bring the period in time down closer and closer to the present, March, 1950.

The Court: I will let him go on and answer.

The Witness: I will try to make this brief, as brief as possible, from April, 1950, according to my book of records here, with the exception of an occasional Metro picture and one Columbia and one Warner—why Warner gave it to me there I do not recall at this time—we stayed in that policy of a Saturday opening until 1951. In 1951, Twentieth Century-Fox, in April, 1951, April 28th, made a picture available to us, and everyone else in the City, on [fol. 637] Saturday. We played that picture. It was Call Me Mister. Warner Brothers at that same time, a week before, made a picture available to us Lullaby of Broadway on the Sunday before.

We then went into the Saturday opening again, sir, and we played on through ten weeks, through Follow The Sun, when Fox again refused to break pictures on Saturday, they went back to a Sunday. Warner's, on the 28th of July, again started to break pictures on Saturday. Up to that time they had not broken them.

[fol. 638] I believe we then went back to a Sunday opening again, playing pictures on a Sunday, except, in September or October, Fox again decided that they would come back to a Saturday opening. That picture that started it in my book here—it may have been one I did not play, but in my book was Mr. Belvedere Rings The Bell. Warner Bros., again, the week prior to that, started the policy again. From that time to this time, including

RKO, Universal, and all the rest of them, are all on a Saturday opening. This book brings me up to the fourth of April of this year.

Q. Now, Mr. Myerberg, Mr. Raftery questioned you yesterday afternoon concerning a fight or argument or dispute of some kind that had occurred with Mr. Norris, as a result of which you had been asked to leave the Twentieth Century-Fox office?

Mr. Raftery: That, may it please the Court, was all cleaned up. I withdrew the question. It was Mr. Darnell, and he knew nothing about it.

By Mr. Rome:

Q. It was also testimony yesterday elicited by Mr. Raftery concerning whether or not Fox had actually offered the Crest Theatre competitive bidding. Did the Crest Theatre ever license pictures from Twentieth Century-Fox Film on a competitive bidding basis?

A. No, sir.

The Court: We will take a recess for ten minutes, [fol. 639] Members of the Jury.

(After a short recess, the following proceedings were had:)

Mr. Rome: If the Court please, I offer in evidence as Plaintiff's Exhibit 95 a group of letters which are clipped together, which I will offer as only one exhibit; and, in order not to take too much time, I will just summarize the fact that the first letter, dated May 2, 1950, Members of the Jury, is addressed to Mr. Glenn Norris, of 20th Century Fox Film Corporation, Washington, by Mr. Myerberg, asking for competitive bidding at the Crest Theatre with clearance for the successful bidder over the losing bidders, so that if the Crest Theatre would be successful, it would have clearance over the Uptown, Pimlico and Avalon Theatres. There is a reply by Mr. Norris, dated May 4, 1950, acknowledging the receipt of the letter, expressing that it is his understanding, of course, "you are refusing to play any pictures which are sold on an equal availability with your Crest Theatre to the Pimlico

and Avalon Theatres," and with the understanding that Mr. Myerberg wished to negotiate on a first-run in the zone ahead of the Uptown, Pimlico and Avalon theatres.

There is a further letter of May 9, 1950, from Mr. Myerberg to Mr. Norris, inquiring for a definite answer. There is a copy of a telegram dated May 16, 1950, from Mr. [fol. 640] Myerberg to Mr. Norris, requesting an answer to his letter of May 9th; a letter from Mr. Myerberg to Mr. Norris, dated June 28, 1950, again requesting an answer to the earlier correspondence; and, finally, a telegram from Mr. Norris to Mr. Myerberg, dated July 3, 1950, reading:

"Have tried unsuccessfully reach you by phone several times during last few days. Tell you we feel our best interests will be served by continuing present structure availabilities Crest Uptown Avalon zone.

"C G Norris Branch Manager Twentieth Century Fox Film Corp."

(Group of communications between C. G. Norris, Twentieth Century-Fox Film Corp., and Harry D. Myerberg, was marked Plaintiff's Exhibit No. 95.)

By Mr. Rome:

Q. Mr. Myerberg, a question was addressed to you by Mr. Raftery concerning whether or not it was a fact that as a result of the Crest Theatre being built and opened, Mr. Garman at the Uptown Theatre actually lost clearance. Is that or is that not a fact, as to whether or not Mr. Garman lost clearance as a result of the opening of the Crest Theatre?

A. No, sir, he lost no clearance. In fact, his run was bettered in the Avalon and Pimlico Theatres.

Q. In what way?

[fol. 641-642] A. Before we opened, the Uptown enjoyed 14-day clearance over the Avalon Theatre, but Uptown enjoyed 14 days over the Avalon. After we opened, that clearance was done away with. In fact, it was done away with to a point now, although the Avalon charges a lesser admission price and is only about six-tenths of a mile from

the Uptown Theatre, they play pictures ahead of the Uptown Theatre, which are repeated in the Uptown Theatre. Taking into consideration those pictures are played on a percentage basis, they are played at a lower admission price at the Avalon, and then moved into the Uptown.

Q. There has been offered in evidence as Plaintiff's Exhibit 8 a letter from Mr. Gibbons to you, in which the statement is made that in order to justify the bids that were submitted on your behalf for certain Paramount pictures that the business of the Crest Theatre would have to have been increased 12½ times. Is that or is that not a fact, that such an increase in business would have been necessary?

A. It would not have been necessary. Mr. Gibbons did not know the facts of the theatre. If you go back and again use the same example, The Stratton Story, which did $385 a tenth, approximately, of playing time, giving us $3,850 a week at a 40-cent admission price, had we charged the downtown admission price, we would have charged 57 [fol. 643] per cent more. We would have had then a $6,000, approximately, week, by increasing our business 25 to 30 per cent, not 12½ times. We would have had sufficient more, more than enough to pay for the film.

Q. Is it recognized in the motion picture industry that a theatre which exhibits pictures on first run will gross more than a theatre will take in if it is playing a picture on a subsequent run or availability?

A. Yes, sir, that is generally conceded in the business.

Q. Mr. Raftery referred to the fact that The Stratton Story has been used as a guinea pig in attempting to compute the measure of damage in this case?

A. Yes, sir, The Stratton Story was——

Q. Just a minute.

A. I am sorry.

Q. Were there any other pictures that were similarly capable of being used to arrive at a similar conclusion with regard to the grossing potentialities of the Crest Theatre?

A. Yes, sir, I think, in 1949 and early 1950, you could have found three or four examples of that. I think one was The Lady Gambles, a Universal picture which played

to considerably more per tenth, as I recall,—I would have to look at that in my figures—than The Stratton Story. [fol. 644] Another was a Fox picture, House of Strangers. I think that was an Edward G. Robinson picture, that played to considerably more than The Stratton Story per tenth. I think there was another Metro picture, a musicale, Neptune's Daughter, that played to a little less per tenth than The Stratton Story.

Now, since that time, of course, there have been other examples, but it must be considered that we did not play too many pictures, as I have explained, with clearance. Let me correct that—with clearance on bidding over the Uptown and Avalon and Pimlico and Pike Theatres from the other companies. I can probably give the other examples if I can remember them. A ten thousand amount was one.

[fol. 645] Mr. Rome: I have offered, sir, a summary listing a group of pictures, some of which have already been mentioned by Mr. Myerberg, giving the name of the picture, what it grossed at the Crest Theatre, and showing the amount of gross per tenth of playing time, and, if I may, sir, I will offer in evidence, as plaintiff's exhibit No. 96, this summary of the pictures which are similar to The Stratton Story.

The Court: Very well.

Mr. Raftery: I make the same objection that I made when he offered the other exhibit on The Stratton Story,—too speculative.

The Court: The same ruling.

(Summary of pictures, similar to The Stratton Story, was marked plaintiff's Exhibit No. 96.)

Mr. Rome: I have no other questions of Mr. Myerberg.

The Court: Do you have any other questions, Mr. Raftery?

Mr. Raftery: Just a couple.

Recross-examination.

By Mr. Raftery:

Q. In talking about the Paramount, you received, on the Saturday and Sunday playing in your Crest Theatre, exactly the same treatment from every one of these distributors that every other 21-day run in Baltimore received? Is not that a fact?

A. I have been told that, sir.

Q. Don't you know?

[fol. 646] A. I have been told they were made available for everybody at the same time. I don't know. I think so. But I do not know. You have asked whether I know it, but I do not know. I think they have.

Q. But you do not claim you were given any other treatment than any other 21-day account received?

A. You mean on the Saturday opening?

Q. On the Saturday opening, yes.

A. I do not think so, sir.

Mr. Raftery: That is all, sir.

Mr. Rome: May I say for the record I had intended to call another witness, but it would have been only cumulative testimony, in the light of the way the record has developed, and consequently, sir, I wish to renew at this time my offer in evidence the decrees in the Paramount case, and unless Your Honor cares to hear me now with regard to that, and subject to my offer in evidence of this, sir, the plaintiff would rest.

Mr. Watkins: Objection is made——

The Court: I do not think there is any need, unless you insist, of making further argument, unless you have additional argument to present to me, my ruling at this point would be the same without prejudice to renew your motion at the conclusion of the case.

Mr. Rome: The only additional thing I would care to [fol. 647] say at this time, sir, is in view of the statement made by Mr. Raftery himself here in his opening to the jury and in the course of the examination, it seems to us, sir, that the factual issues as now raised are squarely within the similar issues raised in the Paramount case,

and in view of the fact that we contend this is a policy applicable not only to Baltimore but throughout the country, which would exclude from the field of first run exhibition throughout the country any theatre located outside of the downtown area, as we view it, sir, that is a manifestation of the conspiracy that exists in the Paramount case, and subject to that statement, sir, I confirm, Your Honor, that the Plaintiff rests.

The Court: I feel my ruling should be the same, but as stated, without prejudice to you to renew it later on in the course of time, at the conclusion of the testimony.

Mr. Rome: Thank you, sir.

The Court: Do you want to be heard on this, Mr. Watkins?

Mr. Watkins: I would like to very briefly, Your Honor.

The Court: Members of the jury, you are excused now until 2:00 o'clock. Counsel want to be heard on a law point. The luncheon is now approaching if in fact it has not already arrived, maybe for some of us, and, therefore, you are excused until 2:00 o'clock.

[fol. 648] (After the jury had left the court room, the following proceedings were had:)

COLLOQUY BETWEEN COURT AND COUNSEL.

The Court: Very well, Mr. Watkins.

Mr. Watkins: May it please the Court, we have asked for a directed verdict on both the first and second counts separately with respect to each of the individual defendants. I will approach it this way, Your Honor, whichever Your Honor would prefer, either the over-all picture or there are certain special situations with respect to certain of the companies. If I may just say with regard to that part, one of the defendants is Warner Brothers Circuit Management Company which actually operates the Stanley Theatre.

I do not recall any piece of evidence of any sort, including the exhibits, that in any way implicates or relates to that defendant. Specifically, there has been no testimony that any request was made that it abandon its position or that there was any conversation with its manage-

ment in which a claim was made that it should not accept the right to exhibit pictures.

May I break there, Your Honor? That is the exhibiting company only, and it has nothing to do with distribution of pictures. Therefore, it would have nothing to do with assigning of pictures to anyone else in the event it did not itself take them.

The Court: Which is that, the Warner?

[fol. 649] Mr. Watkins: The Warner Brothers Circuit Management Corporation.

The Court: The Warner Brothers Circuit Management Corporation.

Mr. Watkins: That is next to the last defendant in the list, and I might just point out to Your Honor that Warner Brothers Pictures, Inc., was not served in the Philadelphia case and is not before the Court in this case.

The Court: Warner Brothers Distributing Corporation?

Mr. Watkins: No, sir. That is before the Court. It is the preceding one, Warner Brothers Pictures, Inc. They are not really before the Court. I think Mr. Rome agrees.

Mr. Rome: That is correct.

Mr. Watkins: And the second one, Warner Brothers Circuit Management Corporation. It operates the Stanley Theatre. I say that it does not have anything to do with who gets pictures except insofar as it like any other licensee, exhibits pictures for which it has received a license, and if it failed to license the pictures or any picture it would have nothing to do with where that picture went or on what conditions that picture went.

So, we have here an absence of any demand on that defendant, any conversations with that defendant, or any ability on the part of that defendant to affect the position [fol. 650] of this particular plaintiff.

The Court: Now, what is the full name of that, again?

Mr. Watkins: That is Warner Brothers Circuit Management Corporation.

The Court: That is the first one you speak about?

Mr. Watkins: No, sir.

The Court: I think you were first speaking about Warner's.

Mr. Watkins: You are right. I then brought in Warner

Brothers, Inc., which was not served and it is not before the Court.

The Court: I think you were talking about the third. You say you were talking only about two?

Mr. Watkins: That is correct, sir.

Although the Warner Brothers Pictures Distributing Corporation is in a different category from any of the defendants other than MGM or Loew's.

I am afraid I confused Your Honor a bit on that. If I may start from scratch again.

Warner Brothers Pictures, Inc. has not been served, is not before this Court as a party defendant. Warner Brothers Circuit Management Corporation is the company operating the Stanley Theatre and has nothing to do with the distribution of pictures and could not license a picture [fol. 651] to anyone else, the Crest, the Uptown or anyone, and, therefore, is not in position to affect the Crest by conduct on its part. And there has been no claim of any refusal to act or to accede to anything which was addressed to it.

Another company which stands in a different position from some of the other defendants is Columbia Pictures Corporation. Now, Columbia, it seems to me might also have an action for defamation because it was the only company of the distributors which did not receive a request for the World Premiere or request at the time to license first run pictures to the Crest in Baltimore City. It was ignored. There is no claim that there was any preliminary conference with Columbia. That was one company in which there was no conference with them before the opening of the Crest Theatre.

You remember Mr. Myerberg enumerated his conferences in Washington with various branch managers, particularly around October to November of 1948, and Columbia was not one of those, or with which the matter was discussed at that time or upon whom a demand for product was made. And there is nothing in the record to show any request for bidding or any first run request with respect to them until beyond the period here. So that Columbia is different in that it was not one of those to whom the request was made and the refusal was given.

Two other companies are in a special position. Those [fol. 652] are Warner Brothers Pictures Distributing Corporation, which as the name indicates is a distributor, and Loew's, Inc., or Metro-Goldwyn-Mayer, as it is frequently called, MGM, both of those have such an interest in the theatres in which the pictures are exhibited that we believe under the decisions, and particularly under the decision of the specific holding of the Supreme Court or Court of Appeals of the Second Circuit in Dipson Theatre, Incorporated, versus Buffalo Theatre, Inc., 190 Fed. 2d, 951.

The Court: That case is referred to on the other points, isn't it?

Mr. Boyd: Your Honor has it in the briefs.

Mr. Watkins: I do not think that was included on the other points as to admissibility, Your Honor. The point in Dipson was whether or not a company owning a theatre has a right to license his pictures to that theatre on such terms which to it may seem proper, and I am trying to find my note on the specific language.

The Court: Well, is the point now you are addressing your remarks to that Loew's in Baltimore licenses only to its own theatres?

Mr. Watkins: No, sir. First run, yes.

The Court: And your point is there is nothing in any of the decisions—I think this must be obvious as a proposition that it is not in restraint of trade for a [fol. 653] company to first run or to license or let its own theatre have exclusively its pictures? You are not contending that is illegal, are you, Mr. Rome?

Mr. Rome: I do contend as to those two companies, sir, by reason of the fact——

The Court: You mean the conspiracy? You are basing it on the ground of conspiracy? I am just asking you who did this, that if the A Company, which is a producer and distributor of pictures, owns theatres in Baltimore, New York and all around, I mean actually own them. Is it your contention that they may not exclusively license or let those theatres that it owns have the exclusive runs of these pictures?

Mr. Rome: If it were found to be the facts, sir, that

the Crest Theatre were so close to downtown as to be in substantial competition with downtown and, consequently, could only play on an exclusive first run basis, I think that there might be some merit to Mr. Watkins' position.

The Court: I do not know any law which supports your proposition. In other words, you are, in effect, saying let us get out for a moment of the moving picture field. You are saying a man makes something and wants to sell it and has his own company to which he sells it, that he, nevertheless, has got to sell it to other people?

Mr. Rome: Sir, in the motion picture industry, by reason [fol. 654] of the injunction entered against these defendants as a result of the approval of the Supreme Court, they have been enjoined against granting any clearance between theatres not in substantial competition.

Now, one of our contentions is, as Your Honor well knows, sir, by reason of our distance we were not in substantial competition with downtown, therefore we are eligible to play day and date with the Loew houses, Warner houses downtown, and even though we might not have had any right, in line with Your Honor's thought, to have an exclusive first run, the course of events require those distributors owning the theatres, as well as operating and distributing pictures, that they license their pictures in such a manner that a theatre not in substantial competition should have access to it without clearance, so that as to Warner and Loew's, sir, we do contend, not only on that basis but also by reason of the fact that there is a conspiracy here, as we claim, the joint acquiescence in conduct, whereby the Loew's and Warner defendants received the benefit of this policy in Baltimore, they being the first run exhibitors among the defendants in Baltimore, in return for similar favors received by the other defendants in other parts of the country, stemming from the nation-wide ownership of theatres by these defendants as was found to exist in the Paramount case.

Moreover, the third aspect, as we see it is that the Court has ruled that the integration of these companies, that is, [fol. 655] their production and exhibition phase of the business, is illegal, and those phases must be separated and divorced. We are seeking here an injunction to protect

the Crest Theatre for the future as well as damage for what happened in the past.

The Court: You mean the Supreme Court says that Company A cannot be a distributor and owner of a theatre, too?

Mr. Rome: That is right, sir.

The Court: You mean laid down that as a flat proposition? I do not so read the Supreme Court opinion.

Mr. Rome: I respectfully submit to Your Honor there is no dispute about that, and I believe these gentlemen would readily admit that as a result of the remand by the Supreme Court of the case to the lower court, the statutory court below, not only ordered them to separate the exhibition phase of the business from the production and distribution phase, in other words divorce them, but in addition ordered them to divest themselves of large numbers of their theatres.

The Court: That may be true as part of the determination of conspiracy, but I am talking now about an abstract proposition. You are apparently contending that no motion picture producer or distributor can ever have a theatre. That is what you said?

Mr. Rome: That is exactly the point, sir, and these defendants who have been convicted of conspiracy have [fol. 656] been so required by the courts, and it is embodied in the decree, sir, which I wish to offer in evidence.

The Court: By the way, if I may interrupt further, you gave me a brief but you have never given me the marked copies of the decrees which I asked for.

Mr. Rome: I have them and they are marked, sir. I did not know Your Honor wanted them submitted at that time. I thought I ought to renew my primary offer of them.

The Court: I have to have them before me before I can determine anything more about your proffer.

Mr. Rome: They are here, and those portions which I seek to offer in evidence are marked in red. They are only the applicable portions, raising the same issues which we contend are raised in the present case.

Mr. Watkins: Do you have a memo indicating what those are?

Mr. Rome: Yes.

The Court: Mr. Watkins, will you now go ahead?

Mr. Watkins: Yes, sir.

The particular language in the Dipson case further, Your Honor, since the point has been raised, it is true that at various times, various times have been set as of which the companies were to divest themselves of theatre interests. None of them, however, relate to the period in controversy, or as far as these two companies alone and [fol. 657] Warner Brothers are concerned relate to any period well beyond the period in controversy.

So, the decrees had no effect upon the private ownership, and as long as we are talking about what the decrees did, they expressly reserved to the defendants the right to exhibit their pictures in their own theatres upon such terms as they desired, up until the time of divorcement.

The Court: Up until what?

Mr. Watkins: Up until the time of divorcement, up until the time they were required to divest themselves of their theatre interests, and that was well subsequent to the time I am talking about at the present time. So, to put it concretely, during the time in controversy the decree expressly recognized the right of these defendants to deal with their two theatres as they pleased and to make such terms with them as they pleased, and I think that is what Your Honor's reaction would be to what the decree was in the Dipson case at 190 Fed.2d, 951, at page 960.

The Court: What is the case?

Mr. Watkins: Dipson Theatres, Inc. versus Buffalo Theatres, Inc.

Then, if I may read just two sentences from that at page 960: "Officers of both Loew and Paramount——" now, Paramount is not involved in this particular argument because Paramount does not have any theatres in Balti- [fol. 658] more. The only two of the defendants who have any theatres in Baltimore in this case are Loew's and Warner Brothers Pictures Distributors. The only distributors having theatres are these two.

Now, the reason I interrupted this is because Paramount in the Dipson case did have local theatres.

(Reading): "Officers of both Loew's and Paramount testified that it was the policy of each to favor theatres in which they had an interest, all other things being equal. This was to be expected." Footnote 12, to which I will return. And the fact they did so was no evidence they conspired to do it jointly rather than doing it individually.

Footnote 12, which appears in the text is as follows: "The consent decree entered into by Paramount in 1940 specifically reserved its right to favor its own theatres, and similar reserves were involved in the decree."

So, there we have the full recognition of the fact that in dealing with your own theatre you can do as you please, you start dealing with outsiders, you can get into the question of equity or discrimination, but as long as you keep it within the family you can do with it as you please, and that is the most that appears in this case with respect to these two, and, therefore, I feel that they are within a special category, and that, as the Court so aptly expressed in the Dipson case, the fact that each decided to favor [fol. 659] its own theatre is no evidence that they jointly conspired each to favor its own theatre. It is simply a case in which he did the normal thing on his own.

The Court: I am not sure I understand you. You say the Dipson case decided that as long as they could keep it in the family, they can do whatever they want?

Mr. Watkins: Yes, sir.

The Court: Do you mean here in Baltimore, then, that Loew's and Warner Distributors, who are the only two out of the group of defendants who own theatres here, that they have kept it in the family?

Mr. Watkins: On first run. My point is this——

The Court: They have kept it on first run entirely?

Mr. Watkins: Each in their own. I don't mean there has been any interchange. I mean MGM has played Loew's pictures at the Century.

The Court: To make it simple, you say Loew's, leaving out the name, you say Loew's has played first run only at Loew's theatres in Baltimore?

Mr. Watkins: Right.

The Court: And Warner Distributors have played only at Warner Distributor theatres in Baltimore first run?

Mr. Watkins: Yes, sir, and that, therefore, the terms on which they did it are of no concern so far as the Court is involved or this case is involved. They could have [fol. 660] charged one per cent or one hundred per cent film rental. They could have jumped the picture for exhibition or given up whatever clearance they felt proper. There you have the same theatres playing pictures first run and other pictures playing first run, and the fact each did what you expected it to do, is no conspiracy.

The Court: Are you also saying there is nothing in the decision of the Supreme Court, in the Paramount case, that is contrary to that? What was the date of the Dipson decision in relation to the Paramount case?

Mr. Watkins: It was 1951, Your Honor, and one of the interesting facts is that the Dipson opinion was written by Justice Hand who was the senior Judge in the case in the statutory court.

So, if anyone knew the Paramount case and the status of theatres at this particular time certainly he was the man that would.

The Court: Have you finished what you have to say on this point?

Mr. Watkins: On the specials, yes, sir.

The Court: Now, I would like to take it up piecemeal. What have you to say to that?

Mr. Rome: In the Dipson case the theatre seeking access to first run from Loew's and Paramount in this case was a theatre located near and consequently came in unques- [fol. 661] tioned substantial competition with the Loew's and the Paramount theatres.

That is unlike the situation which we have in Baltimore where we contend that we are sufficiently far away not to be in substantial competition, and hence eligible to have access to pictures upon a day and date first run basis as distinct from an exclusive first run basis.

Moreover, sir, Mr. Watkins has chosen to ignore the mandatory language contained in all of the decrees entered in the Paramount case and enjoining every one of the defendants from granting any clearance to theatres not in substantial competition.

Consequently, sir, we contend that their right to put their

own product into their own theatres must be read in the light of additional mandatory language of the Court causing them not to grant theatres not in substantial competition, clearance.

Now, there is one other fact which has been also totally ignored. Warner Brothers Circuit Management, which operates the Stanley Theatre, and Loew's Incorporated, which operates the Century and Valencia play in those houses not only Warner product and not only Loew's product, but into those houses they get product from certain other companies and so they are really part and parcel of this conspiracy just as much as any of the other distributors are. Even on Mr. Watkins' basis, it would be [fol. 662] a little different if the only product that played in the Stanley Theatre was Warner product, or if it were, say, that the only product they played in the Century Theatre were Metro product, but that is not a fact, sir, as has been amply demonstrated on the record. Other companies furnish product to those theatres, too. And he refrained from touching entirely the point which goes, as we see it, to the heart of the case, from our viewpoint. We are so far away as not to be in substantial competition with downtown and, hence, as I have said, we do not want the Crest Theatre to be precluded from having equal access with Loew's and with Warner's which those companies have to their own first run product. Moreover, sir, Mr. Watkins cannot possibly, it seems, leave them out of this action, at least as to the second cause—but I take it he has not been addressing himself to that as yet.

Mr. Watkins: That is right.

The Court: Do you want to say anything in rebuttal of Mr. Rome?

Mr. Watkins: No, Your Honor.

Still on the first cause of action, which is the conspiracy with respect to first run, I say that there is in this case no evidence of conspiracy. Now, I would like just to step forward one step from the preceding argument, that two of the companies involved, I think clearly have the right [fol. 663] to play their own product on the basis that they want.

Now, their conduct, which is relied upon as showing uni-

formity, is found to be legally proper on one particular ground. Now, there is no other evidence was respect to the other defendants except the claim that they have played this product in this way for a long period of time and the uniformity is the sole contention with respect to the existence of a conspiracy.

There is not one word of evidence in this case or one word in any form that there is a claim, that there is direct evidence of any conspiracy. The only claim is that you should draw an inference of wrong-doing from the fact that people over a period of time have—Judge Chesnut said on the basis of distribution in the industry, sold licenses for their pictures in a particular way and did not disrupt that practice when one man came in and said I want it done differently.

Now, the uniformity is the sole thing relied upon, and what I said to Your Honor is what was said in the Fanchon and Marco case, and which was said by Judge Chesnut that similarity of conditions may call for similarity in treatment.

Here you have the plaintiff writing similar letters, and if his proposition is unsound he ought to get similar answers.

The Court: Now, Judge Chesnut heard the whole [fol. 664] case, did he?

Mr. Watkins: Yes, sir.

The Court: In other words, there wasn't any ground for the motion of directed verdict there, was there?

Mr. Watkins: No, sir, it was not a jury case. Both of these cases were not jury cases.

The Court: He could have entertained a similar motion that the plaintiff had failed to make out a case. I see your point, but I am disposed to hear everything in a case of this kind, particularly since it is involved, I grant you, and involves some new features that may be totally non-existent in any of the cases relied on by Mr. Rome. I am not saying that by way of conclusion, but as a possible truth, in view of all those things, I think this is in the area of the type of case that the Court ought to hear the whole thing, to see what the defendants have got to say about it, because I am not satisfied that this uniformity by itself may not under these circumstances be sufficient to warrant my going ahead

and hearing the whole story. That is putting it in non-technical language, the present view which I take of the case.

Mr. Watkins: But Your Honor makes yourself very clear, and all I was intending to give in anticipation was you had at least as much uniformity in the conduct, the request of the plaintiff as you had with respect to the [fol. 665] defendants, and from that it would seem to me that no reasonable inference of a conspiracy could be drawn.

It was testified had every one uniformly granted the request of the plaintiff there would have been no conspiracy, but when each one uniformly refused to grant the request it was conspiracy. That does not seem to me to be logical; if you get what you want it is not conspiracy, but if you do not get what you want it is conspiracy. If you got it it would be the result of good business judgment. Likewise, if you do not get it, it is equally true that you do not get it because of good business judgment. My only point is there, sir, where you have the same thing asked of several people and where it is admitted that if the request was granted, there would be no evidence of conspiracy, the failure to grant by one or any is no evidence of conspiracy.

The Court: I gather in trying to summarize what the plaintiff's position is on those latter points, don't they say there would be no conspiracy, because it would first have to give them the right which they claim they have to enter into competition, from which they are at present excluded, and they say that applies to all others in like circumstances with themselves as to whom they claim you have likewise denied this opportunity. That is the way I understand it. Isn't that in substance what you say?

Mr. Rome: That is exactly it, sir.

[fol. 666] The Court: So, I don't think it necessarily follows. I am not attempting to make a ruling on the merits of the case. In fact, I might say that the reason I am not disposed to grant any motion now is because I feel I do not know the merits of the case yet. I have only heard one side.

Mr. Watkins: Of course, Your Honor, my only justification for moving is there are no merits in the case. That is the only possible justification for my being here.

The Court: I didn't expect you to say otherwise.

Mr. Watkins: I would not be standing here if I thought otherwise. I see Your Honor's point, and you understand mine, and I do not think there will be anything gained to attempt to push that further.

The Court: This is, of course, without prejudice to the right to renew this motion at the close of your testimony. And also, as I have said, Mr. Rome, my ruling is not final with respect to your motion that you be allowed to put the decree in as disclosed in the Paramount case. I have not had a chance—you have just given it to me, as a matter of fact—although I do not think I would have had a chance to give the full consideration to them much sooner, anyway, but I feel that your client is not prejudiced by my delaying the ruling on that point. You might call it prejudice, but I think it is purely technical. If I should grant [fol. 667] your motion, it would mean that you would put this in in the course of what would normally be called rebuttal rather than putting it in in your main case.

Mr. Rome: I quite understand that, sir.

The Court: I cannot see that you would be prejudiced in any event.

Mr. Rome: I will be happy to be governed by Your Honor's wishes.

The Court: I can further rule on that after I have heard the defendants' case.

Mr. Rome: May I say just one further word, sir? I have given Your Honor the decrees with respect to all the defendants except the decree as to Paramount, which is contained in this volume, which is similarly marked, sir, to that which Your Honor has as to the other defendants.

If Your Honor wishes, I would be glad to have a typewritten copy prepared and submitted to Your Honor this afternoon.

The Court: I do not want to burden you, but I would like to have before me all parts of the decrees which you are asking me to allow you to introduce into evidence. Am I correct in this, there is one which I have not yet had?

Mr. Rome: Yes, Your Honor. I will have that this afternoon.

The Court: Tomorrow is soon enough.

[fol. 668] Mr. Berenholtz: That will involve taking this

book out of the court room. It is a book belonging to the bar library. If I can get Your Honor's permission——

The Court: There is no great hurry.

I give you this advance notice so you may not be inconvenienced. I do not think the Court will be able to sit on Monday or Tuesday of next week, because I think I have to be out of town for one of those days and possibly two. So, we will sit this afternoon beginning at 2:00 o'clock and sit until 4:00 or maybe a little after, and then tomorrow until 1:00 o'clock. We have only a half session tomorrow. Then we will have to adjourn until Wednesday morning next week.

Mr. Raftery: Your Honor, we are having a little trouble with hotel reservations for out-of-town witnesses.

The Court: You would not want them to live in the suburbs?

Mr. Raftery: It is a thing over in the neighborhood of the Crest Theatre which seems to be causing all of our troubles these days, that race track. Saturday there is some big race out there.

The Court: Saturday is the Preakness. I mention that because I want to forewarn you, in speaking to Baltimoreans, perhaps you may not understand their attitude if you did not recognize what the Preakness was.

[fols. 669-670] Mr. Raftery: I think Your Honor will take judicial notice of it. We have a lot of out-of-town witnesses and we had hoped to go right straight through until 1:00 o'clock tomorrow. If we peter out, due to lack of evidence, by a quarter or half past 12, may we ask your indulgence?

The Court: Yes, except I would like to ask you to arrange to use practically all of the time I am giving you tomorrow.

Mr. Raftery: We will.

The Court: Because even a half hour or three-quarters of an hour means a lot of difference in cleaning up the case.

Mr. Raftery: You will not mind our calling a local witness?

The Court: I would like that if the other side does not object, and it will help fill in the blank spaces of time.

Mr. Rome: I have no objection.

Mr. Raftery: We will go right through, but we may have to substitute a witness.

The Court: We will take a recess until 2:00 o'clock.

(Whereupon, at 12:50 o'clock p.m. a recess was taken until 2:00 o'clock p.m.)

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[fol. 671] AFTERNOON SESSION

(Met, pursuant to the taking of the recess, at 2:00 o'clock p.m.)

The Court: Very well, gentlemen, we are ready to proceed.

Mr. Boyd: If Your Honor please, by way of introduction to the first witness, I would like to read into evidence from the deposition of Mr. Myerberg this colloquy on page 22 of his deposition. The question is asked:

"Q. From what section did you anticipate you would draw patronage?"

And the answer was:

"A. That theatre is located on Reister-town Road and Rogers Avenue, which is almost diametrically in-between Towson and Catonsville. We expected to draw from Park Circle north from approximately halfway to Catonsville and halfway to Towson and as far probably north as Reisterstown."

Later on—I have not been able to put my hand on the precise page, but I proffer to supply it to the Court and counsel—the witness Myerberg said, or used an expression describing the southerly boundary of the area as a line coming in around Walbrook and the easterly line would be on Roland Avenue; thirdly, by way of introduction to the chart supplied by the plaintiff, and in evidence, he [fol. 672] shows the draw area claimed to be Roland Avenue, to a southerly line of the draw as indicated as Gwynns Falls Parkway, and then with a line extending generally northwest from that point.

Now, with those introductions, I would like to call Mr. Collins to the stand.

Thereupon THOMAS COLLINS was called as a witness for and on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record, please, sir.
The Witness: Thomas Collins.

Direct examination.

By Mr. Boyd:

Q. Mr. Collins, where do you reside?
A. 514 Castle Drive, Baltimore.
Q. In Baltimore City?
A. Yes, sir.
Q. What is your business?
A. Aerial photography and mapping.
Q. How long have you been in that business?
A. Approximately five years.
Q. Do you operate out of the old City Airport?
[fol. 673] A. That is correct.
Q. You maintain your own photography equipment?
A. Yes.
Q. Your own airplane?
A. Yes.
Q. Do you have associates in the business with you?
A. No associates.
Q. You have assistants and employees?
A. Employees, yes.
Q. Mr. Collins, did you at my request make an aerial survey map of the general northwest section of Baltimore City, and beyond?
A. Yes; I did.
Q. Mr. Collins, I show you this large photograph and ask you if you can identify it?
A. Yes; I can.
Q. What is it?
A. That is a photographic map I made of this section of town, at your request.
Q. When did you do it, approximately?
A. Approximately—it was photographed two months ago.

Q. Sometime in March, then?

A. Sometime in March; around the middle of March.

Mr. Boyd: Your Honor, I offer this in evidence.

[fol. 674] (Aerial survey map, general northwest section of Baltimore City and beyond, was marked Defendants' Exhibit No. 9.)

The Court: Are you going to tack it up on the board?

Mr. Boyd: Yes, sir.

By Mr. Boyd:

Q. Now, Mr. Collins, if you care to come over here, I would like to ask you some questions about it.

Mr. Collins, that photograph you made represents the general northwest section of the city?

A. Yes.

Q. Would you mind pointing out some of the characteristics; for instance, is Druid Hill Lake on there?

A. Yes; this is Druid Hill Lake, here.

Q. And Lake Ashburton?

A. Yes.

Q. Can you identify the Pimlico Racetrack?

A. Yes.

Q. Can you identify the intersection of Belvedere Avenue and Park Heights Avenue?

A. Yes; right here.

Q. Right there, where the word "Pimlico" appears?

A. Yes.

Q. How far north, approximately, does that go above the city line, Mr. Collins?

[fol. 675] A. That goes approximately a mile beyond the city line, north of the city line.

Q. Will you indicate by some small mark in the margin where the city line runs, on that map?

A. Yes.

Q. Will you mark it in the margin of the map?

A. (Witness marks on map.)

Q. Is the western line approximately in the left margin of the photograph?

A. Yes.

Q. Approximately the margin?

A. Just within the margin, about half-an-inch.

Q. Now, Mr. Collins, at my request, did you attempt to delineate on that photograph certain areas?

A. None whatever.

Q. I mean, did you attempt to show a certain area, at my request, by drawing lines?

A. A certain area?

Q. Yes.

A. You mean, these lines?

Q. Those lines there.

A. Yes.

Q. You have on there two narrow lines, one is red and one is green, and the green line appears on the right edge of the photograph and is at approximately what geo-

[fol. 676] graphic location in the city?

A. This line here, you mean?

Q. Yes.

A. That indicates approximately Roland Avenue, from this point here.

Q. Well, it is Roland Avenue from any point?

A. Yes; well through the line.

Q. You mean at the circle?

A. In the radius.

Q. In the radius, from this point which you now show as being the Crest's location?

A. Yes.

Q. Where is Park Circle on this map?

A. Park Circle is right here.

Q. Where there is a red radius line?

A. That is correct.

Q. Touching the area which obviously is Druid Hill Park?

A. That is correct.

Q. Is there a line on there which goes through the Walbrook section?

A. Yes.

Q. Where is that?

A. This line right here, the green line.

Q. The green line which goes through the place where

[fol. 677] Windsor and Walbrook appear on the picture?

A. Yes, sir.

Q. Now, there are some other red lines on the map, Mr. Collins. The red line in the upper right quadrant is a radius line from the Crest location showing what, sir?

A. It indicates a position halfway, approximately halfway, from the Crest Theatre to Towson.

Q. And there is a red radius line in the lower left quadrant of the photograph, indicating what?

A. This red line indicates a position approximately halfway to Catonsville.

Q. That is the line which is just two inches above the wording, "Edmondson Village"?

A. That is right.

Q. Now, on the map appear certain designations of what are theatre names?

A. Yes.

Q. You have located on the map all the theatres that are within the area covered by the map?

A. That is right.

Q. And the arrows following each one, or near each one, point just as accurately as you can make it, to the location of those theatres?

A. That is correct.

Q. Mr. Collins, if you were called upon to identify [fol. 678] Gwynns Falls Parkway on the map, could you do so?

A. Yes.

Q. Would you make some appropriate mark in the margin as to where Gwynns Falls Parkway appears?

A. This is Gwynns Falls Parkway, right here.

Q. All right.

A. It more or less ends right at this point, and continuing on over, it would be approximately here.

Q. Will you make a "GFP", so that we will know that?

A. (Witness marks on map.)

Q. Mr. Collins, just west of the word "Crest" on the map, there appears a darker portion of the shading. I am pointing, so that you will know what I mean. The area in this triangular shape, will you describe that area to His Honor and the jury?

A. Well, in describing this area, the only thing I can say

about it is that it appears to be vacant land, more or less. There are very few houses, not much development.

Q. Is there a wooded area there?

A. This is all wooded area in here.

Q. The darker shade?

A. The darker area indicates woods, and this is the railroad track here.

Q. The darker wooded area then bounds on the railroad track?

[fol. 679] A. That is correct; yes. There are a few structures within this area, and some large buildings down in here, but for the most part——

Q. That dark triangle is vacant land?

A. Yes.

Q. Will you point out to the Court and jury, in the areas which lie to the north of the Crest area—when I say "vacant areas", Mr. Collins, I mean areas as contrasted to built-up city sections, which appear from the obvious blockings on the rest of the picture.

A. Actually, the congested area, you might call it, ends right here.

Q. What is "right here"?

A. I don't know the names of all these streets.

Q. But you are pointing to a more or less circular section?

A. Yes. On this part of the map here, following a line such as that, this complete section in here is what you might call not too well-developed, not too densely developed.

Q. That section lies partly below a mile beyond the city line?

A. It is more beyond the city line.

Q. For the benefit of the jury, who might not be able to see the lettering, would you point out on the map at [fol. 680] this time the location of the various theatres that have been put on there; for instance, where is the Uptown Theatre on that map?

A. This is the Uptown Theatre, right here.

Q. Directly below Pimlico Racetrack?

A. Yes.

Q. Where is the Pimlico Theatre?

A. The Pimlico is just west of the Uptown.

Q. Northwest, you mean?

A. Northwest of the Uptown Theatre.

The Court: You might give the streets they are on.

By Mr. Boyd:

Q. The Uptown and Pimlico are on what street?

A. That is Reisterstown Road.

Q. The Uptown?

A. Yes.

Q. Or do you mean Park Heights Avenue?

A. I am sorry—Park Heights Avenue.

Q. Where is the Crest with relation to that?

A. The Crest is southwest of that, at this point here on Reisterstown Road.

Q. Will you show the jury the running of Rogers Avenue on the map, please?

A. Rogers Avenue is like this.

[fol. 681] Q. It goes across and touches Pimlico Racetrack on a tangent?

A. Just about.

Q. And it is continued in a southwesterly direction, also?

A. There is a street here; actually, what it is——

Q. You don't know that it is Rogers Avenue?

A. No.

Q. But it is a geographical continuation?

A. It looks to be.

Q. Where is the Ambassador Theatre?

A. Here is the Ambassador Theatre, here.

Q. Almost due south of the Crest?

A. To the south of the Crest, due south of the Crest.

Q. And the Gwynn is nearby that location?

A. Yes; just across the street from that.

Q. Where is the Forest Theatre?

A. The Forest Theatre is to the east, a little bit further.

Q. And the Forest and Ambassador and Gwynn are all on Liberty Heights Avenue?

A. That is correct.

Q. The Ambassador and Gwynn are at Gwynn Oak Avenue, I believe?

A. I believe that is correct.

[fol. 682] Q. And the Forest is on Garrison Avenue, at Liberty Heights?

A. Yes; this is Garrison, here.

Q. Now, did you point out the Avalon Theatre?

A. This is the Avalon, here.

Q. Which is south of the Uptown on Park Heights?

A. On Park Heights; yes.

Q. Are there any other theatres within the area north of Gwynns Falls Parkway, and otherwise confined to Roland Avenue on the east?

A. No.

Q. There are no others?

A. No. These two here are the only other two.

Q. They are east of Roland Avenue?

A. Yes.

Q. On 36th Street?

A. Yes.

Q. They are the Ideal and the Hampden Theatres?

A. Yes.

Q. Also, on the map south of the green radius lines, is the Walbrook and Windsor. They are on North Avenue, I believe?

A. Yes.

Q. Near Tenth Street or Ellamont Street?

A. Yes; it is near Walbrook Junction, on this. I am [fol. 683] not too familiar with that area.

Q. There are other theatres appear on there, but they are outside of the area you have attempted to show within the line?

A. Yes.

Q. There is just one more I wish you would point out to the jury and Court; that is Edmondson Village?

A. Right here, on Edmondson Avenue.

Q. And that is about four inches from the bottom of the picture?

A. Yes.

Mr. Boyd: Witness with you.

Mr. Rome: No questions.

(Witness excused.)

Thereupon EDWARD HAWKINS was called as a witness for and on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name for the record?
The Witness: Edward Hawkins.

Direct examination.

By Mr. Boyd:

Q. Dr. Hawkins, what is your occupation, sir?
[fol. 684] A. I am a professor of marketing at Johns Hopkins University.
Q. Where did you receive your advance education?
A. I did graduate work at the University of California for a Ph.D.
Q. You received your Ph.D. at the University of California?
A. Yes.
Q. At what time?
A. 1938.
Q. How long have you been professor of marketing at Johns Hopkins University?
A. Six years.
Q. I believe you are also Dean of the School of Business there?
A. That is correct.
Q. Prior to that time, were you connected with the Department of Commerce?
A. Yes; for five years.
Q. Were you Chief of the District Cost Unit, Bureau of Foreign and Domestic Commerce?
A. That is correct.
Q. Were you at any time connected with the University of Pennsylvania?
[fol. 685] A. Yes; I was Professor of Marketing there.
Q. During what years?
A. 1939 to 1941.
Q. Have you been connected with the publishing field in the matter of marketing?
A. Yes; at present, I am Editor-in-Chief of the Journal

of Marketing, which is published by the American Marketing Association.

Q. Have you, yourself, written and published articles of a general nature in connection with marketing?

A. Yes; quite a number.

Q. Do you hold any position with the City of Baltimore?

A. I am connected with it at present, with the City Planning Commission, as Director of a research project on Retail Shopping Centers.

Q. And, in addition to that work, or in connection with that work, have you, and previously to that work, have you from time to time made surveys of population areas and other types of surveys?

A. Yes; I have.

Q. Dr. Hawkins, the term "shopping center" is a rather broad one, and I wonder if, for His Honor and the jury, you are in a position to define it as it is generally accepted in the field of your work?

[fol. 686] A. Yes; there is no official definition, but about three weeks ago there was held in Baltimore a national convention of the National Association Planners, which included city planners, state and county planners, and the definition which I will give was offered there, of different types of shopping centers; and there was general agreement among those planners.

They speak in that field of a primary or regional shopping center as being a center that will draw trade as far as 50 miles away. It will have anywhere from 60 to 150 different stores in it, including at least one large department store, and several smaller ones.

The secondary or sectional shopping center will draw trade for perhaps five miles, in substantial quantity, and will have from 20 to 50 stores, including at least one department store, usually a branch of a downtown department store.

The neighborhood shopping center will have up to 15 stores, with no department store. It will consist chiefly of convenience stores, convenience goods stores, such as grocery stores, restaurants, personal service establishments, and so on.

In addition to these three types of centers, there is a term

used that is called "string street". That is not a center, but is a scattering of stores along a street, usually a main [fol. 687] traffic artery.

Q. Dr. Hawkins, in Baltimore City, are there any shopping centers which would qualify, in your definition, as a primary or regional shopping center?

The Court: Well, now, isn't that self-evident? Why need we go into that? There must be any number of them.

Mr. Boyd: That is just the point. I asked if there are any. I would like Your Honor to hear his answer.

The Witness: No, sir; there is no shopping center——

The Court: Of course, this case will not be decided by definitions. I don't mean to exclude this, but are you going to analyze the entire City of Baltimore?

Mr. Boyd: No, sir; only in part.

The Court: After all, as I see this case, it is not going to rest upon what kind of shopping center there is there. It is going to turn upon the population within a reasonable radius of this theatre, and the people that live there, and move to and from there, and are likely to frequent this place, either on foot, bus, or in their own automobiles; and it seems to me that the store situation, while it is an attraction, is purely a secondary attraction, if you have sufficient density of population. I am not excluding this, but I am just trying to warn you against giving it a classical designa- [fol. 688] tion to all of the shopping centers of Baltimore.

Mr. Boyd: I have no intention to do that.

The Court: What do you call Lexington Street, for example, Doctor, between Charles Street and Park Avenue?

The Witness: That will be part of the downtown primary shopping center.

The Court: There you are. We all know that, don't we?

Mr. Boyd: That is right; but what I want to show, and what I expected this witness to answer, if Your Honor will permit him, that in Baltimore City there is only one primary shopping center. That, Your Honor, is a very essential point in this case.

The Court: You mean, according to the definition the doctor gave?

Mr. Boyd: According to the accepted standards; yes.

The Court: Go ahead.

By Mr. Boyd:

Q. Is there more than one primary shopping center in Baltimore City?

A. No, sir; there is not.

Q. What is it?

A. That is the downtown shopping center.

The Court: How broad is that? What area, roughly, does that cover? It takes in a large part of the town, [fol. 639] doesn't it?

The Witness: It would cover not more than half-a-mile, I would say, from the main center of Lexington and Howard.

By Mr. Boyd:

Q. A half-mile from Lexington and Howard Streets?

A. As being the main retail shopping center.

Q. Are there secondary shopping centers in Baltimore and, if so, can you name them?

A. Yes; there are some secondary or sectional sections. Edmondson Village is one; Waverly; the Belvedere, and York Road area; Northwood. These are some of them.

The Court: What do you call Howard Street for four, five, six, seven blocks from Fayette up?

The Witness: As it extends north from the main shopping center, I would call that a string street.

By Mr. Boyd:

Q. You mean, beyond the half-mile area?

A. Yes.

The Court: You mean, you don't put Howard Street in your primary shopping center?

The Witness: Oh, yes; in the center of town.

The Court: What?

The Witness: In the center of town; yes.

Mr. Boyd: I think Your Honor did not hear, perhaps, [fol. 640] fully, the answer the professor made. He said there is one primary shopping center in Baltimore City, extending about a half-mile in radius from Howard and Lexington Streets. When he speaks about Howard Street,

I think he is thinking of the area beyond that, which I just described.

The Court: I see. Perhaps I did misunderstand him.

By Mr. Boyd:

Q. Professor Hawkins, do you have means of knowing, and have you checked the areas from which shopping centers will draw their patronage?

A. Yes. The City Planning Commission has made a number of studies, by interviewing the shoppers at the various shopping centers, to see where they came from, where they lived. That work is continuously going on, and we expect to cover 23 shopping centers in Baltimore, and to do it in that fashion before we finish the complete study.

Q. The shopping centers that you refer to as Waverly, Northwood, and York, and Belvedere, are fairly closely situated, aren't they?

A. Yes; they are.

Q. Do they have an overlap?

A. Yes; they overlap considerably.

Q. Is there a mileage area which you are in a position to attribute to the combined Belvedere, Waverly and Northwood centers?

[fol. 691] A. Yes; I have figures for each of them separately for the combination. If you would take about a two-mile radius from each of those centers, you would define an area that would account for about 85 per cent of their business.

Q. Of their total draw?

A. Yes, sir.

Q. Dr. Hawkins, in what category of shopping center do you place the Hill Top Shopping Center? My question assumes that you have made a study of it and are familiar with it.

A. Yes. I would say Reisterstown Road——

The Court: Do you mean in the term "Hill Top" the shopping center at the Crest?

Mr. Boyd: That is what it is known as, Your Honor.

The Witness: Reisterstown Road I will call a string street. The Hill Top Center is a nucleated center along this street. It has, by my count, 15 retail and service es-

tablishments, all of a convenient, good type. I would call it the neighborhood center.

The Court: I can't hear you.

The Witness: I would call it the neighborhood center.

By Mr. Boyd:

Q. And it would fall into Classification 3, that you gave [fol. 602] us before?

A. That is correct.

Q. What would be the normal area of draw for a neighborhood shopping center such as Hill Top, located where it is?

A. It would be different for different establishments at the center. It is usually accepted that a convenience to the store——

Q. Convenience to what?

A. Convenience to the store, such as a grocery store, or a service establishment such as a barber shop or hairdressing shop, will draw most of its business from a radius of 5 blocks or so.

The Court: How many?

The Witness: Five blocks or so.

By Mr. Boyd:

Q. And, Dr. Hawkins, I take it that the figures vary to some extent by the availability of parking, and things of that kind?

A. That is correct.

Q. Have you made surveys, Dr. Hawkins, of any of the shopping center areas in the City of Baltimore with respect to the draw from that area, as it would affect the attendance at the downtown motion picture theatres?

A. Yes,—although the primary emphasis of the study was the downtown theatres.

[fol. 603] Q. Did you come at my request to make a survey of attendance at downtown motion picture theatres with the view to determining what portion of their attendance come from particular sections of Baltimore?

A. I did.

Q. Did I define to you and request that you make such a survey, particularly with reference to the area in the

neighborhood of the Crest Theatre, which was described to you as covering Roland Avenue on the east, Park Circle, generally, on the south, down to Gwynns Falls Parkway, west to the city line, and then extending to the city boundary from those two east and west extremes?

A. I don't believe you particularly asked me to make the study in that way. You asked me to find out where the people came from who were at the downtown theatres. Then, you asked me to locate such people in respect of several different areas, one of which was the one you described.

Q. In other words, you are now reminding me that I asked you to make a complete survey of downtown attendance, and then localize your figures to a certain prescribed area?

A. Yes.

Q. Which was the area described?

A. Yes.

Q. Did you make such a survey?

[fol. 694] A. I did.

Q. When?

A. It covered a period of 7 days: January 9, 1952, and January 31st——

Q. You mean January 9th as the single day?

A. Yes; and January 31st through February 5th.

Q. The switch from January 9th over to January 31st was occasioned by what event?

A. By the bus strike that started on the 10th.

Q. How did you make that survey, Dr. Hawkins?

A. The survey was made by personal interviews conducted by students in my marketing research class.

Q. Under your direction and instruction?

A. Yes, completely. They interviewed personally people coming into the theatres, taking these people at random, so that we would have a representative cross-section of all of the people going into the theatre. The interviews were proportioned to be representative in respect of days of the week and time of the day. We took an equal number of interviews at each theatre, and then adjusted those to what we though to be the proportion of the attendance at the theatre.

Q. On that particular day?

A. Yes.

Q. When you say the interviews were weighted, shall [fol. 695] we say, for the days of the week, are you alluding to the manner in which the motion picture week is considered, that is, by tenths?

A. Yes, sir.

Q. Two Saturdays, three Sundays, and one to each of the other days?

A. Yes.

Q. What question was asked of those persons who were interviewed?

A. We asked only one question: "What is your address?" This, of course, was preceded by an introductory remark, "Pardon me. I am making a survey. Would you mind giving me your address?"

Q. How many interviews did you conduct?

A. We conducted 1,200 interviews at the six leading downtown theatres.

Q. And of those, Dr. Hawkins, did you get a usable total of replies? There were some you could not use, I suppose?

A. Yes. There were very few rejections. People were willing to answer the questions. Of the 1,200 responses that we got, 1,137 were usable. The others were addresses that we could not locate on our Census Tract street list.

Q. In other words, you were unwilling to use them [fol. 696] because you could not definitely locate them?

A. That is correct.

Q. You referred to Census Tracts. That is a form of map breakdown that was available to you?

A. It was prepared by the United States Census Bureau, dividing the city into 150 different sections.

Q. It does not correspond with postal zones?

A. No, it does not.

Q. Dr. Hawkins, was this survey conducted by you and your associates in accepted form for such surveys, and are you able to give His Honor and the jury the accuracy of the result you obtained by that survey?

A. Yes. Since it was a random sampling, it is possible to state with certainty what the degree of sampling error would be. On a sampling of that size, 1,200, when applied

to a particular figure which we will need later, for any breakdown of the answers of the magnitude of 15 per cent "yes" and 85 per cent "no", with that kind of answer, a sampling of 1,200 has a probability of 95 out of 100 being right, within two percentage points.

The Court: Better than the Gallup poll?

The Witness: It is better than the Gallup poll; yes, sir.

By Mr. Boyd:

Q. Dr. Hawkins, would you care to comment on any comparison with the Gallup poll?

[fol. 697] A. Yes. The chief difference is that Mr. Gallup was asking people to give their opinions of what they were going to do some weeks hence. About 9 percent of the people did not know. Some of them who did give them an answer apparently changed their minds. In our survey we were not asking for such an opinion, and we were not asking for a forecast; we were asking merely, "Where do you live?"

Q. A simple fact that they knew?

A. Yes.

The Court: Maybe they liked the picture so much they wanted to get on the mailing list, so that they would come back.

Mr. Boyd: We will come to the mailing list, Your Honor.

The Witness: We did not ask their names.

Mr. Boyd: They did not ask for their names.

By Mr. Boyd:

Q. Are you willing to say, upon the basis of your professional experience and reputation, that the survey that you made, with the probability of 95 out of a hundred as being within two percentage points of being correct——

A. That is correct.

Q. Dr. Hawkins, did you take these figures that you got as a result of the survey and apply them visually to the census map of the city?

[fol. 698] A. Yes, I did.

Q. Do you have that map with you?

A. Yes, sir; here it is (indicating).

Q. Now, will you identify this, Dr. Hawkins?

A. Yes, sir. This is a map of Baltimore City, showing the division by census tracts. The map itself was prepared by the City Planning Commission. The coloring I put on, myself.

Q. And you are prepared to identify and explain that coloring?

A. Yes, sir.

Mr. Boyd: I will offer this in evidence, if Your Honor please.

(Map of Baltimore City, showing division of census tracts, prepared by City Planning Commission, was marked Defendants' Exhibit No. 10.)

By Mr. Boyd:

Q. I notice, Dr. Hawkins, that you have some concentric circles on the map?

A. Yes.

Q. What is this circle (indicating)?

A. That is one mile from the intersection of Howard and Lexington.

Q. What is the second?

A. Two-and-a-half.

Q. And the third?

[fol. 699] A. Five miles.

Q. Do they have relation to a square mile area I wish to ask you about?

A. They do not.

Q. Before we proceed with the map, have you made a figure that you can give as to the percentage of downtown theatre patrons living within a zone area of 5 square miles?

A. Yes, sir.

Q. What percentage of the downtown theatre patrons, as shown by your survey, live within that 5 square mile area?

The Court: Can't you point that out?

Mr. Boyd: Yes, Your Honor.

The Court: I think it would save time. If that chart goes to show that, you can just show it by the chart.

Mr. Boyd: It does not show it in a defined line, but he will be able to show it.

The Witness: These circles (indicating) are air-line direct distances from the center. Since my data were tabulated by census tracts in these areas, I did not want to cut through them. So, what I did was to select whole census tracts, the inner one being a group of census tracts that covers about 5 square miles, which contained roughly all [fol. 700] of this area (indicating).

Q. Then, the second circle?

A. Yes.

Q. Then, your third and further group of census tracts, that would cover a belt outside of the second circle, that would cover about 25 square miles?

A. Yes.

Q. What does that show?

A. That is grouping the tracts, roughly, within this 5-mile circle, but without cutting through any census tract.

Q. Then, you considered an outer belt area here (indicating) of some 61 square miles?

A. That is everything lying outside of the circle.

Q. But within the city limits?

A. No.

Q. Now, then, Dr. Hawkins, can you tell His Honor and the members of the jury what percentage of the downtown theatre patrons, as shown by your survey, live in the first area you described?

A. That percentage is about 15 per cent.

Q. What percentage came from the inner belt, or the next area out?

A. That second belt accounts for about 40 per cent.

Q. And the third, or outer belt?

A. That is the remainder of the 100 per cent.

[fol. 701] Q. Would you like to refer to your notes?

A. Yes. The outer belt is 21.8 per cent. The remainder of the 100 per cent then lies beyond that belt.

Q. And that 21 or 22 per cent is beyond the City Limits, without any doubt?

A. Yes, sir.

Q. Now, Dr. Hawkins, what is the green or the blue-green area shown on the map?

A. That is the combined market area of the Belvedere Center, the Waverly Center, and the Northwood Center, with this exception—The combined area includes also this section shown by the red line (indicating).

Q. Which is in the yellow part?

A. Yes; and which overlaps.

Q. And they usually overlap each other, don't they?

A. That is correct.

Q. What does the yellow section show?

A. That is the area of the Crest Theatre as it was told to me.

Q. Which is the Gwynn's Falls Parkway—Park Circle Roland Avenue definition?

A. That is correct.

Q. You have done it as nearly as you could by the census tracts?

A. That is correct.

[fol. 702] Q. On the left-hand side there is an area outlined in red. What is that?

A. That is the area of the Edmondson Village Center, as shown by a City Planning Commission study.

Q. With the same basis of draw, and so on, that you have been discussing?

A. Yes, sir.

Q. Dr. Hawkins, have you compiled, as a result of your survey, that portion of the downtown theatre attendance which comes from the combined Northwood, Waverly and Belvedere sections?

A. Yes, sir. This area up here (indicating) accounts for 15.16 per cent of the patrons at downtown theatres.

Q. Have you compiled in similar fashion, Dr. Hawkins, the percentage of downtown theatre patrons from the Edmondson Village area?

A. Yes. That area accounts for 7.89 per cent of the patrons of the downtown theatres.

Q. And have you similarly complied the percentage of downtown theatre patrons coming from the Crest Theatre area, as you have defined it on that map?

A. Yes. Of these patrons of the downtown theatres, 16.34 per cent live in this Crest area.

Mr. Boyd: The witness is with you.

[fol. 703] Cross-examination.

By Mr. Rome:

Q. I understand, Dr. Hawkins, your testimony to be that you were requested by Mr. Boyd to make this survey in January of 1952. Is that correct?

A. I believe the request came earlier. That is when the survey was made.

Q. Was the request made much before that time?

A. I don't recall. I believe it was sometime in December.

Q. Of 1951?

A. Yes, sir.

Q. In any event, it was within a matter of months?

A. Yes, sir.

Q. You had never been consulted by any of the motion picture companies, or their representatives, before that time with regard to this problem, had you?

A. No, sir.

Q. And they had never gotten into touch with you to inquire of you concerning these facts before the Crest Theatre opened as a theatre?

A. No.

Q. Had you ever been consulted by anyone from the New York offices of any of these companies?

A. No.

Q. Or anybody from the Washington Offices?

A. No.

[fol. 704] Q. Is it your thought, Dr. Hawkins, that only what you have described as a primary shopping center is one that can support what has been referred to here as a first run theatre?

A. I am not an expert in the motion picture business.

Q. But you have no thought with regard to that problem at all?

A. No.

Q. So far as you are concerned, a theatre located anywhere outside of the downtown or in the downtown area may be equally suitable as a first run motion picture theatre?

Mr. Boyd: That is direct examination, sir.

The Court: I will allow the question.

Mr. Boyd: I do not recall asking him about any suitability, sir, at all.

The Witness: The word was "suitable"?

Mr. Boyd: Will you read the question, please?

(Whereupon the pending question was read by the Reporter.)

The Witness: If I must answer that from a marketing and economic point of view, I would say no.

By Mr. Rome:

Q. Do you have any knowledge about the gross earned by theatres outside of the downtown area?

A. No.

Q. Do you have any knowledge of what potential gross they might earn if they were to have access to first run [fol. 705] pictures?

A. No.

Q. Do you know what the total theatre population of Baltimore is?

A. You mean the number of theatres?

Q. No, the number of people who patronize theatres in the City of Baltimore.

A. No, I know for a period of one week the number of people who patronized six downtown theatres.

Q. And so long as first run product is concentrated in the downtown area, people who want to see first run motion pictures must go to that area, must they not?

A. Oh, yes.

Q. No matter where they live in the greater Baltimore area?

A. Naturally.

Q. I do not suppose your inquiry of these patrons of the downtown theatre included any question as to whether or not they would equally patronize a theatre in the so-called suburban area.

A. No, it did not.

Q. You were not requested to make such an inquiry?

A. No.

Q. Did you ever make any check of the persons who actually patronized the Crest Theatre to inquire where they [fol. 706] might come from and what area they live in?

A. No, for the Crest area I accepted merely the area that was given by Mr. Myerberg.

The Court: I cannot hear you, sir.

The Witness: I am sorry. I say, for the definition of the Crest area I accepted the area that was stated by Mr. Myerberg.

By Mr. Rome:

Q. But you made no inquiry to find out where the people who patronized the Crest Theatre came from?

A. No.

Q. You were not requested to do that, either?

A. No.

Q. Isn't it a fact, sir, that there may be many, many areas with dense populations that have no shopping center in them at all?

A. I think that would be very rare.

Q. What I mean by that, there may be stores and shopping facilities, but is it not the fact that there are, by common knowledge, throughout the country many sections of cities, of other communities which are strictly devoted to residential areas without having what you have described as a primary shopping center or even a neighborhood shopping center?

A. This happens only when they are zoned that way, and I think it very rare that zoning would exclude neighbor- [fol. 707] hood shopping.

Q. But people who live in such areas, even though they be only a few, are people who would seek amusement, go to theatres, and so on?

A. Yes.

Q. Have you ever made any inquiry, sir, to find out whether or not a theatre, in order to attract patrons from every area from which it may draw, needs a shopping center in order to do so?

A. No, I have not.

Q. You have no thought on that subject?

A. No.

Mr. Reese: I have no other questions.
Mr. Boyd: Thank you.
The Court: That is all, Doctor.
(Witness excused.)
Mr. Watkins: We call Mr. William Zimmerman.

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Thereupon, WILLIAM ZIMMERMAN was called as a witness for and on behalf of the defendants, and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.
The Witness: William Zimmerman.

[fol. 708] Direct examination.

By Mr. Watkins:

Q. Where do you live, Mr. Zimmerman?
A. New York City.
Q. And what is your occupation or employment?
A. I am employed by RKO Radio Pictures, Inc. I function as an assistant to the Vice President, Mr. Robert Mochrie, who is in charge of domestic distribution, and I also assist Mr. Depinet, the President of the company, in the formulation of distribution policy and the handling of exhibitor relations.
Q. What is your education or professional background, Mr. Zimmerman?
A. I am a lawyer who was employed in the Legal Department of the company in 1934 until 1946, when I was transferred to the Executive Department of RKO Radio Pictures, Inc.
Q. Keep your voice up a bit, please, and talk to the jury.
A. I am sorry.
Q. Do you participate in any particular phase of the motion picture business in your employment?
A. I was describing my function. My participation is related particularly to the maintenance of satisfactory exhibitor relations, the composing of the differences be-
[fol. 709] tween competing exhibitors with respect to RKO

product. Frequently, we are presented with conflicting claims on the part of exhibitors. Their concepts of whether or not they are in competition depend very frequently where their economic interest lie. What we tried to do was to compose the differences between them, keeping in mind that our primary purpose is to obtain maximum revenue.

Q. Is your work in any way associated with the question of clearance and run?

A. Of course clearance and runs are at the heart of the marketing and the exhibition of our pictures and are frequently the subject of controversy.

Q. Now, you mentioned the marketing of our pictures. Does RKO market only pictures produced by it?

A. No. As a matter of fact, a very important part of the RKO program of feature pictures is the Disney pictures, of which we are very proud, for example Alice In Wonderland and also cartoon pictures. We also distribute throughout the world, I might add, Goldwyn pictures. Best Years Of Our Lives would be one picture people would recognize.

The Court: I do not believe the jury can hear you.

The Witness: I am probably not projecting my voice enough.

I say, we also distribute the pictures of Samuel Goldwyn [fol. 710] who is one of the important producers in the United States. In addition to that we distribute the pictures produced by other independents such as Sol Lessor, for example, who makes those perennial Tarzan pictures. We have an important part of our program each year which consists of the product of so-called independent producers.

By Mr. Watkins:

Q. Your function in attempting to reconcile differences between distributors or among exhibitors, is that the same with respect to the products of Disney and Goldwyn, for example, as it is with respect to pictures distributed by your company?

A. Of course it is. The only difference is that under the contracts of Disney and Goldwyn and with respect to other producers, they have varying degrees of control over the policy with respect to the distribution of their pictures, but by and large they follow our recommendations.

Q. You say they have varying degrees of control over the policy of distribution. I wish you would explain that in a little more detail.

A. The way I would explain it is this: Usually an independent producer has the right to approve each license contract we obtain, in other words, each exhibition contract, to see whether or not it provides for terms which the producer thinks is representative of the value of the engagement.

[fol. 711] Q. I do not want you to go into any particular detail, but just talk about one picture of Disney, say, and explain very briefly how you would go about ultimately securing a license of that picture?

A. We have branches throughout the United States. We have 32 branch offices which are pretty well autonomous units whose activities are subject to district, division manager, and then on the top in New York a sales manager. The branch manager has salesmen, and the salesmen are assigned to a number of theatres they call a block of theatres. Let us assume it is a certain picture, the salesman will go to the Bijou Theatre in the area and obtain a license. The exhibitor will agree to 40% gross and play the picture Thursday to Monday, for example.

Now, assuming that the branch manager thinks these terms are representative, this license application, because it is only a license application, not an agreement, until we get the approval in New York this license application with the terms, with the exhibitor's name appended, goes to New York. It is sent by the branch manager to New York. Now, if we, RKO, the RKO sales executives think that those terms are representative terms, we then send that license agreement to the Disney representatives. They have their sales approval representative in New York, and if they approve it then we send the approval to the [fol. 712] exhibitor, we execute the contract and we have a binding license agreement.

What I wanted to say, you asked me the degrees of control. That is a sort of negative control of terms. But in the case of a producer such as Goldwyn it is specifically provided in his distribution agreement that he can designate general distribution policy, the customer to sell, and

in addition, approval of terms. But as a practical matter the right to approve sales terms carries with it obviously the power to determine sales policy.

Q. Well, is this approval by the Disney or Goldwyn representative a perfunctory matter? Or is it one which is exercised?

A. It is exercised religiously by Disney with respect to every single sale. The same applies to Goldwyn.

Q. Does RKO defendant own any theatres in Baltimore?

A. RKO Pictures does not own any theatres anywhere.

Q. That is true of first run and neighborhood?

A. That is true of any run.

Q. In October of 1948 did you receive a communication from the Crest Theatre applying for a World Premiere and for first run pictures?

A. Yes, I think I remember that. In October of 1948, I think Mr. Brecheen, who is our Washington Branch Manager, and has under his jurisdiction the Baltimore territory. I think it was in October that he forwarded to me [fol. 713] a letter which was signed by Mr. Myerberg and directed to Mr. Brecheen.

Mr. Watkins: Plaintiff's Exhibits 3 and 6, please.

(Documents handed to the witness.)

The Witness: In this letter Mr. Myerberg talked in very glowing terms of this fine new theatre which was nearing completion, I think within four weeks it was to be completed, and that it had been designed, originally built, and intended to be a first run outlet in the City of Baltimore, and asking, if I remember, for a World Premiere.

So, I think my impression of the letter was he wanted exclusive first run in the City of Baltimore.

By Mr. Watkins:

Q. Now, I show you Plaintiff's Exhibit No. 3, which is a letter of October 12, 1948, addressed to Metro-Goldwyn-Mayer Corporation. However, it has been stipulated that identical letters, with the possible exception of the conference date in the first paragraph, were sent to seven of the distributing companies including your RKO. Is that the letter to which you had reference?

A. I cannot say with absolute certainty that it is identical with the letter I received, sent me by Mr. Brecheen, but I could say generally it was in the same vein.

Q. Do you recall the request for the World Premiere?

A. Yes, I do, very definitely.

Q. Now, Mr. Zimmerman, would a World Premiere be [fol. 714] consistent with a day and date exhibition?

A. It would not.

Q. In the third paragraph, on page 2, I call your attention to the following language: "I am at the present time in a position to tender my bid herewith for your first run pictures in Baltimore which will be available for exhibition at this theatre."

Does the term "first run pictures" have any recognized meaning in the motion picture trade?

A. Yes, it does.

Q. What is that meaning?

A. The trade meaning of "first run" carries with it an exclusive run. When someone asks first run in the town in our business, that means exclusive first run. If he does not mean exclusive first run, the practice is to so state. He will say, "I want first run in the town day and date with your regular customer or with the blank theatre," and so forth, but in the absence of that, the reasonable understanding is that he wants an exclusive first run.

Q. Is that the general acceptation of the term?

A. Yes, it is.

Q. After the World Premiere aspect, what was your understanding as to the run requested by this letter?

A. An exclusive first run in the City of Baltimore.

Q. You said you received a forwarding letter from Mr. [fol. 715] Brecheen, and I show you plaintiff's exhibit No. 6 and ask you if that is the letter to which you refer?

A. Yes, it is, Mr. Watkins.

Q. And was there a data sheet accompanying it?

A. Yes, there was. It is Form B, if I remember, which gives us certain statistical information concerning the theatre making the request.

Q. Were you at that time familiar with the way in which your product was licensed in Baltimore City?

A. I was generally familiar with the manner in which we licensed our pictures in Baltimore, yes.

Q. And what was that general manner?

A. Well, we had been licensing our pictures for first run in Baltimore, I think over 20 years, to Mr. Rappaport who owned the Hippodrome Theatre, and I think who at that time had recently completed, maybe a year or two before, the Town Theatre.

Q. Was Mr. Rappaport a satisfactory or unsatisfactory customer?

A. Well, I think that letter that Mr. Brecheen sent me accompanying the letter of Mr. Myerberg illustrates it pretty amply. I think in that letter Mr. Brecheen points out that we have a very, very satisfactory customer in Mr. Rappaport. That was no news to us at the home office.

Q. What, if anything, is Mr. Rappaport's reputation as [fol. 716] to the exploitation of pictures exhibited at the Hippodrome or Town theatres?

A. He has had an excellent reputation, a competent showman, a man of integrity.

Q. Now, Mr. Myerberg's letter referred in what you might call glowing terms to the Crest Theatre. What was the condition of the motion picture industry with relation to exhibition at about this time, the end of 1948?

A. Well, 1948 really was a forecast of things to come, indicating a real slide in the volume of business being done in the motion picture industry. We had very highly profitable years in 1946, 1947 and the year 1948 was a significant year, showing the trend downward, so that any exhibitor who in that year put a great deal of money in a theatre, his timing was unfortunate.

Q. Without offering them as exhibits, unless the plaintiff desires it, there was correspondence between you and Mr. Brecheen which ultimately led to telephone calls relative to a conference in New York with Mr. Myerberg; is that correct?

A. That is correct.

Q. And that, according to Mr. Myerberg's notes, took place on November 18, 1948. Would that correspond approximately to your recollection?

A. Approximately. It sounds correct to me.

[fol. 717] Q. Now, to the best of your recollection, tell

the Court and jury in substance what transpired at that time.

First, let me ask you, if I may, when the conference began, what was the nature of the run, if any, which was being requested or sought by Mr. Myerberg?

A. Well, it is very difficult now, four years later, to try to be exact as to a conversation. I can only say at that conversation there was a request for either exclusive first run, and in the alternative a request for day and date first run. However, during the conversation the motion picture Joan of Arc became the subject of a request by Mr. Myerberg, and in that instance my definite impression was that he wanted Joan of Arc either as a World Premiere or as a very early opening engagement to play exclusively first run in his Crest Theatre.

Q. Now, will you continue your recollection?

A. We had, I would say, a rather thorough discussion of his theatre, he described his theatre in great detail, the plans, the character of his theatre, the modern conveniences that were being installed, the type of community, the Hill Top community they were serving.

I think that as a part of this whole project there was this community project of stores. It was going to be a shopping center. And he was most articulate in presenting his view, I thought, and I thought very competently.

[fol. 718] I, on the other hand, remained unpersuaded because it seemed to me that he had in essence, however nice a theatre it was, however modern, he had a neighborhood theatre, serving a limited neighborhood area, and that, one, certainly in a show case city of the type of Baltimore, we are not going to use as a show case for our pictures, a neighborhood house. I indicated that to him. With respect to his request for a day and date run, I had discussed the matter at some length over the phone with Mr. Brecheen and inquired as to whether or not the first run downtown theatres drew substantially from all areas of Baltimore, and Mr. Brecheen said they definitely did, so that for me to seriously consider, or for RKO to seriously consider the Crest Theatre a day and date run theatre with downtown, we had to look away from all the legitimate considerations with respect to the first run downtown theatres, eliminate

clearance, even though the theatres were substantially competitive, and generally, it seemed to me, ddiscriminate with respect to the Crest Theatre, with no compensation for doing so.

I want to add this: I told Mr. Myerberg that I held out little hope that we would grant either one of his requests, for some of the reasons I just outlined just now, but I would advise him definitely after I discussed the matter with Mr. Mochrie, the General Sales Manager, Mr. Levy, our Divisional Manager, whose division includes Baltimore. [fol. 719] Q. Did you at that time state any final position with respect to the exhibition of Joan of Arc?

A. No, I did not. If my memory serves me, I also said that is part of the whole, and I would advise him with respect to Joan of Arc at the same time I advised him with respect to his general run request for first run or day and date exclusive.

Q. I would like to call your attention to part of Mr. Myerberg's testimony with respect to his version of the conference and request, and I am reading from pages 115 and 116 of the stenographic transcript. This is directed to Mr. Myerberg by his counsel:

"Q. What happened when you saw Mr. Zimmerman?

"A. Mr. Zimmerman tried to persuade me from first-run policy in the City of Baltimore, telling me he did not do that anywhere in the country, that their general policy throughout the country was to play their pictures in large neighborhood theatres downtown, and he did not want to and did not see where they could deviate from that policy."

Does that correspond with your recollection of what was said on that point?

A. As I said before, Mr. Watkins, I cannot tell you my recollection in specific words, because I cannot remember. I can tell you the substance of what I said. Now, the substance of what I said to him was that we thought in [fol. 720] marketing our pictures in the large cities, the key cities, we found that it was preferable to license our first run in the downtown area for a number of reasons: First of all, a theatre in the downtown area is centrally located, it is located where the masses of the people are found for their entertainment. It is easily accessible from

all areas of the city. It is in the mind of the public, in the minds of the exhibitors, that an important picture has its first run in a large city in the downtown show case. If the picture is shown first run in a large city in a neighborhood house, it is tagged as an inferior picture. So that on subsequent runs, instead of getting large film rental, we get small film rental. We must think in terms, when we are marketing a picture in a large city, like Baltimore, we must think not only of the first run exhibitions, we must think of all the subsequent run exhibitions. For example, in the City of Baltimore I think we have about 60 theatres.

Q. You say "we."

A. I think the City of Baltimore has 60 theatres. When I say, "We," I mean we solicit 60 theatres. In addition, I think there are about 40 theatres in the surrounding areas of Baltimore.

Now, if we have a successful picture in its first run, that has an important showing, then we can be successful in obtaining adequate terms from the exhibitors operating [fol. 721] the 60 theatres in Baltimore, and the 40 theatres in the surrounding territory. So, we have not only a question of the immediate revenue obtainable from the first run, we have, which is frequently much more important, we have the first run as an exploitation device, to set up the importance, the desirability of seeing the picture in the mind of the public and, therefore, the desirability of licensing it in the minds of the various exhibitors operating in Baltimore.

Now, that is the substance of what I told Mr. Myerberg.

[fol. 722] Q. Then, Mr. Myerberg continued his account of the conference——

A. Pardon me. May I say one thing: I think I did mention in that conference, I mentioned the fact, for example, talking of the immediate desirability of a downtown theatre first-run, as against a neighborhood house, is the fact that you get a pretty substantial matinee business in your downtown theatres, because it is your primary shopping center, the people are found there, and they come in,

they are shopping, and they take an odd hour or so and go into the downtown theatres.

Q. Is there any difference, in your experience, in the pedestrian patronage of the downtown theatre, as distinguished from the suburban or neighborhood theatre?

A. I will say this: when you say "experience", we know as a matter of fact that you do get this drop in business. When I talk about matinees, that is one of the illustrations of this so-called pedestrian drop in business. People come in and shop for a few hours, and go into a theatre.

Q. The concluding statement that Mr. Myerberg used in the conference was in answer to the question:

"Was there anything more to your conversation with him at that time?"

"A. No, sir,—well, he said something to the effect, 'If [fol. 723] you will go home and be a good boy now, and take 21-day pictures,' or something to that effect, ended the conversation."

Did that correspond with your recollection of the tone of the conference or the statements at the conference?

A. No; it does not. I told Mr. Myerberg that what I thought we would give him would be a competitive opportunity for first neighborhood run, which was 21 days after first-run downtown.

Mr. Watkins: May I have Plaintiff's Exhibit 20, please?

By Mr. Watkins:

Q. I show you Plaintiff's Exhibit 20, Mr. Zimmerman, and call your attention to the fact that this contains a confirmation or purports to contain a confirmation of an oral bid, stating Theater Enterprises, Incorporated agrees to pay 35 per cent of the first $8,000 gross box office receipts and 65 per cent of all over $8,000. "We will also place any reasonable guarantee, the figure to be mutually agreed upon."

Was that offer accepted?

A. It was not.

Q. Will you tell the Court and jury why the offer was not accepted?

A. Frankly, we thought that we could make more money by licensing the picture first-run downtown. As a matter [fol. 724] of fact, I think the film rental we obtained from the exhibitor from the, I think it played the Town Theatre, was $21,000. In addition to that, we frequently get offers, when an exhibitor wishes to make a point, he will say, "I will pay you X Dollars, or will give you any kind of reasonable guarantee;" and assuming you do get the guarantee, and the picture does not do well in his theatre, it is traditional in our business to make what we call adjustments. It is a custom, when we are licensing motion pictures, if an exhibitor has an unsuccessful engagement, he can come to our office, and to the offices of the other distributors, and we are willing to give him a reduction in the film rental, because it turned out to be unprofitable. So, the fact that an exhibitor offers a guarantee, or offers a very attractive term, is not completely persuasive.

Mr. Watkins: Will you give me Plaintiff's Exhibits 21 and 22, please?

By Mr. Watkins:

Q. I show you Plaintiff's Exhibit 21, which has been read in evidence, and ask you whether that stated the position of your company with respect to the availability upon which you were willing to license pictures to the Crest, and your position with respect to the offer for Joan of Ark?

A. Yes; it does.

[fol. 725] Q. Will you tell the Court and jury what the decision there announced was, with respect to the availability of pictures to the Crest?

A. Well, we told them that we were willing to afford the Crest Theatre a competitive opportunity to obtain our pictures for exhibition in the Crest Theatre on first neighborhood run in its area.

Q. Well, now, the term may be self-explanatory, but so far it has not been mentioned by you. What is meant by competitive bidding neighborhood first run?

A. Well, the Crest, in our view, was in substantial competition with the Uptown, and I think it is the Pimlico, and, I think, the Avalon, which were operated by Garman, and Garman was licensing our product for exhibition in one or more of his theatres on first neighborhood run.

Now, since the Crest was in substantial competition with Garman's theatres, clearance between them was appropriate, and what we were offering Mr. Garman, I mean, what we were offering Mr. Myerberg, was an opportunity to bid and, if his bid was better than the bid offered by Mr. Garman for his theatres, he could play the picture in the Crest Theatre with clearance over the three Garman theatres.

Q. And would the converse be true?

A. If Garman's offer was the most desirable bid, he would be given that privilege, of course.

[fol. 726] Q. In Plaintiff's Exhibit 22, which is Mr. Myerberg's reply, is an acceptance of the offer to bid, is it not?

A. Yes.

Q. Did Mr. Myerberg—when I say "Mr. Myerberg", did the Crest Theatre have an opportunity to bid on your RKO pictures?

A. Yes; he did. We offered for bidding, if I remember rightly, the Goldwyn picture Enchantment, and The Boy With *The* Green Hair. And a picture called—there were two more pictures, I think, but Mr. Myerberg refused to submit a bid.

Q. Before you leave that, Mr. Zimmerman, in requests for bids, have you sent out a statement of the basis on which you want the bids to be made, in terms of dollars or percentage?

A. No.

Q. How is that done?

A. What happens is, we send out a letter to each exhibitor, advising them that a particular picture is available in that territory at a particular time for exhibition.

Q. That is a printed form letter, is it not?

A. Yes; it is a form we have worked up, which is very practical and rather simple. It imposes no standards as to terms, but says, "Submit your most desirable offer."

Q. Is the same form sent to the various theatres which [fol. 727] may be involved in the bidding?

A. Yes; identical forms to all of them.

Q. I show you a copy of what purports to be a letter dated January 21, 1949, addressed to Mr. Harry Myerberg, and relating to the picture The Boy With Green Hair. Is that your standard form of request for bid?

A. Yes.

Q. And would that same form be sent to Mr. Myerberg?

A. Yes; it would be.

Mr. Watkins: I ask that this be marked as Defendants' Exhibit 11.

(Request for bid, January 21, 1949, on picture, The Boy With Green Hair, was marked Defendants' Exhibit No. 11.)

Mr. Watkins: Since this is the first time this matter has been developed, I think it might be better if we read the form to the jury.

The Court: Very well.

Mr. Watkins: This reads as follows:

"January 21, 1949.

"Mr. Harry Myerberg,
"Theatre Enterprises, Inc.,
"302 Park Ave.,
"Baltimore, Md.

"Re: Crest Theatre, Baltimore, Md.

"Dear Mr. Myerberg:

"This is to advise you that each of the following features is available for 1st neighborhood run exhibition in [fol. 728] Baltimore, Md.

"The Boy With Green Hair—Available February 20.

"Will you kindly forward to us, at your earliest convenience, the terms upon which you are willing to exhibit each feature in which you are interested? You are to make a separate offer of terms for each feature which

shall be complete in all details and shall set forth first the following:

"1. The film rental, whether percentage or a flat sum, or percentage against a minimum guarantee or any variation thereof, which you will pay;

"2. The number of days or weeks during which the feature will be exhibited;

"3. The playdates upon which and the theatre in which the feature will be exhibited;

"4. The type of program which you intend to present with the feature, whether a double feature program, etc.

"5. The hours of operation of the theatre and the number of shows per day.

"We reserve the right not to accept any offer which we do not consider satisfactory for any reason.

"If you are licensed to exhibit any such feature 1st neighborhood run in your theatre, you will be granted the following clearance:

[fol. 729] "Seven (7) days over second run in the zone.

"In order for your offer to be considered, it must be mailed c/o D. J. Loventhal, RKO Radio Pictures, Inc., 1270 Sixth Avenue, New York 24, N.Y., on or before January 28, 1949.

"Very truly yours,

"Branch Manager.

"cc: Mr. Nat Levy, Mr. Wm. E. Dahler, Mr. D. J. Loventhal, Mr. R. J. Folliard."

Mr Watkins: Mr. Rome calls my attention to the fact that in the very large space on the first page, on the name of the picture, I did not give the available date. The picture was The Boy With Green Hair, and the available date is February 20th.

By Mr. Watkins:

Q. Did Mr. Myerberg bid on that picture or the other pictures which you have mentioned?

A. No; he did not. As a matter of fact, I think, if my

memory serves me correctly, Mr. Brecheen was unable to obtain an offer from Mr. Myerberg for any of the pictures, although he had indicated, just prior to that, an anxiety to make such an offer.

Q. Let me interrupt you. I did not feel it necessary, unless plaintiff wishes, to introduce in evidence another one of those, and simply say it is similar, except the picture [fol. 730] is Clay Pigeon, and the available date is April 20, 1949. But you received no bids from Mr. Myerberg; is that correct?

A. Yes; we were advised that Mr. Myerberg was unwilling to make a competitive offer or bid.

Q. Was the offer to bid competitively kept open?

A. He informed or indicated to Mr. Brecheen that he was willing to, if not required to bid competitively, he was willing to play it on first neighborhood run, not to compete against the other theatres, the Uptown Theatre, and the other Garman theatres would play on the same availability; namely, at the same time; so we licensed the pictures, some of the pictures, to Mr. Myerberg, for his Crest Theatre, without bidding, day and date with the Garman theatres, either the Uptown, or the Avalon, or Pimlico, depending on which theatres Mr. Garman exhibited our pictures first neighborhood run.

In that connection, I was interested to see what the competitive drawing power of the theatres were, in view of Mr. Myerberg's statement of the unique character and location of this theatre; and I noted, I think, during that period, where there was not competitive bidding with the Uptown Theatre of Mr. Garman, Mr. Garman gave us more film rental than did the Crest Theatre operated on the same run. If my memory serves me, one of those pic- [fol. 731] tures was Cinderella, and I may be wrong——

Q. There was offered in evidence by the plaintiff, as its Exhibit 91, a letter from Mr. Brecheen to you, dated September 16, 1949, which forwarded a letter from Mr. James J. Lindsay, Attorney, concerning the Crest Theatre.

A. Yes.

Q. And, without rereading it, it purported to set forth the history of the offer of competitive bidding and, as you

said, failure to submit bids, and then offering pictures on the same availability?

A. I remember receiving the letter from Mr. Brecheen to me, forwarding the letter from Mr. Lindsay, dated September 13, 1949, acting as the attorney for the Crest Theatre.

Mr. Watkins: I offer in evidence, as Defendants' Exhibit 12, copy of a letter dated September 13, 1949, from Mr. James J. Lindsay to R. K. O. Radio Pictures, Inc., which is the letter forwarded with Plaintiff's Exhibit 91.

(Letter, September 13, 1949, James J. Lindsay to R.K.O. Radio Pictures, Inc., was marked Defendants' Exhibit No. 12.)

Mr. Watkins: This Exhibit 12 is on the letterhead of James J. Lindsay, Baltimore, Maryland, September 13, 1949, addressed to R.K.O. Radio Pictures, Inc., 203 Eye Street, N.W., Washington 1, D.C., Att'n: Mr. J. B. Brecheen, Branch Manager.

"Gentlemen:

[fol. 732] "Although our Crest Theatre has been in operation for approximately six months, from the very outset your company has refused to permit this theatre the right to competitively bid on pictures first run, City of Baltimore. Your company, over objection, has imposed a policy of first subsequent run on this theatre and has placed it out of the competitive zones of the Upto-n, Avalon, Pimlico and Pikes Theatres."

What is meant by the phrase, "out of the competitive zones"?

The Witness: That is in effect refusing the Crest Theatre an opportunity to play ahead of the Avalon, Pimlico, and Uptown and with clearance over those theatres.

Mr. Watkins: I will continue reading:

"Accordingly, pictures were booked with opening dates starting on Saturday. This was the announced policy of the Crest Theatre necessary to keep to an absolute minimum the losses suffered because of your refusal to permit competitive bid on first run pictures in Baltimore. Your

company furnished pictures first subsequent run in compliance with the Crest policy until recently when suddenly your company refused to allow the Crest to begin exhibition on Saturdays."

Is first subsequent run the same as first neighborhood run?

[fol. 733] The Witness: Yes.

Mr. Watkins: I will continue to read:

"Your decision to impose first subsequent run pictures on the Crest Theatre out of the competitive zone of the Uptown, Avalon, Pimlico and Pikes Theatres carried with it the obligation to make pictures available for the Crest *21 days* after the last play date of first run City of Baltimore; you have failed to live up to this obligation, and have caused considerable loss to our clients by your action.

"Please advise immediately when your company will make pictures available for the Crest Theatre 21 days after first run City of Baltimore. In addition, please understand that the original requests concerning first run pictures at the Crest Theatre are in no way withdrawn.

"Yours very truly,

"(Sgd) James J. Lindsay,

"Atty. for Theatre Enterprises, Inc."

Mr. Watkins: I offer in evidence, as Defendants' Exhibit 13, a copy of a letter dated September 26, 1949, from William Zimmerman to James J. Lindsay.

The Witness: Yes; that is my letter.

Mr. Watkins: I will read this Exhibit 13:

[fol. 734] "September 26, 1949.

"James J. Lindsay, Esq.,

"522 Equitable Building,

"Baltimore, Md.

*Crest Theatre, Baltimore, Md.*

"Dear Mr. Lindsay:

"Our Washington office has forwarded to us your letter of September 13th. You infer that over the objection of

your client, RKO placed the Crest Theatre out of the competitive zone of the Uptown, Pimlico and Pike-Theatres. The contrary is true. RKO first offered your client a competitive opportunity to obtain pictures first neighborhood run ahead of the Uptown, Pimlico and Avalon Theatres. The Pike- Theatre was not included because it was not in competition with any of these theatres and in any event, presently exhibited pictures on second neighborhood run.

"Your client advised us that he was not interested in this competitive opportunity and since both your client and the competing operator were willing to play on the same availability, we have been licensing pictures for the Crest Theatre on that basis.

[fol. 735] "Your client's complaint concerning availability is, in our view, without substance. RKO pictures are offered to your client on first neighborhood run and on the same play date furnished the other theatres in Baltimore exhibiting the picture on first neighborhood run. We are aware of no requirements, contractual or otherwise, which grants your client the right to exhibit RKO pictures in his Crest Theatre ahead of the other theatres playing the picture on first neighborhood run.

"Very truly yours,

"William Zimmerman.'

"cc: Mochrie, Levy, Folliard, Brecheen, Loventhal."

By Mr. Watkins:

Q. What is second neighborhood run?

A. That is a run that follows first neighborhood run, and, I think, probably, with some clearance period of between 7 and 14 days. I don't know exactly.

The Court: I cannot hear you.

The Witness: Second neighborhood run is the run of pictures that follows after the first neighborhood exhibition of the picture, and usually there is a clearance period, a waiting period between the first neighborhood run and the second neighborhood run, which would vary between 7 and 14 days.

[fol. 736] By Mr. Watkins:

Q. Was competitive bidding reinstituted with respect to the Crest Theatre, Mr. Zimmerman?

A. Yes; it was the occasion for that, which brought the letter from Mr. Rome, I think.

Q. I show you Plaintiff's Exhibit 62, which is a letter dated November 2, 1949, from Mr. Rome to RKO Radio Pictures Inc., and ask if that is the letter to which you have reference?

A. No; I think I have reference to a subsequent letter from Mr. Rome, because this letter merely reiterates the original request of Mr. Rome's client, Theatre Enterprises, for a first-run in the City of Baltimore.

Q. And your answer to that was—?

A. My answer to that was the same as my answer to the original request, except I did put in this the statement that, "its location does not disclose such exceptional circumstances as would make appropriate a modification or variance of our present policy for the benefit of that theatre."

Q. Did you mean to imply there might exist circumstances which might justify such a modification?

Mr. Rome: I don't know whether you should attempt to have this witness say what should be implied, and I object to the question.

By Mr. Watkins:

Q. Very well; the statement reads:

[fol. 737] "Our investigation of the Crest Theatre and its location does not disclose such exceptional circumstances as would make appropriate a modification or variance of our present policy for the benefit of that theatre."

Do you care to make any further statement with regard to that particular language?

A. I think it is self-explanatory, and states what I should have said in reading the first paragraph. I stated:

"It is our view that in large cities such as in Baltimore the most satisfactory method of exploiting and marketing our pictures is achieved by licensing their first-run exhibitions to theatres located in the downtown area.

"Our investigation of the Crest Theatre and its location does not disclose such exceptional circumstances as would make appropriate a modification or variance of our present policy for the benefit of that theatre. In our judgment the Crest Theatre, however glowingly described, is, in the final analysis, a neighborhood theatre. We have been furnishing pictures to the Crest Theatre on first neighborhood run which is the availability we consider appropriate to that theatre."

Q. You said you subsequently received a letter from Mr. Rome, without introducing it, unless Plaintiff so desires—the correspondence; will you tell the jury the substance of it?

[fol. 738] A. I think I received a letter from Mr. Rome, which repeated the same mistake, I am sure, inadvertent, that Mr. Lindsay had committed; in other words, Mr. Rome seemed to be under the misapprehension that we had not given the Crest Theatre an opportunity to obtain pictures ahead of the Garman theatres, the Uptown, the Pimlico, and the Avalon, and I think one of my assistants wrote a reply and repeated the history, that we had offered Mr. Myerberg the opportunity, and Mr. Myerberg said he would rather not bid but would play day and date with the Garman theatres.

We again offered Mr. Rome, for his client, another opportunity to obtain pictures for the Crest Theatre, with clearance over the Garman theatres. I think Mr. Rome sent a letter accepting the offer.

Q. These details will be more familiar to your Washington branch manager than to you, I suppose?

A. I suppose as to the information submitting the pictures for bidding, he might have, because he actually executes the policy; but the correspondence was with me.

Mr. Watkins: May I have Plaintiff's Exhibits 64 and 65.

By Mr. Watkins:

Q. Mr. Zimmerman, I show you Plaintiff's Exhibits 64 and 65. Plaintiff's Exhibit 64 is a letter dated April 17, 1950, from you to Mr. Seymour Simon, 29 South LaSalle Street, Chicago, Re: Crest Theatre, Wichita, Kansas;

[fol. 739] and Plaintiff's Exhibit 65 is a letter dated April 18, 1960, from you to Mr. H. H. Hunt Cincinnati, Ohio, Re: Tower Theatre—Wichita, Kan.

Would you examine those two letters and tell the Court and jury to what they relate and what the exhibition conditions were to which they relate?

A. Well, in Wichita, Kansas, in a neighborhood area, there were two theatres, one owned by a man named Hunt, and the other was built by a man named Sullivan. Mr. Hunt had requested an opportunity for an exclusive first-run. Rather, I think, day and date in the city; at any rate, first-run. And the same thing applied to Mr. Sullivan, when he had erected his theatre. We were reluctant to put our pictures first-run in a neighborhood house, or suburban house. However, when we received the letter from Mr. Seymour Simon, a lawyer representing Mr. Sullivan, and reiterating the fact that we wanted to avoid litigation, we gave great consideration to the matter. I want to say this; after all, Wichita is a city of about 150,000 people. The penalty of playing our pictures first-run in a neighborhood theatre in Wichita is not as great, because it is not an important key city, as Baltimore is. Baltimore has a population of somewhere around 950,000, and, I guess, with the metropolitan area, it is more than a million, or a million and two or three hundred thousand; but when [fol. 740] it comes to Wichita, you are talking about maybe 10 or 12 or 15 or 20 days subsequent run theatres, with the penalty not being too strong revenue-wise; and there was the persuasion of a lawsuit if we did not grant it, and we decided to grant both the Sullivan and Tower Theatres competitive bidding against the two theatres for first-run. When I did so, I indicated to Mr. Seymour Simon that I was doing it on an experimental basis, and that we reserved the right to discontinue such a procedure if and when experience, in our judgment, demonstrated that a discontinuance was desirable.

Q. What has been your experience?

A. Our experience has been this: I asked that some analysis be made, and what it seems to indicate is that where you play your picture first-run downtown, your overall revenue in the area is better than when you play

a picture in a first-run suburban area, or day and date with downtown.

Q. Mr. Zimmerman, in determining the terms upon which the RKO licenses or refuses to license the exhibition of its pictures in any theatre, have you at any time ever entered into a combination, conspiracy or agreement or understanding with the representatives of any other distributor as to such terms and conditions?

A. We never have.

Q. What is the basis upon which your decision to license [fol. 741] or not license is made, and the terms of such license?

A. Our first consideration is the best interests of RKO films, with particular emphasis on the maximum revenue for the company, and also for fair treatment to the exhibitors involved, and, as usual, we try our best to resolve the conflicts between the exhibitors. Those are the main considerations that dictate our decisions.

The Court: We will take a recess now, Members of the Jury, until 10 o'clock tomorrow. We will have a morning session tomorrow, until around 1:00 o'clock. We won't sit on Monday or Tuesday of next week. There will be no afternoon session tomorrow.

(Whereupon, at 4:10 o'clock p.m., an adjournment was taken until Friday, May 16, 1952, at 10:00 o'clock a.m.)

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[fols. 742-744] Reporters' Certificate to foregoing transcript omitted in printing.

[fol. 745] Transcript of Proceedings—May 16, 1952, 10:00 A.M.

The Court: Very well, Members of the Jury and Counsel, we are ready to proceed.

Thereupon WILLIAM ZIMMERMAN resumed the witness-stand and, having been previously sworn, testified further on behalf of the defendants, as follows:

Direct examination (Resumed).

By Mr. Watkins:

Q. Mr. Zimmerman, you and I seem to have equal difficulty so the jury could hear us yesterday. I have just one point that was not covered. Mr. Myerberg testified that in Washington pictures played simultaneously at the Warner Ambassador, an uptown house, and at a downtown theatre. Is that true with respect to the RKO product?

A. It is not true with respect to the RKO product.

Q. In Washington, does RKO play its product downtown and anywhere else simultaneously?

A. No; it licenses its pictures for exhibition exclusively first-run downtown, usually in the Keith's Theatre.

Mr. Watkins: Witness with you.

Cross-examination.

By Mr. Rome:

Q. Who is the exhibitor who operates the Keith Theatre in Washington, Mr. Zimmerman?

A. RKO.

[fol. 746] Q. RKO, itself?

A. RKO Theatres Company. Well, I might add that we also license pictures to play in other theatres downtown. I said, usually, RKO Keith's, but we license them to the Metropolitan and other downtown theatres.

Q. Yesterday, under questioning by Mr. Watkins, you said that RKO Radio Pictures, Inc., does not own any theatres. That is not so, however, with other corporations within the family of the RKO corporations. They own a great many theatres. Isn't that the fact?

A. Well, the fact is this: that prior to December 31, 1950, there was a holding company called Radio Keith Orpheum Corporation, which owned all of the stock of the RKO Radio Pictures, Incorporated. It also owned all of the stock of

RKO Theatres, but there was a complete divorcement and disaffiliation in December, on December 31, 1950.

Q. A divorcement stemming from the Paramount case; is that correct?

A. Yes.

Q. And this holding company, which was the holding company of RKO Radio Pictures, Inc., was also the parent company of a corporation which owned the theatres; isn't that so?

A. Yes.

Q. And the corporation which owned the theatres, one [fol. 747] of your affiliated companies, owned theatres all over the country; isn't that the fact?

A. Yes. When you say "all over the country", I do not want you to give the impression that we had many hundreds of theatres. Actually, over the country, I would say, in possibly 20 large cities throughout the United States, RKO Theatres would own a theatre.

Q. How many theatres were actually owned by that corporation within the RKO family?

A. I would say there are in the RKO theatre group, roughly, somewhere between 100 and 110. I am not familiar with the RKO theatres now, because RKO Pictures, Inc., have nothing to do with those theatres.

Q. Since this divorcement?

A. For at least two years now.

Q. How many large cities did you say there were in which the RKO Theatre Corporation had theatres?

A. Well, now, I am not an expert on RKO theatre locations.

Q. But, roughly?

A. I gave it at 20. And I said to myself, I wondered whether I am accurate. I can tell they operate in, San Francisco is one, Los Angeles is one, Chicago, Washington, Boston, New York.

Q. And, in those cities that you have in mind, the theatres [fol. 748] owned by the RKO Theatre Corporation are located in the downtown area of those cities; isn't that so?

A. By and large, that is correct.

Q. And those are the theatres that have played first-run RKO Radio pictures?

A. Not necessarily, because in many of those cities we have competitive bidding. In fact, in quite a few of them, we have opposition to the RKO theatres bidding against RKO for the product.

Q. That would be only since 1950, though?

A. As a matter of fact, prior to 1950. We even put the bidding in in 1949.

Q. But, prior to 1949, the RKO theatres were playing the product not only of RKO, but of all companies that are distributor-defendants in this action; isn't that so?

A. No; I don't think that is so. As a matter of fact, in most of the large cities, Mr. Rome, RKO would have the product of RKO Radio Pictures, this is prior to 1949, as I say, in many instances, they have competitive bidding; but let's go back prior to 1949. RKO theatres had a product of RKO and possibly one other distributor, you see.

Q. The other members of the so-called Big Five of the industry, Fox, Paramount, Loew's and Warners, and also, to your knowledge, owned theatres in many sections of the [fol. 749] country?

A. Yes, sir; they did.

Q. And you are thoroughly familiar with the fact that those companies and the other companies that are defendants in this action are engaged in various phases of the motion picture business, aren't you?

A. Yes. Of course, you mean the Metro distributes pictures, and the Loew's Theatres exhibit pictures,—sure.

Q. The only reason I raise that, Mr. Zimmerman, is due to the fact that the answer that has been filed by RKO in this very suit professes to have no knowledge or information as to the business of these other distributor companies, and I want to establish the fact that this is known to your company?

A. Right. If you mean, as a matter of common knowledge, we in the industry would know that. Of course, I know it. What our lawyers do, as a technical matter, is something else. That is technical pleading, I understand.

Q. Who is the Mr. Mochrie you referred to as being the gentleman you were going to discuss the Crest situation with?

A. Robert Mochrie is our vice-president in charge of domestic distribution.

Q. Is that position comparable to the position referred to as general sales manager?

[fol. 750] A. That is right.

Q. Has Mr. Mochrie always been with your company?

A. Mr. Mochrie has been with our company, to my knowledge, since 1939.

Q. Prior to that time, was he with any of the other companies?

A. Yes; prior to that time he was for some period with United Artists, and some period with Warner's, and some period, I think, with FBO, or one of the small producing distributor companies. I don't remember just exactly which. It is back in the twenties.

Q. In the capacity of the sales department, generally speaking; isn't that so?

A. Yes; he was branch manager. He was district manager, and he was division manager.

Q. Always in the sales office?

A. Always in distribution.

Q. And, before he became the person in charge of the domestic distribution for RKO, who had been the sales manager, or the person occupying that same position with RKO?

A. I think his predecessor was Andy Smith.

Q. That is the same Andy Smith who subsequently became the general sales manager of Twentieth Century-Fox?

A. Yes. Now, he is no longer connected with Fox; that [fol. 751] is right.

Q. To your knowledge, Mr. Smith was also at one time associated with Warner Bros. in a distribution capacity, wasn't he?

A. Yes; he was.

Q. And the Mr. Goldwyn, whom you referred to, who produces pictures distributed by your company, at one time was one of the important personages having to do with United Artists, wasn't he?

A. I think he was an owner of some of the stock of United

Artists, by reason of the fact that he produces pictures for them to distribute.

Q. When you say an important phase of the duties of RKO Pictures, Incorporated, is to distribute the pictures of independent producers, you refer to Mr. Disney and Mr. Goldwyn and Mr. Lessor. How many pictures a year are produced by Mr. Disney, usually; that is, feature pictures?

A. I would say he produces about two a year.

Q. About two a year. How about Mr. Goldwyn; how many pictures, feature pictures, does he generally produce a year?

A. I would say he produces about one a year; but there isn't any magic in numbers. It is a question of the importance of the pictures.

[fol. 752] Q. I readily appreciate that.

A. Goldwyn releases a very important picture, a picture which might gross over $5,000,000. Now, that is as important as a half-dozen pictures, or ten pictures, that each produce a half-million dollars.

Q. There is no question about that, Mr. Zimmerman, but, actually, as far as the number of pictures which are distributed by RKO, it is a fact, isn't it, that the greater number of its pictures are produced by RKO, itself?

A. Yes; but I would say this: I haven't mentioned other independent producers. If we were to list our roster of pictures, a third are put out by independent producers.

Q. You know, do you not, who the general sales managers, or the persons in charge of distribution of the other distributor companies, are?

A. Yes; I know them. I know them personally, and I know who they are.

Q. You see them frequently?

A. I wouldn't say I see them frequently, but I see them from time to time, of course.

Q. You have mentioned the fact that you are thoroughly acquainted with the business these other companies are in. That is a fact, is it not?

A. When I say "thoroughly acquainted", I know the [fol. 753] business they are in. When you say "thoroughly acquainted", you don't mean the details of their operation? I don't.

Q. You do know, however, the group of eight companies, the eight distributing companies that are here in this action, produce and distribute by far the greater number of important feature motion pictures in the United States, do they not?

A. They do; and I think they would like to produce even more of them.

Q. I am sure they would.

A. I know we would.

Q. You have referred to the fact that RKO had 32 autonomous branches in various sections of the country. That is also true of the other distributors in this action, generally speaking, is it not?

A. Yes; when you talk about autonomous, to be an autonomy depends on the confidence which the top executives have in a particular branch manager or district manager. Some require more surveillance. The Washington Branch Manager, for example, Mr. Brecheen, is one of our top branch managers, and he has pretty much carte blanche in a great many matters.

Q. That is not entirely so with regard to all phases of his activity, is it? You have referred to the fact that there [fol. 754] are district and division managers over the branch managers?

A. Yes.

Q. And, actually, Mr. Brecheen refers matters to New York for decision?

A. Yes; there is an irreducible hard core of supervision. I am just talking about the degree of supervision.

Q. It is equally true, is it not, that branch managers from as far away as Los Angeles, when a problem comes along regarding a theatre seeking access to first-run pictures, must necessarily submit that to New York?

A. Yes; they submit it to Mr. Walter Branson and myself.

Q. As a matter of fact in the hierarchy is Mr. Branson in a superior position to you?

A. No; he is not. I am not under his jurisdiction. In fact, the only ones I am accountable to are the president of the company and the vice-president in charge of distribution.

Q. That is Mr. Depinet and Mr. Mochrie?

A. Yes. Mr. Mochrie has two sales assistants, three division managers, located in New York City, and the country is divided into three parts. I can go into detail, but you just want the structure?

Q. That is correct.

[fol. 755] A. Mr. Branson is the division manager for the west, and Mr. Levy is division manager for the eastern territory.

Q. As far as your own activities are concerned, I assume, from what you have said, that you must take up important decisions with Mr. Mochrie or Mr. Depinet?

A. I do. Mr. Mochrie—very frequently with Mr. Mochrie; to the extent that Mr. Depinet interests himself in a distribution problem, then with Mr. Depinet.

Q. So that we may have your position, I take it, from what you are saying, that Mr. Mochrie, if he differs with you on a problem, he is in a position to override you?

A. Yes; but I give him a pretty stiff argument.

Q. You have referred to the fact that salesmen of RKO are assigned a block of theatres. Do you know who it was who was assigned the block of theatres in Baltimore?

A. No; I don't know who it was. You see, in a problem which involves—may I answer?—I would like to answer your question and explain what I mean in this connection: We may have an important run, like first-run Baltimore, the largest city in the state of Maryland, and the only one in excess of 100,000. Obviously, on account of that situation, an account of that character is not handled by the salesman. It is handled at least by the Branch manager, if [fol. 756] not the District manager. Indeed, I am sure the division manager is interested, too, because it is a big city.

Q. By that, you mean——

A. Because it is a key city.

Q. And, by "key city," you mean it is a very important city to your company?

A. That's right; it is one of our important accounts. It is one of the important cities on the Eastern Seaboard.

Q. Do you know whether or not the branch manager or division manager who interested himself in the Baltimore situation ever sought to license RKO pictures to any thea-

tres in Baltimore for first-run, other than the Town and Hippodrome Theatres?

A. I frankly don't know that. I know that, of course, we have competitive bidding first-run in Baltimore, because other exhibitors have indicated an interest. Other large exhibitors have indicated an interest in our product first-run; we give them that opportunity. I would say, the reason we did not license the others is that we did not get any request from anybody else for first-run.

[fol. 757] Q. As of what time did other exhibitors begin to express interest in your product?

A. This winter.

Q. Just this winter?

A. Yes.

Q. Now, did your own company ever interest itself in seeking to obtain other outlets for first run in Baltimore?

A. Well, now, the only way I can answer it is this: From a business point of view we have Mr. Rappaport, who is a man who has two good theatres. He has the new theatre, the Town Theatre, and the large Hippodrome Theatre. He is an excellent show man. He is a man whom we have enjoyed very good relations with for 20 years. He shows a great interest in RKO pictures. He works very closely with us over the years, and has spent a great deal of money in advertising, in setting up the first run of our pictures, because he realizes the importance of first run to obtain maximum revenue throughout the area. He is one of our best customers in the United States.

Now, I don't think good business requires us to look around for somebody else.

Q. Has there ever been an occasion over these years, Mr. Zimmerman, in which RKO had some particular picture for which it was seeking a large theatre, or, perhaps a theatre that had the potential of returning a greater amount of [fol. 758] gross than was being returned by the Town or the Hippodrome Theatres?

A. As far as large theatres are concerned, Mr. Rome, I think the Hippodrome has about 2250 seats, which is a pretty large theatre, plus the fact that there isn't any real virtue or magic in size. That may be offset, you know, in part by additional playing time. In any event, my point is,

the Hippodrome is large enough for the City of Baltimore. When Baltimore was able to support longer runs, Mr. Rappaport went to greater expense to himself and built that Town to give even better representation to our pictures.

So, here was a man who was supporting us on every picture—let us assume this Hippodrome case, but I am talking from a business point of view, let us assume we have a top picture, a picture in which he can make a lot of money. He supports us on the A-minus pictures. I do not think it would be loyal for us to look for someone else, when he has supported us so well over the years.

Q. He was a thoroughly satisfactory customer to RKO?

A. Oh, an excellent customer, one of the best.

Q. So far as the problem of seating, which you raised, a theatre of 1600 seats, so far as size is concerned, is completely suitable as a first run theatre, is it not?

A. I would say a theatre of 1600 seats would be perfectly suitable, as far as seating capacity was concerned.

Q. Are you undertaking to say with regard to the [fol. 759] satisfactory nature of your customer relationship with Mr. Rappaport, that that would be sufficient in itself to prevent your product going to any other exhibitor with a suitable theatre to first run product from RKO?

A. I am not saying that. Now, our policy is this: That regardless of how satisfactory our customer relationships are, we think that in order to comply with apparent current legal requirements, if there is a downtown theatre which is a representative outlet, which asks for an opportunity to get our pictures regardless of how satisfactory Mr. Rappaport is, we have some kind of a legal compulsion, no matter how distasteful it is. And it is distasteful for us to leave a very satisfactory customer, and we nevertheless put the pictures up for competitive bidding. That is what we are doing now in Baltimore first run, Mr. Rome.

Q. So that as long as the theatre is suitable, it would have, as you describe it, the right to have access, perhaps, under competitive bidding to your product?

A. Suitable, of course, is a conclusion from a variety of factors. Location would be one, and so forth.

Q. Now, let us take this specific example. Suppose the

Crest Theatre was located in the downtown area of Baltimore. Would it have right to have access?

A. Yes.

Q. It would have right to have access to RKO pictures [fol. 760] on first run in the City of Baltimore?

A. It would be offered a competitive opportunity.

Q. So, if I understand you and follow you, it is only by reason of the fact that it is located outside of the downtown area that it has been denied that right of access to RKO pictures?

A. I think that is a fair statement of the reasons for our decision.

Q. And that would be true as to any theatre located outside of the downtown area, no matter how fine it might be?

A. That is correct. I mean it is true of any theatre in Baltimore. It is true of any theatre located outside of the downtown area.

Q. Is not that true also with regard to other cities in the country?

A. Yes, generally true with respect to other cities, depending on circumstances. Now, when you mean cities, we have permitted in Wichita, Kansas, where the—as I think I explained yesterday—well, it was a smaller city, 150,000, it was not an important key city, you were not running too much of a penalty on subsequent run in depreciating the value of the picture. There you could afford to take a chance, and we did permit bidding, a competitive opportunity in the neighborhood house to obtain first run in Wichita, Kansas.

[fol. 761] Q. Is it not true, however, that there is more likelihood of a city of greater number of people being able to support day and date first run than a smaller community?

A. Well, fortunately that is so, but on the other hand, let us take New York City. It is a very interesting thing that we have never gotten, and there is some big neighborhood theatres in the Bronx.

The Court: I cannot hear you.

The Witness: I am sorry. I was saying in New York City, which is our largest city, we have never received a

request from a neighborhood house for an opportunity to play first run day and date with Broadway.

What you say is true, and we do have very large neighborhood houses in New York City and you would think throughout the years you at least would have had one request.

By Mr. Rome:

Q. And your thought is the larger the City, the less possibility there is for you to undertake experiments?

A. No. That is not my thought. Frankly, I do not know, because we have not experimented in the large cities. But that is not the consideration with respect to a large city. What I have said with respect to a large city is as follows: That in a large city such as Baltimore, where you have a downtown area, which is your important shopping area, where you have your entertainment and where you have a [fol. 762] very large number of subsequent run theatres, the success of your exhibition in these subsequent run theatres depends in part upon the exploitation value and the success of your first run.

It also applies to the surrounding area, the exhibition in the theatres in the surrounding area. There, if you play your picture in the neighborhood house, in the mind of the public, in the mind of the exhibitors, it is a "B" picture, it is a small picture, it is an unsuccessful picture.

So, instead of getting top terms from exhibitors on subsequent runs, you get low rentals, low percentages.

Now, the penalty for experimenting in a large city, of putting your picture in a neighborhood house, is so great that we see no reason why we should do it, especially because we think the methods that we have of first run downtown and subsequent runs is a perfectly proper, good, sound marketing method, which gives the public the opportunity of going to the theatre downtown, they can see the picture earlier downtown at a higher admission price. If they want to wait—and there is nothing wrong in waiting—and they want to see it in a neighborhood theatre at their convenience and at lower admission prices, they can do so. If they want to wait still further, they can do that, and see it at a subsequent run theatre in the neighborhood at still

[fol. 763] lower admission prices. It seems to me it is not only for the convenience of the public, but we obtain maximum revenue.

We see no reason in the world why we should alter that satisfactory marketing system we have, for Mr. Myerberg.

Q. Now, there are a number of things in what you have said, Mr. Zimmerman. To start off with, you said you had never experimented in any large city. Do I understand you correctly, sir? Now, isn't it a fact in Los Angeles, where RKO has theatres, you do have situations in which not only RKO but all of these distributor companies play and do a multiple first run policy in a number of theatres in the Los Angeles area in downtown Los Angeles and in so-called suburban communities?

A. Now, let me clarify both the situation with respect to Los Angeles and my answer.

What I am saying is that where we have the preference, where there is a downtown outlet which is willing to license our pictures, our preference is to sell it to the downtown outlet on exclusive first run. That is what I told you about Baltimore.

Now, what happened in Los Angeles is this: In fact, in Los Angeles you really have two more or less separate cities, if you have been to Los Angeles, one, is Los Angeles downtown Los Angeles, and the other, two, is Hollywood.

Now, there are in effect two main centers. We license [fol. 764] our pictures in the main to the Pantages Theatre in downtown Hollywood and to the Hill Street Theatre in downtown Los Angeles.

Now, the Hill and the Pantages Theatres cannot use all of our pictures, or they do not want all of our pictures. Now, we can't get the same satisfactory terms—this is in the past—now, we have competitive bidding in downtown Los Angeles and in downtown Hollywood. But I am talking about the past. We tried to get others outlets in the downtown area. What happens if we cannot get outlets confined to the downtown area? We usually do the best we can, in handling small pictures. Now, there are a number of exhibitors in L.A. and Hollywood, who say we will do this: We have a small house in downtown L.A.; we have a small house in downtown Hollywood. We have two other houses

in some outside area. You have a small picture and we will play them in the four theatres. We do get the downtown exhibitions but we also play them in the other two houses. Which, incidentally, Judge Yankwich said is understandable.

Q. And one of the other theatres you referred to as one of the other exhibitors in the outlying areas is Fox, one of the defendants in this action?

A. Oh, yes, sir.

Q. You referred to the fact there are two areas in Los Angeles, really separate communities, downtown Los An-
[fol. 765] geles and Hollywood. But isn't it a fact, Mr. Zimmerman, that Fox also has another theatre called the Loyola, which is a number of miles from either downtown Los Angeles or Hollywood, which plays the product day and date not only of RKO but other distributors?

A. No, it does not play the product of RKO.

Q. Never?

A. Maybe sometime in the past it played a picture, but not within the last three or four years.

Q. You are not undertaking to say it has never done so?

A. I am not undertaking to say it has never done so, but I am not undertaking to say it has played the product of other companies in addition to Fox, because I do not know, but I will say the Baldwin Theatre, which laid a great deal of emphasis on this day and date and said, therefore, it should have the right to RKO product to first run. Judge Yankwich said it should not have the right to RKO product first run.

Q. That is right. You have said if a picture plays in a downtown house it will help [illegible] the success of the subsequent run engagements. Yesterday you used as an example of one of your top pictures Joan of Arc, on which the Crest Theatre had made a bid, but which you licensed to the downtown theatre and on which you got some $20,000 of film rental.

[fol. 766] A. 20,900, something like that, Mr. Rome.

Q. It was important to you, was it not, to have Joan of Arc play in one of the theatres you described as a show case downtown only to implement the subsequent run revenue that would be derived by RKO; is that right?

A. Yes. But let me just say this: I think my answer was when we thought we would make more money first run in downtown. Didn't I say that in connection with Joan of Arc?

Q. Both yesterday and today, as I understood your testimony. You said this: It is more important for your company to have subsequent revenue than to have first run revenue.

A. I did not departmentalize or compartmentalize it, as you stated. I said there are two aspects to the problem. I said, one, in connection with first run we feel we can get maximum revenue on first run by playing it downtown. Two, there was a very, very important consideration and that was the effect of the first run engagement on your subsequent runs. That is what I said. I wanted to clarify that.

Q. Do you know what the total revenue that RKO derived from the playing of Joan of Arc on all subsequent runs in the City of Baltimore?

A. I cannot answer that yes or no, because this was not the regular release of the picture. As I understand it, as I said yesterday, we thought we would get more money [fol. 767] playing the picture first run downtown. As a matter of fact, we did get very substantial revenue, $21,000, roughly, which seems to me is as impressive an amount of money as we could have gotten from our friend Mr. Myerberg, but this exhibition was a road show exhibition, and a road show exhibition, you do not normally get many subsequent runs.

What happens when you have a very important picture, you have what you call a road show or pre-release. You get a long run of the picture. Usually a higher admission price is charged than normally. You take the picture out of release and at a certain time, whether a year or six months, you then show it again at popular prices.

You have first run exhibition, then you have your subsequent run exhibitions. At that point your subsequent run exhibitions are important.

What I understand you are saying, as to road show exhibitions, you do not have much subsequent run rental. I think you are correct. I think we played only two road

engagements after first run downtown. That is unusual. We do not usually have that.

Q. The point I was getting at, Mr. Zimmerman, is the fact that your company has informed us that the total amount of subsequent run revenue derived from all subsequent runs in the City of Baltimore on the picture Joan of Arc was just about $5,000.

[fol. 768] A. That is right. I just said that.

Q. And I wanted to inquire of you whether you consider that is the kind of important subsequent run revenue you had in mind?

A. Mr. Rome, if you had given me the regular first run exhibition where we license the picture on the normal regular release, then I could answer you. But what you did is take the special type of showing where you normally do not get a subsequent run, and you are using that rare case, you see, to ask me a question about the importance of a subsequent run.

Q. No, I did not, Mr. Zimmerman, because the interrogatory addressed to your company requested information as to the total subsequent run revenue in the City of Baltimore. However, it is a fact, is it not, it is generally recognized in the motion picture industry that the so-called cream of the business, as was characterized by the United States Supreme Court, is the revenue derived from first run business throughout the country?

A. The so-called cream of the business?

Q. Yes.

A. The way I can answer you is this: That usually the most revenue is obtained by the earliest run. However, there have been very many, many successful theatres operating on first neighborhood run, second neighborhood run, [fol. 769] and so forth. Of course that is what helps keep the industry going.

Q. It is a fact generally recognized in the industry, is it not, if a theatre moves up its availability, places pictures earlier, generally speaking its gross would increase?

A. Generally speaking, yes.

Q. And if a theatre were to have access to first run product as distinct to product on the later availability, that same generalization would hold true, would it not?

A. Yes, but you have to look at the particular cases. I just had an experience with the situation in a town in northern New York where the exhibitor was given the opportunity for first run pictures, and after he had them for a while he found he could make more money operating second run. That is not rare. So that the particular facts determine the answer to that question.

Q. Yes, I agree. But is it not generally true that a greater amount of gross, *a greater amount of gross* will be earned by a theatre playing first run pictures?

A. Yes, it certainly is true.

Q. So the Reporter may get this, I think it would be better if you and I not talk at the same time.

The Witness: I am sorry.

Mr. Raftery: That follows with you also, Mr. Rome. [fol. 770] That goes both ways.

Mr. Rome: I meant it both ways, Mr. Raftery.

The Court: If I understand you correctly, what you are talking about is akin to what one would say about the theatre. I think it need to be called the "legitimate" theatre?

The Witness: Yes, a great deal.

The Court: When it opens in New York it seems to be the most desirable thing to do. It has been the practice to keep it there a long while to get everybody keen to see it and to go to New York if they can, and that enhances the reputation of the performance, and that is where the great revenue comes in and at the same time boosts the revenue. Only after an extended run there they do put the show on the road.

The Witness: Yes, sir.

The Court: Now, is that not what you say is akin to that?

The Witness: Exactly.

The Court: You have found the downtown results from first runs within this limited zone akin to what the so-called legitimate playhouse find is the best advertiser, the best revenue producer, to open in a big city like New York and stay there until everybody is wild to see the play, but cannot go except by buying tickets a long time in advance [fol. 771] and paying a lot of money for it, and they finally

that route desire to see it is projected all over the country.

The Witness: An exact analogy.

The Court: That the play is going to come to Baltimore or Galveston or what not. It is related to that same psychological element; is that right?

The Witness: It is an exact analogy, sir. It is just parallel.

By Mr. Rome:

Q. One difference that occurs in that situation, Mr. Zimmerman, is the fact that the motion picture is made in a number of prints, so it is possible to show the same motion picture simultaneously in a number of places, whereas, generally speaking, a show on a legitimate stage has only one Ezio Pinza who can only play in one South Pacific at the same time.

A. I do not want to get into the mechanical differences. I want to point out to you you could simply have your Broadway opening and your road show engagement and have different casts, the same play, or musical, start at the same time as the Broadway opening.

Q. And that does occur, does it not, at the same time?

A. No, it never opens simultaneously at the same time.

Q. Isn't that frequently due to the fact that a show having a particular star such as Mary Martin, Ezio Pinza, or any other great names of the stage, is incapable of [fol. 772] duplicating himself on a road show?

A. That isn't true. Martha Wright was in the road show, and she was playing in Chicago and elsewhere at the same time Mary Martin was playing in New York.

Q. We will not get into the relative merits of Mary Martin and Martha Wright.

A. I have seen Martha Wright, and I tell you Mary Martin is far superior.

Q. You have stated if a picture opens first run in a so-called neighborhood house it is necessarily tagged as a "B" picture. Is not that the necessary result of the fact that as a result of the activities of your company and the other distributor companies, the public has never had an opportunity to see a first run picture in such a suburban or neighborhood theatre?

A. Well, I would say that is only—I do not know which comes first, the chicken or the egg. I do not know whether the reason is because the picture companies have only put or licensed neighborhood houses with "B" pictures first run or it is because the neighborhood theatres being unimportant theatres, there is no reason to put an important picture in there. When I say "unimportant," I mean unimportant from a point of view of drawing, from the city, to support the first run in that theatre.

Q. Well, how are you able to reach that conclusion, Mr. [fol. 773] Zimmerman, if as you have stated to be the fact, you have never experimented in a large city in the United States?

A. Now, let me just say this: This obligation to experiment, I have always wondered how valid that obligation is. In other words, if we have a perfectly satisfactory business way of marketing our pictures, what compulsion is there upon us to abandon this tried and true method, and in a large city experiment with another method with a costly, expensive picture, which would result in the loss of a substantial amount of revenue to us and the only one at the same time that it would satisfy would be Mr. Myerberg.

Q. Now, is it not a fact, Mr. Zimmerman, that one of the reasons why your company and these other companies before us in this action have time and again been found guilty of conspiracy to violate the anti-trust laws, is the fact that you have not experimented?

Mr. Watkins: I will object to it as having no relevance in law or in fact to this situation.

The Court: I will allow it.

The Witness: If we have been found guilty we must have been found guilty of conspiring.

By Mr. Rome:

Q. Is one of the reasons you have been found guilty of conspiring to violate the anti-trust laws is your unwillingness to experiment?

A. I do not know. We are getting in a legal argument [fol. 774] here.

I just want to say this: I think if there is any merit in what you have said, it is only because we have failed to ex-

periment when it was to our business interest to do so. Now, I say to you here it would not be to our business interest to do so. That is what I have been saying this morning and yesterday afternoon.

Q. Let us take a specific case. Didn't your company, as well as every other distributor company here, to your knowledge, you being a lawyer as well as interested in the distribution, Mr. Zimmerman, raise the defense with regard to the attempts made by drive-in theatres to get access to first run pictures, that you are unwilling to experiment because in your sound business judgment you simply could not get the same kind of rental from drive-in theatres on first run?

A. What are you talking about?

Mr. Watkins: Your Honor, may I have a standing objection to interrogation of this kind of interpreting court cases or legal objections?

The Court: I think the question is probably appropriate if you can give the witness the cases you are referring to.

Mr. Rome: I will be glad to do so, sir. I refer to the Milgrim case, involving a drive-in theatre. If I may state [fol. 775] the situation——

Mr. Watkins: May my objection continue without the necessity of repeating it?

The Court: I will allow it.

Mr. Watkins: And without repeating my objection to the line of testimony?

The Court: Very well.

Mr. Rome: I refer to the fact in the Milgrim case involving a drive-in located about two and one-half miles from the City of Allentown, and about four and one-half miles of the City of Bethlehem, Pennsylvania, your company, as well as every other company here in this action, raised as a defense the fact that you simply could not get enough revenue out of drive-in theatres on first run, and that you were unwilling to experiment to find out whether or not you could, and that your company, as well as these other companies, were found guilty by the court of conspiracy to violate the anti-trust laws by your conduct in that regard?

The Witness: Actually, I wasn't in on the defense of the case. I wasn't a witness. I do not know the exact technical defense made in our behalf; I didn't have anything to do with the preparation of it.

The Court: I have allowed the question, allowed it to be answered, but I think to get into drive-in theatres, we are not dealing with the problem here, you are going a [fol. 776] little too far afield.

Mr. Rome: The only reason I attempted to bring it up at all, sir, was because in our view it bears upon the motive and the good faith with regard to the position taken by the defendants in this regard.

The Court: Well, there may be so many different factors in drive-in theatres——

Mr. Rome: If I may pursue it for one or two questions, I will drop it then.

The Court: I think we had better keep indoors.

By Mr. Rome:

Q. Mr. Zimmerman, is it not a fact the net result of the position that has been taken by yourself here and your company, as well as the position that has been taken by the other defendants, is that in effect a fence is placed around the downtown area of Baltimore as well as these other large cities which you speak of with the result that no theatre located outside of that fence, outside of that area, can have access to first run pictures?

A. I do not know if there is a fence. I do not know about the policies of any of the other companies and I am not interested. I am only interested in the policy of RKO, that policy which will give it maximum revenue. Now, I will say this, that the effect of our decision naturally is to confine our first run exhibition of our pictures in the downtown area where it belongs, if that is what you mean.

[fol. 777] Q. You said you are not interested in the policies of the other companies and do not know anything about them.

A. I do not say I do not know about them. I do not care about them. All you have to do is look at the newspapers. You can see where Warner's play W, X and Z pictures.

Q. And those are downtown areas?

A. Yes, sir, they are.

Q. Have you ever seen the Crest Theatre?

A. No, I have not.

Q. Has Mr. Mochrie ever seen the Crest Theatre?

A. No, he has not.

Q. Has any New York executive ever seen the Crest Theatre?

A. No. We thought it much more important for the local representatives who know the territory and know the competitive factors, to inspect and make recommendations than to have Mr. Mochrie or myself take flying trips here to Baltimore and make some kind of a decision. And, of course, Mr. Brecheen and Mr. Folliard, both of them, made a thorough inspection of the Crest Theatre and the surrounding territory before we made our decision.

Q. But it was neither Mr. Brecheen nor Mr. Folliard who actually made the decision?

A. But they made the recommendations. In other words, it was their evaluation that there was very substantial [fol. 778] competitive conditions between downtown playing first run and the Crest Theatre territory.

Q. You would have known that before, would you not?

A. I would say I would know it generally, but obviously we want to be as thorough as possible.

Q. Is it not necessarily true that so long as there is only one theatre in a city like Baltimore playing your product first run, that it must draw from all the areas of the city where people want to see first run pictures?

A. Yes, of course.

Q. So that there is nothing unusual about the fact that Mr. Brecheen should have told you that the Crest Theatre would be in competition with downtown because it draws from that area?

A. Mr. Myerberg described this very unique character of the Crest territory. He indicated that there was an enormous shift of population, almost like the center of gravity of Baltimore had shifted. I was very interested to see if there was in effect a new downtown area being created, a second city in Baltimore. If there was that very unique and special situation, of course we might reconsider

our decision. Actually, Mr. Brecheen and Mr. Folliard went there and said it was a very nice area, a perfectly nice community, period. But it is a neighborhood area.

[fol. 779] Q. Do you know what the population of the area around the Crest Theatre is?

A. Do I now know? I heard in court some statement as to what the population was.

Q. Did you know what the population was at the time RKO made its decision?

A. As I remember, I asked the figures they had in mind. I certainly was not impressed, and my recollection was it was under a hundred thousand, very substantially.

Q. Who was it that gave you the figure that was under a hundred thousand?

A. Either Mr. Brecheen or Mr. Folliard.

Q. It has been testified, as you now know, Mr. Zimmerman, that the population in the area around the Crest Theatre was, at the time in 1948 when the Crest Theatre was being built, just about a hundred thousand, or 105,000.

Mr. Watkins: That was the area defined by Mr. Myerberg.

Mr. Rome: I take it that is what we are talking about.

The Witness: I don't know that. I was talking about the immediate area of the Crest Theatre. I cannot tell you as defined by Mr. Myerberg, because he did not define it for me.

[fol. 780] By Mr. Rome:

Q. In your opinion, is a population of 100,000 people enough to support a first-run theatre?

A. I cannot answer that.

The Court: I think we are just going over the same thing in a little different way. The witness has already answered and given you his views on that. You are just asking it in a little different fashion.

Mr. Rome: I will not pursue that, if I have the answer to that one question.

The Witness: The only way to answer that, is in relation to downtown. In other words, it has no meaning if the hundred thousand is part of the population of a city that is served by downtown deluxe theatres for first-run.

By Mr. Rome:

Q. Which, of the Town, or Hippodrome Theatres, do you consider to be your better outlet in the city of Baltimore?

A. Better outlet? I don't know. I think it depends on the type of picture. I imagine that a picture like Flying Leathernecks, a big Technicolor picture, drawing from all classes, probably the Hippodrome. If you are talking more of a class picture, I imagine the Town Theatre would be more appropriate. It depends on what picture you are licensing.

Q. You recall, do you not, Mr. Zimmerman, that Mr. [fol. 781] Brecheen informed you that in his opinion the Crest Theatre was comparable to the Town Theatre?

A. Yes; I remember that, he said it was a fine theatre, comparable to the Town Theatre, but he said it is a suburban house. I remember the end of that sentence.

Q. Do you know what kind of gross has been earned at the Town Theatre, or at the Hippodrome Theatre, in downtown Baltimore, during the years '48, '49 and '50?

A. I told you about Joan of Arc. I don't know what the gross is. I think the Baltimore film rental varies anywhere from 5,000 or 10,000. Around in that figure; I think Mr. Brecheen will be in a better position to tell you the actual figures for 1949.

Q. According to the information furnished us by your company and the other companies in interrogatories, Mr. Zimmerman, it is shown that the Hippodrome Theatre, during the season 1948-49, grossed $132,699, and it has been shown that the Town Theatre during that period of time grossed $267,288. Now, in your opinion, is a gross of $132,000 the kind of gross that you expect from one of your showcase theatres?

A. Very disappointing; but these grosses were down everywhere.

Q. Are you familiar with the total gross earned by the Crest Theatre on subsequent-run, playing pictures at an [fol. 782] admission price which was 57 per cent lower than downtown?

A. No; I am not familiar. The only figures I ever saw were the comparative figures that showed that the Uptown

grosses more, put more money in the box office, than the Crest.

Q. Would it have any effect on your decision, if it is now brought to your attention that the Crest Theatre, when playing a subsequent-run policy, day and date with theatres which you have described as being in substantial competition, grossed $122,000?

A. No; it wouldn't. I tell you what we might do: If we found that the Hippodrome was an unsatisfactory outlet, we would look for another downtown outlet. We would not put it in a neighborhood house.

Q. Despite the Crest Theatre at subsequent-run admission prices grossed $122,000?

A. Of course. I am sorry, I thought you were through.

Q. And, despite the fact that even with the Crest Theatre, if it had played at first-run admission prices, without taking any single additional patron, would have grossed approximately $200,000, your position would be the same?

A. That is a hypothetical case I would like to an-
[fol. 783] swer. I think there is one thing here that has not been brought out; that is, that there is an apparent assumption that people will pay first-run prices, first-run downtown admission prices, to see a picture at neighborhood theatres, I am not at all sure they will,—plus the fact that, actually, if we give you a first-run, I assume here, are you talking of day and date with downtown, or just exclusive?

Q. Either way.

A. Certainly, if you gave it day and date with downtown, we can see no reason to discriminate in your favor. There are many neighborhood first-run theatres, in which event we would probably have to set up six or seven or ten or twelve neighborhood theatres first-run. We have grave doubts as to whether people in those neighborhoods, for the privilege of seeing a picture a week or two earlier, the same picture, will consistently pay first-run downtown prices.

Q. But, again, you don't feel certain, because you have never experimented with it?

A. No. But I can answer, assuming they would.

Q. You are not attempting to suggest that Mr. Myerberg ever suggested to you that he wanted first-run for his thea-

tre, to the exclusion of any other theatre in the so-called suburban section of Baltimore?

[fol. 784] A. We didn't know quite that, but he certainly didn't say, "Mr. Zimmerman, I want you to understand that if you give this to me, I don't want you to discriminate against any other theatre, and you can make the pictures available for them." He did not say that.

Q. That would necessarily follow, in your own mind, wouldn't it?

A. It wouldn't necessarily follow, in my mind, if he didn't say it. If I was deciding the way he wanted,—what I would do is something else; what I would have in my mind is that I wanted to be fair, wanted to treat everybody fairly.

Q. You said that the rentals from your downtown theatres might vary from five to ten thousand dollars?

A. I took a guess. I really don't know.

Q. You don't know?

A. I don't know what the figures are. The figures speak for themselves. You must have them.

Q. May I say, then, that according to the figures which your own company has furnished, which was during the season 1947-48, the average rental earned by your company per picture from the Hippodrome Theatre was $2,028?

Mr. Watkins: You are dividing the total by 52. You are making an average?

Mr. Rome: No, no. I am taking the ten pictures that [fol. 785] played the Hippodrome Theatre, and divided it into the total film rental received by RKO Radio Pictures from those ten pictures.

The Witness: Have you made the same computation for the Town Theatre?

By Mr. Rome:

Q. Yes; and during the same season, 1947-48, the average film rental per picture for the 16 pictures which played in the Town Theatre was $5,916?

A. Almost $6,000; yes. That is probably where I got the five to ten.

Q. Are you acquainted with the fact that during '48-'49

season, the average rental per picture paid by the Hippodrome on the nine pictures played there was $1,314?

A. Not then. I am now acquainted with it.

Q. May I also bring to your attention that during the season '48-'49, of the 19 pictures of your company that played in the Town Theatre, the average film rental paid was $2,670?

A. Yes; I know it now.

Q. And, in the season '49-'50, the average film rental per picture paid by the Hippodrome for the ten pictures it had from your company was $2,911, and during the season of 1949-50, of the 23 pictures played by the Town Theatre, the average film rental was $1,725. Those are the kind of film rentals you have in mind, then, necessarily, when you [fol. 786] speak of the large film rentals earned by your fine downtown outlets in the city of Baltimore; is that correct?

A. No, sir; that is not correct. I certainly have in mind large film rentals. I would like to say, we would like to have them as large as possible, and I think, as far as the Town is concerned, you have pretty fair film rentals, $6,000; but let me ask you——

Mr. Watkins: No.

The Witness: Pardon me, I am sorry. The questions are so argumentative that I find myself indulging in a kind of a debate, which I would like to avoid.

By Mr. Rome:

Q. It is a fact that, nevertheless, the two outlets of RKO pictures produced film rentals on the averages that I have mentioned?

A. It is a fact; but I would like to add that, having a first-run exhibition of our picture in a downtown house certainly preserves the importance of that picture, however moderate the engagement was, preserves the importance of that picture with respect to subsequent-run, preserves the exhibition value of the picture.

Now, if we are getting argumentative and hypothetical, then I might say to you, on a hypothetical basis, even if it were conceded—and I don't think it is—I don't think it

proves that Mr. Myerberg's theatre would have paid us more. But, assuming it did, I think the losses we would [fol. 787] have had on the subsequent runs would have been much greater than the additional amount of revenue that Mr. Myerberg's Crest Theatre could give us.

Q. You keep talking about subsequent-run revenues derived by your company. Does your company keep records showing the amount of subsequent-run revenue derived from Baltimore?

A. Of course.

Q. It is a fact, you keep such records for every city where your pictures play?

A. We have records for every city, for every engagement.

Q. Who is Mr. Joseph J. Laub?

A. Mr. Joseph Laub is a lawyer in our company.

Q. He is assistant secretary of RKO Radio Pictures?

A. He is a lawyer. That is his primary function, in the legal department.

Q. Are you acquainted with the fact that Mr. Laub has made a sworn affidavit in this very case?

A. Yes.

Q. In support of objections to the plaintiff's interrogatories, in which we were seeking to find out what the subsequent-run revenue was in the City of Baltimore, and Mr. Laub made this statement under oath:

"RKO Radio Pictures Inc. does not keep any records of [fol. 788] the total film rental derived from any particular city."

A. Now you are talking about total film rental. We do not total the film rental. I said to you that we have records of the engagement of our pictures in each theatre. That is exactly what we have. But we do not totalise them. I want to explain that, because it is important. It would require a great deal of additional work to do it, and we see no reason to do it.

Q. So that, actually, the amount of subsequent-run revenue derived from any particular area is not even carried as a separate figure on the books of your company in any way?

A. If Mr. Laub says so, it is true; yes.

Q. Despite the fact that it has, according to your present

testimony, a great importance in the considerations of your company?

A. Of course, you don't have to totalize it to see the difference. You see, with these exhibitors, on an A-picture, they will give you 40 per cent, and if you have a B-picture, they will give you 25 per cent, or a flat rental. Our branch manager knows the fact. You don't have to have the total. You are going to each of these exhibitors.

Q. And you still take the position that, without ever having experimented and without knowing the total sub-
{fol. 719} sequent-run revenue, if a theatre from outside of the downtown area would have a first-run, it would hurt your revenue?

A. We know, that if we do put a picture in a neighborhood area, it is deemed as an inferior picture, and the exhibitors give us their lowest terms.

Q. I have difficulty, Mr. Zimmerman, without attempting to argue in following you, in reaching your conclusion——

A. Now, wait just a second. I told you we couldn't —I don't know what I said to you—our preference, when we have a downtown outlet, we would prefer to sell that first-run. There are situations where we cannot get our preference. I don't have to go through all that, as to why. Then we market it as best we can.

Now, marketing as best we can, we try to get as much money as we can. If the only place we can put the picture would be in a neighborhood house, we put it in a neighborhood house. The effect of putting the picture in a neighborhood is, as I have told you.

The Court: I suppose it may be akin to what experience seems to prove, that a woman will pay $5 for a hat in a downtown prominent section of the city and, if she sees the same hat at the same price, or cheaper, out in what you have been calling a neighborhood, she won't buy the hat, although it is exactly the same, and she might get it a
[fol. 720] little cheaper?

The Witness: Yes, sir.

The Court: There is a psychological effect there?

The Witness: Of course, there is.

By Mr. Rouse:

Q. You have stated that your company is interested in the maximum amount of revenue?

A. Yes.

Q. You have also stated that if a theatre were to make a large bid, and then did not earn enough gross to pay that, that there would be adjustments that would be made?

Mr. Watkins: He did not say that,—if they made a bid, there would be adjustments.

The Witness: I never adjust on bids,—period,—because that is another way of taking a lower bid.

By Mr. Rouse:

Q. So that, actually, if the Crest Theatre were to have access to first-run pictures as a result of bidding, there would be no problem of having to give it an adjustment in the event its gross did not warrant the bid that was made?

A. That is correct. I also want to point out, if it was a very disappointing performance, or engagement, sometimes you have difficulty collecting from an exhibitor. I don't mean this to make any comment about the financial integrity of Mr. Myerberg—I am sure it is perfectly fine—[fol. 791] but we do find that where a situation such as this, where a man might stretch himself out and give a large guarantee, and have a disastrous engagement, there is always the possibility of uncollectibility,—you know that.

Q. But there is no suggestion——

A. None whatever.

Q. —with regard to the Crest Theatre?

A. Certainly not. I am just talking about a general business consideration.

Q. You have stated that you are familiar with Baltimore. Are you familiar with the Parkway Theatre?

A. I am generally familiar with the way we license our pictures in Baltimore. I am not familiar with Baltimore.

Q. Are you familiar with the fact that your company has recently started to license pictures to the Parkway Theatre?

A. Where is the Parkway Theatre, and on what availability are we licensing it?

Q. I was wondering whether you would know?

A. I don't know. I never heard of the Parkway Theatre.

Q. It is generally recognized in the motion picture industry, is it not, that the further out from a focal point a theatre may be, that the least clearance there is between that theatre that is further out, and a theatre at the focal [fol. 792] point?

A. You mean lesser clearance is more appropriate?

Q. Yes; do you agree with that?

A. Oh, yes; but let me say this: you cannot take any one of these factors in a vacuum. For example, I can well imagine two theatres being a mile apart, and there is a toll bridge between them, and the clearance between them may be only approximately seven days, because there is a 10-cent toll charge, and people never go across; and you might have theatres five miles apart, but there is an express highway, and you can get there in a few minutes; then 14 days may be appropriate.

Q. Has it been a fact in the motion picture industry that one of the toll bridges, in effect, to use your phrase, that has been created, which frequently prevents people from patronizing first-run theatres in the downtown area, causing this falling-off in gross that you have mentioned, yourself, has been the charge for parking, and the difficulty with parking, that is now generally prevalent in most large cities of the country?

A. I suppose—let me say this: you ascribe one reason for the decrease in gross, apparently, to the parking difficulty. I have not conceded that. The first thing that occurred to me, when you talked about decrease in gross, was the word "television"; but, outside of that, many [fol. 793] people do not have cars. In fact, I would say the majority of people who go to motion pictures, that motion pictures receive its greatest support from the low-income group, who do not have cars, to start with. There are plenty of bus facilities in Baltimore to bring them down to the theatres, in addition to the fact that they come down, anyhow, for entertainment of all kinds.

Q. Isn't one of the bright spots in the motion picture industry, in the last few years, the development of drive-in theatres, whose income depends solely on automobiles?

A. Yes; and we are very happy to have that patronage, too.

Q. Has it been a fact that in some instances drive-in theatres located out of downtown areas have gotten access to first-run pictures?

A. I thought you charged me with the fact that I would not give drive-ins the right to get first-run downtown Allentown. I am wondering which way you are going.

Q. I have charged you with that; and isn't it a fact that as a result of a suit, some drive-in theatres have gotten access to first-run pictures?

The Court: We are getting back in the automobile, again.

By Mr. Rome:

Q. Did you discuss the Crest Theatre with Mr. Mochrie and Mr. Levy, as you indicated to Mr. Myerberg you would? [fol. 794] A. I did, of course. I discussed the Crest situation with Mr. Folliard. First of all, I spoke with Mr. Folliard, and I told Mr. Folliard and Mr. Brecheen to go down and make a personal inspection. They did. They reported to me, as I told you.

Now, I then discussed the matter with Mr. Mochrie and Mr. Levy, at some length. There was no doubt at all amongst us as to what the proper thing to do was.

Q. Your view, Mr. Zimmerman, the view of your company, is that the Crest Theatre is in substantial competition with downtown?

A. It is.

Q. Shouldn't the Crest, then, have an opportunity to compete with downtown, in view of your wish to be fair among exhibitors, as you have described?

A. Why, Mr. Rome, I have just testified for the last three or four hours why it should not.

The Court: I think we are just going back over the same thing.

Mr. Rome: I am almost through, sir.

By Mr. Rome:

Q. The letters which were shown to you by Mr. Watkins, yesterday, addressed to the Wichita situation, were actually

identical letters, weren't they, Mr. Zimmerman, the wording was identical?

[fol. 796] A. I don't know that. I have my letters, and I will identify my letters. That is all I can do.

Q. I am talking about your letters.

A. Identical, they were?

Q. In their wording.

A. With whom—what letters?

Q. The two letters that you sent, one to Mr. Simon and one to Mr. Hunt?

A. I am sorry. You mean whether these letters are identical in their wording?

Q. Yes.

A. I don't remember now. There would be no reason for a variance, let me put it that way.

Q. And there would be no significance in the fact that they are identical?

A. None that I think of. I was dealing with an identical situation.

Q. You refer to the Wichita situation, and your offer to them. Isn't it a fact that Fox had a theatre there, called the Boulevard, which was outside of the downtown area, and which, for a number of years, had access to first-run pictures?

A. I don't know much about it. I think you are right. I will say this: it has happened from time to time, in some cities, smaller cities, where an exhibitor has a first-run [fol. 796] downtown, and has another outlet, and thinks he can do better if he runs his other theatre and plays day and date, and you go along with him. It may be against your judgment, but he is your outlet, and he gives you the downtown first-run.

Q. In your testimony yesterday, Mr. Zimmerman, you were asked this question, on page 740:

"Q. Mr. Zimmerman, in determining the terms upon which the RKO licenses or refuses to license the exhibition of its pictures in any theatre, have you at any time ever entered into a combination, conspiracy or agreement or understanding with the representatives of any other distributor as to such terms and conditions?

"A. We never have."

Do you remember being asked that question and giving that answer?

A. We never have. I am talking about myself. I never did. I am talking for myself, and I am talking for our company with respect to this case. That is what I assume this is for.

Q. But the question was in more general terms, and you are now attempting to suggest that your company has not actually in the past been found guilty of having entered into a combination and conspiracy with regard to the licensing and exhibition of pictures?

[fol. 797] A. Mr. Rome, our company has been found in the past, to a certain extent, guilty of a conspiracy to violate the Sherman Act. It is a matter of record. There is no reason for your arguing with me about it. It certainly was not my intention to distort that record.

Mr. Rome: I have no other questions.

The Court: Have you any more questions?

Mr. Watkins: I have two.

Redirect examination.

By Mr. Watkins:

Q. Mr. Zimmerman, Mr. Rome referred to the RKO family, yesterday. Has that family owned any theatres in Baltimore in the last ten years?

A. Well, as a matter of fact, when you say "the RKO family," there just ain't none. But, if you mean the RKO Theatre Company, it has not owned theatres in Baltimore for at least the last 15 or 20 years.

Q. Do you know the condition of health of Mr. Folliard?

A. Yes. Mr. Folliard unfortunately has not been well. He has had a heart condition. As a matter of fact, I think, a couple of weeks ago, he again—I don't know whether it was the fourth or fifth time—had to be confined to his home. He has just recently gotten out of bed.

Mr. Watkins: That is all.

The Court: That is all, sir.

[fol. 798] The Court: We will take a five-minute recess.

(After a short recess, the following proceedings were had:)

The Court: Very well, gentlemen; we are ready to go ahead.

Mr. Watkins: Mr. Brecheen, please.

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Thereupon Joseph B. Brecheen was called as a witness for and on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Joseph B. Brecheen.

Direct examination.

By Mr. Watkins:

Q. Mr. Brecheen, where do you live?

A. I live in Silver Spring, Maryland, a suburb of Washington, D.C.

Q. Now, Mr. Brecheen, please keep your voice up, and remove your hand from your mouth.

What is your position?

A. I am local branch manager for RKO Radio Pictures, Inc.

Q. Where do you have your headquarters?

A. Washington.

[fol. 790] Q. What territory is covered by the Washington branch?

A. We cover the District of Columbia, Virginia, Maryland, Delaware, south of Wilmington, and a small section of West Virginia.

Q. Are you familiar with Baltimore and the theatres serviced by your company?

A. Yes, I believe I am.

Q. How long have you been Washington branch manager?

A. Since August, 1942.

Q. Had you any experience in the picture business before that time?

A. Yes, sir.

Q. In what capacity?

A. Well, I practically grew up in the picture business. I entered it in 1916, in Dallas, Texas, and I gradually worked my way up to Washington.

Q. Did you have any conference or conferenses with Mr. Myerberg with respect to the availability of pictures for the Crest Theatre before the opening of the Crest Theatre?

A. Yes, sir.

Q. Mr. Myerberg, Mr. Brecheen, refers to a conference about October 11, 1948. Do you recall a conference then or at about that time?

[fol. 800] A. Yes, sir; there was one.

Q. Where was it?

A. In my office.

Q. To the best of your recollection, will you state what the substance of it was?

A. Well, Mr. Myerberg came to see me. That was the first time I had had the opportunity to meet Mr. Myerberg.

Q. Had you known before that time that the Crest Theatre was under construction?

A. Yes, I had known it was under construction. I learned it two months earlier, I believe.

Q. Now, Mr. Brecheen, continue with the conference, please.

A. He came to see me concerning the theatre and the possibility of acquiring pictures for his theatre.

Q. On what availability and run did he seek to acquire pictures for the Crest Theatre?

A. Much to my surprise and amazement, he requested a first run Baltimore.

Q. What did you understand first run Baltimore to mean?

A. The terminology "first run" carries with it the understanding of exclusive.

Q. You say you were surprised that he used that expression?

[fol. 801] A. It was so unusual for a neighborhood theatre to request a first run that it was just a little shocking or unusual.

Q. Did you have any discussion with him as to the theatre

and as to what you believed would be the availability of pictures?

A. Well, up to a point. He described his theatre to me and invited me to take a look at it. He told me some very elaborate plans that he had for launching it as a first run theatre, about World Premier-s, bringing stars from Hollywood, and so on and so forth. In the course of the conversation, I became very curious about Mr. Myerberg's background and his experience in the business, because his plans seemed to me rather fantastic. So, in the course of the discussion when I was convinced that he wanted a first run, I told him that I was not the policy maker for my company; that the best I could do would be to recommend to my superior executive; and it was my suggestion that he put any request he had in writing, after which I would be glad to make the recommendation.

Q. Did you at that time indicate to him what you thought the nature of your recommendation would be?

A. Well, I don't remember for sure whether or not I did; but it seems to me that I did attempt to discourage any idea of a first run, because I thought the location of his [fol. 302] theatre precluded a practical idea of first run pictures in Baltimore.

Q. Did Mr. Myerberg at that time discuss with you any question of playing pictures day and date with downtown?

A. No, sir.

Q. Has Mr. Myerberg ever discussed with you the question of making pictures available to the Crest Theatre on a day and date basis?

A. No, sir.

Q. In the testimony of Mr. Myerberg, on page 73, he made, in part, this statement of his recollection of the conference:

"* * * Mr. Brecheen tried to discourage me * * *"

Well, that is correct, isn't it?

A. Yes; I am sure I tried to discourage the idea.

Q. Continuing:

"* * * and he said he could not possibly see how I could get first-run pictures there since RKO has a national policy

which had not permitted first-run pictures except with a few exceptions, to any theatre located outside of a downtown area of a city,——"

A. I don't believe I said that, because I was not in a position to talk from the standpoint of national policy; and I am still not in a position to talk from the standpoint of national policy; I could only talk from knowledge I have [fol. 803] of the business in its relationship to the territory which I supervise.

Q. Continuing, he said:

"——that they had a very satisfactory customer over here in the Hippodrome Theatre, in Mr. Rappaport, and as far as he was concerned"—that is you "he had no intention of changing."

A. I probably told him we had a very fine customer, Mr. Rappaport, because we did have then and we do have now. I don't remember that I ever used the words "so far as I am concerned we have no intention of changing", because circumstances alter cases, and I am not the policy maker for my company. I carry out the policy they make, to the best of my ability.

Q. There is also a reference in Mr. Myerberg's testimony to a discussion with you, or a reference in the conference to the playing of Joan of Arc. Do you recall anything about that?

A. He talked to me about his desire to obtain Joan of Arc for a World Premier-, and we did have some discussion concerning the picture. But at that time no policy had been determined with respect to the sale of the picture, and I was not at liberty to discuss it. I could talk about the picture from the standpoint of probable box office value, star value, and availability, but not from the standpoint [fol. 804] of sales, because I do not start selling a picture until I am given a policy to sell on.

Mr. Watkins: May I have Plaintiff's Exhibit No. 6, please?

The Clerk: Yes. Here is No. 6.

By Mr. Watkins:

Q. You said you requested Mr. Myerberg to put his request in writing. You subsequently received a letter from Mr. Myerberg, didn't you, in which he stated his desire with respect to pictures?

A. Yes, sir; I received such a letter.

Mr. Watkins: I showed the witness a photostatic copy of a letter on the letterhead of Theatre Enterprises, Incorporated, dated October 14, 1948. This has not been offered in evidence, but it falls within the stipulation that it is identical, except as to the conference date, as the letter previously introduced in evidence as Plaintiff's Exhibit No. 3.

By Mr. Watkins:

Q. From that letter, Mr. Brecheen, what was your understanding as to the run that was being requested by Mr. Myerberg?

A. It was my understanding that he requested a first run.

Q. And a first run meant—?

The Court: Do you need to go into all of the details?

[fol. 805] The Witness: He is requesting a first run.

The Court: Mr. Myerberg, for two or three days, explained what his position is. Do you need to go over all of the details of these prior conferences? We know now what the issue is and what the position of both sides is. Why go into all of the details of the prior conferences and prior correspondence?

By Mr. Watkins:

Q. Upon receipt of a letter of this character requesting a new run, what would you do?

A. I would acknowledge the letter, I would prepare a form giving statistical information concerning the theatre requesting the new run, and statistical information concerning theatres already enjoying that run, and I would send it to my New York office, together with any comments I might care to make about it; and then they make the final decision as to what we do in that kind of a situation.

Q. Did you do that in this case?

A. Yes, sir.

Q. This is Exhibit No. 6 (indicating). Did you read that letter?

A. Yes, sir; I read that letter.

Q. Your recommendation was for a first neighborhood run?

A. That is right.

Q. What was the reason for that?

[fol. 806] A. Well, I looked at the theatre and its location, and I thought then, and I think now, that it is a very fine neighborhood theatre; but it is one of a number of fine neighborhood theatres in the City of Baltimore, and deserving of no special privileges not accorded other profitable neighborhood houses.

Q. Is there any place within your Washington branch area in which a downtown theatre and a neighborhood theatre play day and date on RKO pictures?

A. Yes, I have one.

Q. Where is that?

A. Richmond, Virginia.

Q. What are the circumstances?

A. Well, the circumstances are entirely different from the situation with respect to Baltimore. First of all, that run was built up through a series of circumstances, and it has existed over a long period of time. Years ago, the company was unable to find an outlet for its pictures in the mid-downtown area; so we did the best we could with our product, and we sold it first run in what was then and is now the Byrd, which is, I guess, two to two-and-a-half miles from the downtown area, but in a very heavily congested center of its own, with a good shopping center around it.

Later, when ownership of the Byrd was acquired by its [fol. 807] present management, they had a downtown house, a very small one as compared with the Byrd, and over a period of years we created a day and date run in the two houses, and gives them a chance at revenue from those people who come from the opposite side of the city, as respects the location of the Byrd Theatre, but will not go all of the way through town and across town to see a picture.

It is our belief that people flow normally from all sections of the city into the heart of the city, but they will not flow all of the way across the city, through heavy traffic, to get something they can get nearer home.

So, the downtown theatre is inferior to the Byrd, but it does give us added revenue on a picture and a better chance at the income than if we played one house alone.

Q. You could not get downtown when you started?

A. We could not get downtown.

Q. Are there any instances in your Washington branch area, Mr. Brecheen, in which neighborhood houses have played day and date on first run?

A. Yes, I have two.

Q. What are those?

A. In Norfolk, Virginia, I sell two neighborhood theatres day and date first run, and in Roanoke, Virginia, I sell two very fine neighborhood houses first run. But in Roanoke they are the only neighborhood houses in the [fol. 808] city.

Q. Was there available to you in Roanoke a downtown outlet for your pictures?

A. No, sir; there never has been.

Q. Is there at the present time?

A. No, sir.

Q. Are the two neighborhood houses commonly owned?

A. Under common ownership.

Q. I believe you said that was true in Richmond?

A. Yes, that is true in Richmond, that is true in Roanoke, and it is true in Norfolk.

Q. What is the situation otherwise in Norfolk?

A. In Norfolk we could never get a downtown first run; we were locked out; so we created a first run day and date in two neighborhood theatres, which probably offsets what we could not get downtown.

Q. In all three cases you were not able to get downtown outlets?

A. That is right. So we created the best market we could for our pictures.

Q. Would you prefer to have a downtown outlet to the method in which they are being played?

A. Yes, sir.

Q. Do you regard the cities as such, Richmond, Norfolk, and Roanoke, comparable to Baltimore?

[fol. 809] A. No, sir.

Q. Are the subsequent runs of those cities of the importance that the subsequent runs are in Baltimore?

A. Oh, no. In Roanoke there are no subsequent run theatres, other than the theatre that plays first run products. They are not subsequent run houses. They are neighborhood houses that play first runs. There are no subsequent run theatres in Roanoke, at all.

Q. It is where you play the first time?

A. That is right. In Norfolk there are very few subrun theatres. The subrun revenue in Norfolk is very negligible as compared with a city like Baltimore. In Richmond there are only 5 or 6 subrun theatres, which are owned by the same people that buy our products first run.

Q. There has been mentioned competitive bidding, Mr. Brecheen, and that your company instituted competitive bidding, and then withdrew it, and then reinstituted it. I wish you would state briefly to His Honor and to the members of the jury how the bidding was set up, what the results were, just give us briefly the history?

A. First of all, our company—You are talking with respect to the Crest Theatre?

Q. Yes, the Crest Theatre.

A. First of all, our company determined that the Crest Theatre should have a right to bid competitively for [fol. 810] products against the Uptown, the Avalon, and the Pimlico Theatres, and whoever obtained the picture on the bidding would have 7 days clearance over the other theatres in that zone.

Q. Let's apply it specifically. If the Crest Theatre won the bid, it would have 7 days clearance over the others?

A. That is right.

Q. Now, take it from the other standpoint.

A. If either one of the other three theatres won the picture on a bid, it would have clearance of 7 days over the Crest Theatre.

Q. Suppose the Uptown won the bid; would the Pimlico and Avalon be able to play day and date with it?

A. No; and they never have played those houses day and date with the Uptown.

Q. You instituted bidding?

A. Yes.

Q. When, approximately?

A. That was in January. I think that was authorized in December, 1948, and we instituted it with the next available pictures in January, 1949. We offered some 5 or 6 pictures for bidding. No bids were submitted.

Q. To whom did you make those offers,—to Mr. Garman and whom else?

A. The offers were made in writing to Mr. Garman [fol. 811] with respect to the Uptown, Avalon and Pimlico Theatres, and to Mr. Myerberg with respect to the Crest Theatre.

Q. Did you receive bids from either of them?

A. No, sir.

Q. Then, what happened?

A. Then, we were losing the revenue in the zone by virtue of the fact the pictures were coming up to what we called availability, with no outlet for them in the zone. Then I requested my salesmen to take up with Mr. Garman and Mr. Myerberg and see if we could not negotiate for our pictures on an equal availability, rather than to go through the mechanics of bidding and finding ourselves without distribution. And he did negotiate such a deal on one picture; and he advised me that they were no longer interested.

Q. As a result of what he told you, what did you do?

A. We discontinued competitive bidding for a time.

Q. Did you reinstitute it?

A. It was reinstituted sometime later.

Q. Do you recall about when that was?

A. It was around April, 1950. I think it was in April, 1950.

Q. What has been your experience since then?

A. Well, it is a very unsatisfactory method of distributing pictures.

[fol. 812] Q. Why?

A. Well, each and every week there are probably more

pictures available in the neighborhood runs than the average theatre can absorb; so, very often we find ourselves waiting for a bid to be submitted, and none is submitted. Then we find ourselves in the position of having to try to negotiate a deal. We are frequently locked out. Well, I don't say "frequently"; but we are occasionally locked out. But occasionally we are able to sell the picture on some sort of basis in the zone. It depends upon what the booking situation is and how well the theatres are already booked after the bidding time has elapsed.

Q. And at that later date, Mr. Brecheen, do you have the same bargaining power that you had at the earlier time?

A. No. You are at the mercy of the exhibitor at that late date. You are up to the deadline of either getting your picture in or losing it entirely.

Q. Mr. Myerberg referred to playing a picture free and clear in the zone. If he obtains a picture on bidding, does he play free and clear in the zone?

A. Yes, sir, if he is awarded the picture.

Q. Under competitive bidding, Mr. Brecheen, it carries with it a clearance over the other theatres in that zone?

A. Yes.

[fol. 813] Q. Has the Crest Theatre ever requested from you that RKO give it a sliding scale?

A. No, sir.

[fol. 814] Q. Questions were asked Mr. Zimmerman about the film rental at the Hippodrome, as contrasted with the receipts from the Town. Are you familiar with the situation in those two theatres?

A. I am fairly familiar with the situation in all the theatres over here.

Q. Now, what did you say at the time after the Town was built?

A. When the Town Theatre was built, because of its newness and its attractiveness, we moved our top pictures into the Town Theatre because we anticipated possibly a longer run, and only pictures that were not suitable for the Town Theatre, including a great many "B" pictures that ordinarily would not play first run, deluxe pictures were put in the Hippodrome.

Q. Was the Hippodrome at that time exhibiting exclusively motion pictures?

A. No, they had a combination picture and vaudeville policy. Therefore, with a strong vaudeville show they did not need a strong picture, and they were able to absorb pictures that would not have been suitable for the Town Theatre or for comparable "A" Theatres.

Q. Now, mention was also made that your company had recently licensed, as I recall it, a picture at the Parkway Theatre; are you familiar with that?

[fol. 815] A. We sold one what we call "double bill reissue" in the Parkway Theatre.

Q. Would you explain those terms?

A. Once in a while, to take up extra revenue, we put together two pictures that were released some years past and it is what we call a "double bill combination." We tried to encourage the exhibitors to play that particular program as a unit, two features on that program.

Q. What is a reissue?

A. Reissue means that the picture has played some time previously and had probably played off its runs throughout the country, and it is brought back and it is started over again. In other words, it is a reissue of something that has been in the past.

Q. All right. Now, the application to the Parkway.

A. All right. In Baltimore, with the exception of a very small number of first neighborhood run theatres, the exhibitors refused to play any pictures that played on a double bill first run. Well, that combination was Hunchback of Notre Dame and Cat People, had played downtown double bill. There was actually such a limited market for it in the neighborhood run theatres that we made a deal in the Parkway in order to try to get some money out of the program.

Q. Is that the only instance?

A. That is the only instance that I remember. We do [fol. 816] not serve the Parkway Theatre as a matter of policy and never have since I have been here. That was just an exception. Again, it is creating a market for something for which there is no market.

Q. Now, Mr. Myerberg referred to his desire to be able

to open pictures on Saturday and that companies had in most instances refused to permit him Saturday openings. What has been the practice up until recently of your company with respect to the opening of pictures at first run neighborhood houses?

A. I have been always opposed to a Saturday opening. I was then, and I am now.

Q. What opening do you prefer?

A. I prefer a Sunday opening.

Q. Would you very briefly state why that is?

A. Yes. In a City like Baltimore or any other comparable situation, the neighborhood theatres play on what we call a "split week policy," which means they play two or possibly three pictures within any calendar week. So, if we get a Sunday opening and a Saturday closing, if we cannot get the most desirable day in the week, which is Sunday, on our picture, then we have a fair chance of getting a Saturday. It is what we would call 104 preferred play dates a year.

Q. Two times 52?

[fol. 817] A. Two times 52. It means they can play two preferred pictures a week, one Sunday opening and one Saturday closing. And I think it is the sensible way for theatres to operate.

Now, one or two of the distributors became a little obsessed with the idea of their releasing a picture on Saturday. They might get Saturday or they might get a Sunday. And when they made the Saturday and Sunday, it means that the rest of us are probably relegated to midweek on a picture that should have at least one or the other or both preferred dates. So, I only consented to a Saturday opening after practically every other company in the business had done it, and I did it in self-defense in order to get some of the preferred time I was losing out on.

Q. It was not simultaneous with the other companies?

A. No. No, I didn't like it. And one company conceived the idea if they would break pictures on a Friday, they might get Friday, Saturday and Sunday. Friday is the next suitable date to Saturday and Sunday. I am trying to break that up. Maybe I will make it Thursday, and

maybe I will soon be back to where we will get two instead of one.

Q. That is the way you prefer to play it?

A. That is the way I am going to play it if I can.

Q. Now, when you had your policy of Sunday opening and then to meet competition you went to Saturday, was there any difference in the availability regardless of what [fol. 818] the opening availability was? Was there any difference between the Crest and any other first run?

A. No, the other theatres are given the same picture.

Q. So, during the period when the Crest could not open on Saturday, no other neighborhood house could play your pictures?

A. That is correct.

Q. Now, there was reference to one particular picture in RKO, Enchantment, which did have a Saturday opening?

A. Well, Enchantment is a sort of peculiar story. That Saturday opening came about through an error that occurred in our home office through competitive bidding in another zone.

If I recall correctly, the notice of availability and the invitation to bid that went out provided for a Sunday date of availability, but an exhibitor in another zone who was bidding, bid a play date with a Saturday opening, and the people handling the bidding department thought it was a terrific play date, so they accepted it without my knowledge. When they accepted it, there was nothing I could do except to honor it. Then I had to make the picture available to anyone else who wanted to play it on Saturday, because I must be fair with all neighborhood theatres.

Q. That was an exception?

A. That was an exception at that time. Not by choice, [fol. 819] but by necessity, to honor a mistake made in another situation in Baltimore.

Q. When you made your change from Sunday opening to Saturday opening, was that as a result of a prior consultation with the other distributing companies?

A. No, it was not. I never consulted with the other companies about it. It was a more or less act of self-defense.

I had to do it in order to try to compete with the other companies.

Q. Mr. Brecheen, did you at any time discuss with any representative of any of the other distributing companies the question of what run or availability or clearance or terms should be given to the Crest Theatre?

A. No, sir.

Q. Have you ever entered into any conspiracy, combination or agreement or understanding with any representative of any other distributing companies as to terms or conditions under which you license RKO pictures to the Crest?

A. No, sir.

Q. What has been the basis upon which your recommendations with respect to licensing arrangements with the Crest have been made?

A. Based on my judgment as to the best business interests of my company and the desire to obtain the maximum revenue for a picture in this area.

[fol. 820] Mr. Watkins: The witness is with you.

Cross-examination.

By Mr. Romo:

Q. Mr. Brecheen, you say you have been branch manager of RKO since August 1942. Have you ever been with any other company during your period of years in the motion picture companies?

A. Yes, I was with Universal from 1918 to 1931.

Q. In what capacity?

A. Bookkeeper and cashier.

Q. With any other companies?

A. No, I went with RKO in 1931 and have been with them ever since.

Q. I gather from what has been testified here before today by Mr. Zimmerman, that you, yourself, have a great deal to do with the handling of the first run account in Baltimore at the Town and the Hippodrome Theatres; is that correct?

A. I do.

Q. Over the years, since you have been with RKO, have

you ever attempted to sell RKO products to any other exhibitor in downtown Baltimore?

A. I had no reason to sell RKO product to any downtown theatre in Baltimore. We have a very fine customer in Mr. Rappaport, and we would like to retain the status quo with him.

[fol. 821] Q. Did any other exhibitor in downtown Baltimore ever try to license a product from you?

A. Yes, sir.

Q. When before that?

A. Within the past year.

Q. Within the past year. Never before that time?

A. Not that I remember. As a result of that, competitive bidding has been instituted downtown.

Q. There has been offered in evidence here a letter sent by you to Mr. Zimmerman in which you state that the Crest Theatre is in your opinion comparable to the Town Theatre.

A. I am talking about construction and appointments when I make that comparison, and I mean that sincerely. The Crest Theatre is a very fine theatre. But in that recommendation I also said it was a neighborhood house, which it is.

Q. I take it from what you have said, if the Crest Theatre were located in the downtown area, being comparable to the Town Theatre, in your opinion, it would be, in your opinion, entitled to have access to first run product.

A. I think he would definitely be entitled to have an opportunity to negotiate first run product or bid for it.

Q. Actually there was no doubt in your mind, was there, Mr. Brecheen, whenever it came to your knowledge, how-

[fol. 822] ever, that what Mr. Myerberg was seeking was either a day and date first run or an exclusive first run?

A. The words "day and date" was never injected into the conversation I had with Mr. Myerberg. The first discussion with me referred to first run product.

Q. But even if he had asked you specifically at that time for a day and date first run, your answer would have been the same, in refusing date?

A. Yes, sir, that is right, it would have been the same.

Q. Now, who is the exhibitor who operates the Byrd Theatre in Richmond, Virginia?

A. That is Neighborhood Theatre, Incorporated. That is the firm name of the circuit.

Q. It is a circuit operation?

A. It is a circuit operation.

Q. How many theatres are there in that circuit, if you know, sir?

A. They probably have what I would say, maybe 30.

Q. About 30?

A. Approximately. I don't know the exact number. They do not have that many possibilities. They have more than one theatre in some towns, but I would say maybe 30, maybe 34 or 35.

Q. For how long a period of time, to your knowledge, [fol. 823] has the Byrd Theatre been having access to first run?

A. The Byrd Theatre had access to first run RKO product when I came to this territory, and the records reveal they had it for a good many years before that. There was no other outlet for our product in Richmond, and there still isn't.

Q. Who is it who operates the downtown first run theatres in Richmond?

A. It is a three-way competition downtown. Neighborhood Theatres own the State, which we sell day and date with the Byrd. Loew's have a theatre downtown, and the Fabian Circuit in New York have a couple of downtown theatres.

Q. Over this period of time there has never been an attempt on the part of the exhibitors operating the downtown theatres to license first run product from RKO?

A. No, sir, there are a couple of times, I wish they would, but we have never been able to do that.

Q. As I understand your testimony, Mr. Brecheen, you say you played a day and date policy with the small downtown theatre.

A. Yes, sir, the State Theatre is downtown, and is very small.

Q. And thereby getting an added revenue on the pictures playing downtown and in the Byrd Theatre; right?

A. That is right.

[fol. 824] Q. I assume added revenue flows from the fact

you had two outlets in Richmond rather than one; is that correct?

A. No, it could possibly be construed that way, but the Byrd Theatre is not centrally located. The Byrd is much the finer theatre, and was our first run theatre. People do not go from the opposite section of the City all the way through heavy traffic to get out on the other side to see a picture. We found that from experience. They do go downtown, though. So, by obtaining an outlet in the downtown area in a smaller theatre, we picked up revenue from people who would not go all the way across town to see a picture in the Byrd Theatre.

Q. The additional revenue obtained by RKO flows from the fact that you had two outlets in the town rather than one?

A. Right, but if we had a suitable outlet downtown, we would prefer it.

Q. Who is the operator of the theatres in Norfolk, Virginia?

A. Wilder.

Q. Wilder. Is that a circuit operation, sir?

A. Well, you might call it a circuit operation. They own two houses in Norfolk, and they own three houses in Portsmouth, and a small sub-run house in Newport News.

[fol. 825] Q. Who were the operators of the first run theatres in Norfolk, Virginia, in the downtown area?

A. Loew's have one theatre, and Fabian has a very fine theatre, and a Class B theatre downtown.

Q. Who is the exhibitor who operates the two neighborhood houses you referred to in Roanoke?

A. S. W. Craven.

Q. Is that also a circuit operation?

A. Well, he has three theatres in Roanoke. He has a sub-run theatre in Lynchburg, he has a theatre in a very small town in Lebanon, Virginia. He has a couple of houses in Norfolk, so I guess you would call that a circuit, too.

Q. Bearing in mind, Mr. Brecheen, as you stated it, you would prefer the downtown outlet if you could get it?

A. That is correct.

Q. Has the policy of playing these fine neighborhood houses in these various cities been a successful one?

A. It is fairly successful.

Q. You have referred to the double bill reissue that played at the Parkway Theatre. Did that double bill reissue, as it played in the Parkway, contain in the license agreement a provision for clearance to the Parkway Theatre from other subsequent run theatres in Baltimore?

A. I don't know whether it did or not, because I did [fol. 826] not negotiate that deal. I asked one of our people in New York to try to get it for me, because I did not have access to the ownership of the Parkway Theatre.

Q. There is a requirement upon your company, is there not, Mr. Brecheen, to license picture by picture and theatre by theatre as you go along; is not that so?

A. That is so.

Q. Having that in mind, is it not the fact that licensing picture by picture would be more advantageous for RKO to have a Saturday opening and since thereby you would get 5/10ths of the movie playing week than if you were to have a Sunday opening and get thereby only 3/10th of the playing week?

A. If I were guaranteed from all theatres 5/10ths of a playing week, I would be delighted, but with 5, 6 or 7 pictures available and one of those pictures getting 5/10ths and me getting 2/10ths in the middle of the week, I don't like it and I don't want any part of it. There is nothing to say—we have to get it the hard way, through negotiation, and if we do not have a top picture, we do not get it.

Q. So, actually, your objection to the system of a Saturday opening stems from the fact that there may be other pictures coming along from your company which would not be able to get a Saturday opening date?

A. That is correct. I have had many such pictures. [fol. 827] When you take a mid-week playing time, you do not come out with much.

Q. Do you recall, Mr. Brecheen, that the first picture which was offered by your company under a competitive bidding system to the Crest Theatre was The Boy With The Green Hair?

A. Yes, sir.

Q. Do you recall the fact that after you had invited the Crest Theatre to bid for that picture, that you received

notice from Mr. Myerberg that unfortunately he had already booked a picture in his theatre for that?

A. Yes, he wrote me such a letter.

Q. He wrote you such a letter?

A. Yes.

Q. And, thereafter, when certain other pictures were offered under competitive bidding by RKO to the Crest, that Mr. Myerberg advised you that he was not interested in licensing a particular picture.

A. I don't remember having received any other letter from Mr. Myerberg except the first one. It may have been directed to us but I don't recall it.

Q. You do not say there wasn't any?

A. I don't say there wasn't but I don't remember any, but I did get the first one.

Q. Prior to this period and within the last year, when you said competitive bidding had been instituted in down-[fol. 828] town Baltimore for your pictures, did you never receive any request for your product from the exhibitor who operates the Mayfair Theatre?

A. I received a request about a year ago from the exhibitor who operates the Mayfair Theatre.

Q. Do you know of any before that?

A. I sold the Mayfair a picture or two from time to time, but it was a picture that was not a top picture and I had no other outlet for the picture. It was one that the Hippodrome did not want.

Q. Did the exhibitor at the Mayfair ever ask licensing from you on what you term top quality product?

A. Never by referring to a specific picture that I know of. He did decide that he wanted or was interested in our product first run and I told him what I told Mr. Myerberg or anybody else, put it in writing and I would send it on, which I did.

Q. Do I follow you correctly that the exhibitor at the Mayfair did actually put it in writing?

A. Yes.

Q. And was he thereafter accorded any pictures that you would refer to as top quality product?

A. He recently was given an opportunity to bid and was

offered what I consider to be a very fine picture under a competitive bidding arrangement and after we went to [fol. 829] the trouble of bidding, he did not submit a bid. The picture is The Halfbreed, which has not played here but will play very shortly.

Q. Do you recall when the requests for bidding in writing was forwarded to New York?

A. I don't know the exact date. I would say within the last year, maybe several months ago, but it was forwarded promptly. I don't hold matters like that on my desk.

Q. But never before that time?

A. I don't think he requested it before that time, no. I negotiated with him and requested him to play a picture now and then.

Mr. Rome: I have no other questions.

The Court: Any other questions? That is all, sir.

(Witness excused.)

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Thereupon Hugh Mackenzie was called as a witness for and on behalf of the defendants, and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record.

The Witness: Hugh Mackenzie.

Mr. Raftery: I am going to offer this witness as a typical witness and avoid calling a similar witness from [fol. 830] any of the other defendants.

Direct examination.

By Mr. Raftery:

Q. What is your full name?

A. Hugh Mackenzie.

Q. Where do you reside?

A. In Drexel Hill, Pennsylvania.

Q. By whom are you employed?

A. By RKO Radio Pictures, Inc.

Q. In what capacity?

A. As the New England Field Representative. The reason I say that is I have just recently been transferred there.

Q. On exploitation and advertising?

A. That is right.

Q. You were in the Baltimore area at one time?

A. Up until a month ago, I was the representative in this area.

Q. What other areas—name some of the cities where you have exploited pictures for RKO.

A. I have exploited pictures in Chicago, New York, Washington, Philadelphia, Cincinnati, Indianapolis, Houston, Texas, Milwaukee, Louisville, Kentucky, Boston, New Haven and a few others.

Q. In every one of those cities, the exploitation has been on the first run engagement in a downtown theatre [fol. 831] in each of those cities?

A. That is correct.

The Court: I did not quite understand. Can you speak up so I get it? You said you were now the New England representative of RKO in what capacity?

The Witness: As to advertising and publicity and exploitation representative.

The Court: Advertising and publicity?

The Witness: That is right.

The Court: I did not get that.

By Mr. Raftery:

Q. To shorten this, what is the series of papers that I hand you?

A. This is a campaign that we did in Baltimore last year for the engagement of Alice in Wonderland, and includes the newspaper advertising as well as the free publicity that was given us by the newspapers.

Mr. Raftery: I am going to offer this as one exhibit.

(Series of papers covering advertising campaign for Alice in Wonderland, was marked Defendants' Exhibit No. 14.)

The Court: You mean this is a scrap book showing the advertisements?

The Witness: Yes, sir.

The Court: Here in Baltimore?

[fol. 832] The Witness: Here in Baltimore.

By Mr. Raftery:

Q. It shows, Mr. Mackenzie, the advertisements, the so-called readers that you got for free in the newspapers and the photographs and whatnot that you got in the newspapers and also a contest that you conducted in connection with a newspaper in cartoons?

A. That is correct.

Q. How much money did you spend on newspaper advertising in that campaign?

A. Well, with the advance, that is prior to the opening of the picture and the first two weeks, we spent in the newspaper $3,278.25. For miscellaneous exploitation we spent an additional $263.50, making a total expenditure of $3,541.75.

Q. And these advertisements in the newspapers in Baltimore, how much per line do you have to pay?

A. In the Evening Sun the rate is 65 cents a line; in the Morning Sun 55 cents a line and in the Sunday paper 60 cents a line. That, incidentally, roughly represents 1,600 lines of advertising estimated.

Q. Did you get any tie-ups in connection with the exploitation of this picture for its first run engagement downtown Baltimore?

A. Yes, sir; first of all, they had a coloring contest. Do you want to speak about the newspaper exploitation [fol. 833] first?

Q. No. Just tell us briefly. We are trying to hasten this thing.

A. In connection with the opening of Alice in Wonderland, we used 50 Read Drugstores. We had special window displays made up, calling attention to the opening of Alice in Wonderland; because of the music in a Walt Disney picture, we had 25 music stores tied-in with the RKO, and because of the Alice in Wonderland comic books, we used 250 newsstands that were given to us. We had a contest on radio station—television station WAAM, which ran approximately a week-and-a-half. We had window displays in some of the downtown stores, such as Kresge's, Hutz-

ler's, and Hochschild Kohn's. Those were all special window displays pertaining to Alice in Wonderland, and its opening at the Town Theatre.

Q. How long before the opening did you come here?

A. Approximately two weeks, maybe a little earlier than that.

Q. And, after you got here, you conferred with Mr. Rappaport?

A. That is correct.

Q. And you made up this campaign?

A. That's right.

Q. On a Disney picture, do you have to spend as much [fol. 834] money to exploit that type of picture in a city like Baltimore as you do some one of your other pictures?

A. No; I think that a Disney picture, because of its character and popularity to children, lends itself to what you call normal exploitation or normal interest. I think it is easier to exploit a Disney picture than other pictures.

Q. You get a lot of free space?

A. Yes.

Q. Did you get a taxicab tie-up of any kind?

A. Yes, we had a tie-up with the Yellow Cab. We had 300 stickers to put on the windows, something which read—I don't remember the exact copy—"Take this cab to the Town Theatre to see Alice in Wonderland".

Q. It is your duty and your obligation, before opening, to try to create as much interest as you can in a first-run entertainment?

A. That is right.

Q. And does your job constitute going around through these various cities?

A. That is right.

Q. Do you remember the most money you ever spent on a campaign in Baltimore for a first-run RKO picture?

A. The most money that RKO Radio Pictures ever spent?

Q. You are the fellow that spent it.

[fol. 835] A. I would include all the costs, and I would say $8,000 would be the tops that we ever spent in the city of Baltimore for a first-run picture.

Q. What is the least you spent on the original run of the same picture?

A. Approximately $2,000, between $2,000 and $2,200, for just an average picture.

Q. And you try to get the exhibitor to pay as much of that as possible?

A. That is correct.

Q. And this was the purpose of your first meeting with Mr. Rappaport, when you came down?

A. That is right.

Q. And do you remember how much you were able to get back from Mr. Rappaport on that first-run?

A. Well, Mr. Rappaport, on Alice in Wonderland, shared with us on a fifty-fifty basis. He spent $1,700, and we spent $1,700. The exact figure is $1,770.87.

Q. That was on the first two weeks?

A. Yes. On the third week we spent—he spent more money; he spent $600. I will give you the exact figures. In the third week of the engagement, Mr. Rappaport spent $507.60 and RKO Radio Pictures spent $107.60.

Q. From your experience as to exploitation and ballyhoo on the first-run engagement, which you create and which [fol. 836] Mr. Rappaport creates, does that help a picture generally in the territory where you are doing the exploitation?

A. Yes, that is the reason for cooperative advertising, and the expense of that exploitation from the motion picture operators, I suppose, it is the picture being set up for the territory, and the area, and it is sort of a glamorous kick-off for the picture, and stimulates interest in it.

Q. And that is done generally by RKO in the key cities in the first-run downtown theatres?

A. That is correct; yes, sir.

Q. And you haven't any different plan when you go into Philadelphia or Indianapolis, or any of the cities you have named, in the general boosting of your picture?

A. No, sir; we have a similar system in every other city.

Q. And RKO maintains a department in New York under Mr. Turner, which takes these campaigns all over the country?

A. Yes.

Q. And you are one of his staff?
A. That is right.

Mr. Raftery: Witness with you.

Cross-examination.

By Mr. Rome:

Q. The campaign that was conducted for Alice in Wonderland, Mr. Mackenzie, was actually a special [fol. 837] campaign, because this was the first Walt Disney picture in some time, wasn't it?

A. No; we had finished Treasure Island, which was the last one we had shown. We have a Disney about every six months.

Q. If Alice in Wonderland had played day and date to the Crest Theatre, and in a theatre downtown, would there have been any greater amount of advertising in it, and exploitation, than was actually given to the picture as it played downtown?

A. Well, that, I don't know, because it would be a separate ownership. We would have to probably negotiate with both theatre owners and find out whether it would be possible.

Q. Though, generally speaking, a theatre exhibitor is agreeable to go along with the company in the advertising and exploitation of any picture that is going to play in his house; isn't that so?

A. Not always; but we try to get them to cooperate with us as much as possible in advertising.

Q. Was that advertising, as conducted, concentrated on any particular area of the city, or was it generally widespread?

A. Primarily in the metropolitan area—the newspapers were of a metropolitan circulation, and the tie-ups in [fol. 838] stores were all downtown department stores, as close to the theatre as we could possibly get.

Mr. Rome: No other questions.

(Witness excused.)

Mr. Raftery: Mr. Rome, to avoid calling other witnesses of this type, would you be willing to stipulate in the record that if I did call witnesses from the other seven distributors, that they would testify substantially as this witness has, on this one point only?

Mr. Rome: The only reservation I have about that, is with regard to amounts, what amounts might make up the figures by the companies. I would be happy to stipulate that quite frequently exhibitors do contribute a share of the exploitation and advertising expense, and that similar campaigns are conducted by the other companies.

Mr. Raftery: I don't want to be held to that amount of money. I think it will be obvious, from the amount of advertising and the lineage figures, and from general experience of all of us looking at the Baltimore newspapers, that every theatre in the downtown area goes in for this same kind of ballyhooing. I am just trying to shorten it.

Mr. Rome: And I am so willing to agree.

Mr. Raftery: All right. I have a long witness to follow, Your Honor.

[fol. 839] The Court: How many more witnesses will you have? This is addressed to both sides. In other words, what is the estimate of counsel?

Mr. Raftery: In view of what has developed now, Mr. Watkins and Mr. Boyd and I were going to get together at our little recess over the week-end and see how many we can eliminate; but we did have witnesses from every company in each of the situations, many of them different; and, as Your Honor is going to stop a week from Friday, we will try our best to put our case in, with every one of these defendants in.

The Court: Cannot you not consolidate, as you have done here, with respect to advertisements? Can you consolidate on some of the other features of the case, and have one or two witnesss testify for all on that specific aspect or aspects?

Mr. Raftery: This next witness we are going to call may make it possible for us to eliminate a number of witnesses, but there are specific charges made against each of these companies, that have got to be refuted.

The Court: They are similar charges, aren't they?

Mr. Raftery: No; some are different. They all come back to the one proposition.

The Court: I am going back to my first question. Can you give me at least a rough estimate, both counsel, as [fol. 840] *as* to how many more days you think this case will necessarily, not possibly, but necessarily, consume?

Mr. Rome: Speaking for the plaintiff at the present time, we do not contemplate calling any additional witnesses, or as of the present time, offering any rebuttal testimony.

Mr. Watkins: Your Honor, we are very much afraid that it will be impossible to finish under two days, but will make every effort to confine it to that, if it can possibly be done.

The Court: I hope you can consolidate the testimony.

Members of the Jury, as intimated, at least, yesterday, we will take a recess now. We will take an adjournment in this case until Wednesday morning at 10 o'clock, Wednesday of next week.

It is scarcely necessary for me to remind you again that, meantime, of course, you do not speak to other people about this case, or any part of it. However, there is no prohibition against your taking in an exclusive first run or day and date movie, either in an uptown or neighborhood theatre.

We will adjourn until next Wednesday morning at 10 o'clock, which ought to give counsel, apart from the early hour of adjournment, a rather long opportunity to con- [fol. 841] solidate the testimony.

(Whereupon, at 1:00 o'clock p.m., an adjournment was taken until Wednesday, May 21, 1952, at 10:00 o'clock a.m.)

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[fols. 841a-843] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 844] **Transcript of Proceedings—May 21, 1952, 10:30 A.M.**

The Court: We are now ready to proceed, gentlemen, in the pending case.

Mr. Raftery: Mr. Charles Grimes.

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Thereupon CHARLES V. GRIMES was called as a witness for and on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name for the record?

The Witness: Charles V. Grimes.

Direct examination.

By Mr. Raftery:

Q. Mr. Grimes, where do you reside?

A. I reside in Silver Spring, Maryland.

Q. You are employed by Warner Bros. Circuit Management Corporation? Is that correct?

A. That is correct.

Q. What is your present position?

A. I am district manager.

Q. Will you keep your voice up, please, so the members of the jury can hear you?

A. I am district manager.

Q. What does your district include?

A. My district includes the City of Baltimore, Frederick, [fol. 845] Maryland, Hagerstown, Maryland, Waynesboro, Pennsylvania, Martinsburg, West Virginia, Winchester, Virginia, Harrisonburg, Virginia, Sta-nton, Virginia, Lexington, Virginia, Clifton Fort, Virginia, and Lynchburg, Virginia.

Q. And Washington, D. C.?

A. I work out of the Washington, D. C. office, yes.

Q. Do you supervise in Washington?

A. No, I do not supervise in Washington.

Q. But you are familiar with the operation?

A. That is correct.

Q. Warner Bros. Circuit Management Corporation is engaged solely in the business of operating theatres?

A. Management and servicing; that is correct.

Q. It does not distribute any pictures?

A. No, sir.

Q. There is a company named in this lawsuit "Warner Bros. Pictures Distributing Corporation"?

A. That is correct.

Q. What is the business of that company?

A. Distributing films to the various theatres.

Q. And both of these companies——

A. They are subsidiaries of Warner Bros. Pictures, Inc.

Q. What theatre have you in Baltimore under your supervision?

[fol. 846] A. The Stanley Theatre.

Q. When did you start in the theatre business initially?

A. I started in the theatre business initially in 1925, in the city of Washington.

Q. With whom?

A. Harry M. Crandall.

Q. Who operated theatres?

A. Who operated a chain of theatres in the city of Washington.

Q. Mr. Crandall later sold out to the Stanley Company of America, is that right?

A. That is correct.

Q. And did you continue on with the Stanley Company?

A. I did.

Q. Sometime in 1928 or 1929, the Stanley Company sold out to the Warner interests? Is that correct?

A. That is correct.

Q. And then you continued with the Warner interests?

A. That is correct.

Q. And you have been in the theatre business steadily and continuously in this area since 1925?

A. Yes, sir.

Q. Who is your resident manager of the Stanley Theatre here in Baltimore?

[fol. 847] A. Our managing director of the Stanley

Theatre here in Baltimore is Mr. Rodney Collier. He is in court at the present time.

Q. He is the gentleman back there with the gray hair?

A. That is correct.

Q. With Mr. Collier, did you cause to be made a survey of the attendance at the Stanley Theatre, Baltimore, for the following dates: January 25 and January 29, 1952; January 30 and February 3, 1952; February 8 and February 10, 1952?

A. Yes, sir, I did.

Q. What method did you use in making your survey?

A. We engaged two young ladies to take a survey of our attendance coming into this Stanley Theatre, to determine, if possible, from what sections of the city we drew our patronage. Our first two surveys were made at the evening hours only. The last three-day survey was made on continuous days from the time we opened until we closed our box-office.

Q. When a patron came into the theatre, you had these two young ladies in the lobby? Is that right?

A. Yes, sir.

Q. And as they would register the patron, they were able to get a registration on a card?

A. We had a sign in the lobby requesting the patrons [fol. 848] to register for our poll, yes, sir.

Q. And each patron would sign his name and address on a card?

A. They would either sign their names and addresses or give their names and addresses to the attendants.

Q. And you have here in court all of those cards?

A. That is correct.

Q. In the two boxes and the bundle on top?

A. That is correct.

Q. And they total 2,555 cards?

A. That is correct.

Q. Now, Mr. Grimes, I show you a map which purports to be a postal district map of the City of Baltimore and the area immediately nearby, and I will ask you if this is a map that you and Mr. Collier used to find out where these 2,555 people came from?

A. It is.

Mr. Raftery: If Your Honor please, I am going to offer this map in evidence as Defendants' Exhibit No. 15.

(Postal District Map of Baltimore and nearby area was marked Defendants' Exhibit No. 15.)

By Mr. Raftery:

Q. Mr. Grimes, you were also furnished by counsel with what Mr. Myerberg said was his draw area around the Crest Theatre? Is that a fact?

A. That is correct, yes, sir.

[fol. 849] Q. Did you and Mr. Collier ascertain that Postal District 15 on that map is wholly within the draw area described by Mr. Myerberg?

A. Yes, we did.

Q. And this survey or analysis of your business reflects the number of cards that were procured from each of the postal districts, and particularly from Postal District 15?

A. That is correct.

Q. Can you tell us, on your first survey, how many cards you received from Postal District 15?

A. On our first survey, taken during the transit strike, we received 95 cards out of the 15 postal area, out of the total of 523.

Q. From all areas?

A. From the city as a whole.

Q. And in your next survey?

A. On our next survey, out of Postal Zone 15, out of a total of 1,001 cards that we received, we received 193 from Postal Zone 15.

Q. And on your third survey?

A. Out of a total of 1,031 cards, out of Postal Zone 15 we had 210.

Q. These later surveys were made when there was no transit strike?

[fol. 850] A. That is correct.

Q. Did you work up a recapitulation to show the total number of cards that you received out of the 2,555?

A. 498 of those cards were from Postal Zone 15, representing 19.5 per cent of the total.

Q. 19.5 per cent of the total patrons that you have cards on here came from that one postal district?

A. Yes, sir.

Q. Are there other postal districts included in part in the draw area testified to by Mr. Myerberg?

A. From my understanding, yes.

Q. You went over it with Mr. Collier?

A. Yes.

Q. And checked it?

A. Yes.

Q. And your understanding, from your own checking with him, is that there are overlap districts which have not been included in the 19.5 per cent?

A. That is correct. That is just the one zone.

Q. And this is a complete recapitulation made up by you and Mr. Collier on the attendance survey made by you at the Stanley Theatre?

A. That is correct.

Mr. Raftery: I offer it in evidence as Defendants' Exhibit No. 16, if Your Honor please.

[fol. 851] (Recapitulation of attendance survey made at Stanley Theatre was marked Defendants' Exhibit No. 16.)

Mr. Raftery: I am now going to offer as one exhibit some photographs of the Stanley Theatre. There is a group of 8 of them.

(Group of 8 photographs of Stanley Theatre was marked Defendants' Exhibit No. 17.)

By Mr. Raftery:

Q. Mr. Grimes, in your opinion, what is the finest theatre in the City of Baltimore?

A. In my opinion, I definitely think the Stanley Theatre is not only the finest in the City of Baltimore, but in this section of the country.

Q. Will you keep your voice up, please?

A. In my opinion, I definitely think the Stanley Theatre is not only the finest in the City of Baltimore, but in this section of the country.

Q. That is, the Baltimore-Washington area?

A. That is correct.

Q. Do you remember the original cost of the theatre, exclusive of the land?

A. In 1926 the theatre was constructed. At that time the cost, exclusive of land, was approximately 1-1/2 million dollars.

Q. What would be the replacement cost today?

A. Well, it is estimated it would be at least 2-1/2 [fol. 852] million dollars.

Q. Approximately what are the operating expenses per week, excluding films, of the Stanley Theatre?

A. The operating expenses per week of the Stanley Theatre, excluding films and interest on investment, are $4,700 per week. That is excluding those two items.

Q. How many employees do you have to have to operate that theatre?

A. At the present time, directly employed at the Stanley Theatre, there are 33 employees, representing a payroll of $1,500 a week.

Q. Including four stagehands, even though you do not have any stage shows?

A. That is correct; we employ four stagehands.

Q. That is a union matter?

A. That is a union matter.

Q. Did you, at my request, have a run-off made on an adding machine of the gross receipts of the Stanley Theatre, starting on February 25, 1949, and ending March 23, 1950?

A. I did.

Q. What were the total gross receipts of the theatre for that period?

A. The total gross receipts of the Theatre for that period were $406,308.24.

[fol. 853] Q. That is the net admissions?

A. That is net admissions.

[fol. 854] Q. Mr. Myerberg was asked this question and made this answer at page 480 of the record: "So you estimate that your theatre on Reisterstown Road, six miles from downtown, would gross just as much or more than either the Stanley or the Century Theatres located in the heart of downtown; is that right?"

His answer was, "Yes, sir, I do."

Have you any opinion on that subject?

A. Yes; sir, I have. In my own opinion I think it is ridiculous. I definitely feel that that would not happen.

Q. Have you any comparable situation or actual figures on an actual day and date play-off with a downtown house that you can bring to this Court and jury?

A. Yes; I have. We have in the City of Washington a day and date neighborhood and downtown run, namely, the Warner Theatre in downtown Washington, and Warner's Ambassador Theatre in the neighborhood section of Washington under common ownership. The two houses are owned by the same owner.

Q. And operated by the same operator?

A. And operated by the same operator. In that area of the Ambassador Theatre, in a very populated apartment house area, it definitely shows no such figures as you just stated that Mr. Myerberg said.

Q. Your downtown Warner Theatre in Washington has [fol. 855] how many seats?

A. It has 2146.

Q. How many seats have you at the Ambassador, located out on Columbia Road and 18th Street?

A. 1334.

Q. Mr. Myerberg has testified here he has approximately 1600 seats in the Crest Theatre. You will accept that figure?

A. Yes, of course.

Q. You know the Crest Theatre?

A. I have been in the Crest Theatre?

Q. You know the neighborhood around it?

A. I have covered the neighborhood around it.

Q. And you have studied the neighborhood with a view to its drawing possibilities as a theatre?

A. Yes.

Q. Downtown how many seats have you in the Stanley Theatre here?

A. 2843.

Q. So, you figure the ratio of the Stanley to the Crest is comparable to the ratio of the Ambassador to the downtown Warner, over 40 miles away, in Washington?

A. Yes.

Q. Now, did you cause to be prepared the actual grosses

of the Warner and the Ambassador Theatres, Washington, D. C., for the period from February 15, 1949 through March 22, 1950?

[fol. 856] A. Yes, I had our Washington office prepare figures to show that.

Q. Indicating under the word "dates" the play date of each particular picture?

A. That is correct.

Q. The total of the picture is under "picture"?

A. Right.

Q. The number of days is under "days"?

A. Correct.

Q. And the name of the distributor who furnished the particular picture is under "distributor"?

A. Correct.

Q. In the next to the last column, under the word "Warner" is the actual gross of the Warner Theatre?

A. That is correct.

Q. And the actual gross of the Ambassador is in the last column?

A. Correct.

Q. Now, I notice here two pictures that indicate stage shows played with them. Flaxy Martin and Mr. Soft Touch?

A. The two stage shows played in the Warner Theatre only. We, therefore, took those two weeks out of the total, feeling that that would not be comparable, would not be a fair comparison.

[fol. 857] Q. For example, on the first one, Flaxy Martin, the Warner Theatre grossed $27,883.66 as against $2,664 at the Ambassador?

A. That is right.

Q. And you consider that as unfair in the comparison?

A. That is correct.

Q. So you eliminated that one and you eliminated High Button Shoes?

A. That is correct.

Q. Have you your footings on the total grossed for this period at the Warner Theater in Washington?

A. The total gross for that period was $634,660.82 at the Warner Theatre, which is our downtown theatre. At

the Ambassador Theatre it was $307,805.81, or 48.5% of the Warner Theatre gross.

Q. 48.5% of the Warner gross at the Ambassador?

A. That is correct.

Q. Now, on the draw area of the Ambassador Theatre as contrasted with the draw area of the Crest Theatre out here on Reisterstown Road, what is your opinion as to the density of the population and draw area in the two areas?

A. In the Washington area, with which I am very familiar, the density of population there is very heavy due to the number of apartment buildings. It is in an apartment section. There are very large apartments [fol. 858] throughout the entire area, Connecticut Avenue and 16th Street. In the Crest Theatre section of Baltimore—I am not as familiar with the City of Baltimore as I am with the City of Washington, however, I have been through that section quite thoroughly—to me I would say that the Ambassador area is two to one in density.

Q. In your opinion do you think the Crest would draw 48.5% of the Stanley gross?

A. In my opinion I do not think it would, and not only from the angle of density of population, but I do not think the Crest Theatre would be the only theatre operating day and date with the Stanley because I think the other theatres in the other neighborhood sections of Baltimore would also demand the equal run of the Crest Theatre, and our clearance would be completely wiped out, and in a very short period of time the Stanley Theatre would find it necessary to close. Now, that is my definite opinion.

Q. Would you attempt to hazard a guess on how much less the Crest would gross in ratio than the Ambassador to the Warner gross?

A. Well, in my opinion, I think that he would definitely gross less ratio than the Ambassador, but I certainly would not be in a position to hazard any guess as to what the Crest Theatre would gross.

Q. Is it your fixed opinion that in guessing on grosses is pure speculation?

[fol. 859] A. It certainly is.

Q. Based on actual figures, do you have or have you caused to be prepared a computation of an estimated net

loss to the Crest Theatre, using the 48.5 ratio of the Ambassador against the Warner Theatre?

A. Yes, I have.

Q. You take the Stanley gross at $406,308.24 and you have computed 48.5% of that. What does that come out as a projected gross based on the Ambassador-Warner situation in Washington?

A. Based on the same ratio as the Ambassador-Warner in Washington, the estimated gross of the Crest Theatre would be $197,059.50.

Q. Mr. Myerberg has testified that his film rental would amount to 35% of the gross. Have you had that computed?

A. Yes. 35% of the gross would be $68,970.83.

Q. Mr. Myerberg estimated that his weekly house expense of $1900 would be increased by $600 additional advertising and usher expense if he went to first run. So, have you computed 56 weeks of operation at $2500 a week?

A. Yes, figuring the 56 weeks involved in the figures, it totals $140,000.

Q. What would be the total expense on that formula?

A. The total expense, including the film, would be [fol. 860] $208,970.83 against a gross of $197,059.50, or an operating loss of $11,911.33. This has all been figured, of course, on net loss during the claimed damage period. That is the 56 week period.

Q. During the period of the losses?

A. That is correct.

Q. The explanation that you put at the bottom of that merely tells the method that you used in arriving at those figures?

A. That is right, yes.

Mr. Raftery: I will now offer in evidence the computation of actual grosses of Warner and Ambassador Theatres, Washington, D. C., for the period February 15, 1949 through March 22, 1950.

The Clerk: That will be defendants' exhibit No. 18.

(Computation of actual grosses of Warner and Ambassador Theatres, Washington, D. C., for period Febru-

ary 15, 1949 through March 22, 1950, was marked Defendants' Exhibit No. 18.)

Mr. Raftery: I will offer this summary in evidence as defendants' exhibit No. 19. I have an extra copy for the Court and I have given my adversary a copy of it.

The Clerk: That will be defendants' exhibit No. 19.

(Summary of estimated net loss to Crest Theatre, using the 48.5 ratio, was marked Defendants' Exhibit No. 19.)

[fol. 861] By Mr. Raftery:

Q. Mr. Grimes, did you cause your Washington office to prepare a schedule showing the play-off of every picture in the Warner Theatre and the Ambassador Theatre day and date engagements, starting with Christmas Day, 1945 and going through the 30th of December, 1951?

A. Yes, I had our Washington office prepare such a form.

Q. And this is the form?

A. That is the form.

Q. Taking your year by year figures, would you tell His Honor and the jury the comparative grosses of Warner and the Ambassador Theatre for each year period?

A. For the year of December 25, 1945 through December 30, 1946, the Warner Theatre, our downtown house, the total was $963,888.22. The Ambassador Theatre's gross was $435,311.32. For the following year, 12-31-46 through 12-30-47, the Warner Theatre gross was $810,705.02. The Ambassador Theatre's gross was $400,806.28. The year 12-31-47 through 12-31-48, the Warner Theatre gross was $639,000.02.

The Ambassador Theatre's gross was $325,890.57. That was for 48 pictures that particular year, eliminating the two stage show engagements that played at Warner's Theatre and did not play at the Ambassador Theatre. That is for the year I am reading now, the statement I just made. That is, for the year 1-1-49 against 12-30-49, the [fol. 862] Warner Theatre gross was $587,311.70. The Ambassador Theatre gross was $283,276.33, eliminating the two stage show engagements from the picture.

For the year 12-31-49 through 12-30-50, the Warner

Theatre gross was $519,633.61. The Ambassador Theatre gross was $244,389.52.

For the year 12-31-50 through 12-30-51, the gross for the Warner Theatre was $592,804.20. For the Ambassador Theatre, it was $244,160.89.

Q. What do the figures total for the Warner for the whole six-year period and for the Ambassador for the whole six-year period?

A. For the six-year total the Warner gross was $4,113,342.77. The Ambassador Theatre gross was $1,933,834.91, representing a ratio of the Ambassador to the Warner of 47%.

Q. Only 1.5% different than it was for this period of the losses?

A. Correct.

Q. Now, have you made a computation based upon 47% of the gross as to whether, if you used that figure, what the ultimate wind-up would be at the Crest Theatre on profit and loss if it grossed 47% of what the Stanley Theatre does downtown.

A. Yes.

[fol. 863] Q. And how much would it lose on that formula? Haven't you got it right there?

A. Yes. Based on that formula, the gross of the Stanley being $406,308.24.

Q. The projected gross of the Crest would be what?

A. $190,964.87, the operating expenses, as outlined in testimony by Mr. Myerberg for the 56-week period, excluding film, would be $140,000. The film rental figured 35% of the $190,964.87, would represent $66,837.70, or a gross expense of $206,837.70, representing a net loss of $15,872.83.

Mr. Raftery: I offer that in evidence.

The Clerk: That will be defendants' exhibit 20.

(Computation based upon 47% of gross, marked Defendants' Exhibit No. 20.)

[fol. 864] Mr. Raftery: I offer first, as Exhibit No. Defendants' 20, the 6-year broken-down picture-by-picture schedule, and identified by the witness.

(6-year broken-down picture-by-picture schedule was marked Defendants' Exhibit No. 20.)

Mr. Raftery: I offer next, the computation of net loss of Crest Theatre, projected, using the Ambassador-Stanley figures for the 6-year period, instead of just for the limited period. It is offered for two purposes; one, to show the static condition, 47 per cent, over a 6-year period, and 48.5 per cent over the period of the lawsuit; and, also, to support the witness' testimony as heretofore given.

(Computation of net loss of Crest Theatre, projected, using Ambassador-Stanley figures for 6-year period, was marked Defendants' Exhibit No. 21.)

By Mr. Raftery:

Q. Now, you have had experience operating a great many neighborhood theatres, have you not?

A. I have operated neighborhood theatres, myself, as a manager.

Q. Warner's have a great many neighborhood theatres in the city of Washington; is that right?

A. Yes; they do.

Q. In relation to theatre attendance, where numerically does the great portion of the American public in large [fol. 865] cities attend, the neighborhood or downtown theatres?

A. There are more people attend the neighborhood theatres than attend the downtown theatres, numerically, definitely.

Q. I think there is evidence here that there are approximately 90 to 100 neighborhood suburban theatres in the environs of Baltimore; is that right?

A. That is approximately; yes.

Q. And you do not operate any of them?

A. We have no neighborhood theatres in the City of Baltimore.

Q. So, in a city like Baltimore, numerically, far more people attend the neighborhood's than attend the downtown's?

A. That is correct.

Q. Can you tell His Honor and the jury why that is so?

A. Well, our business is broken down into classifications of income groups, with which we are familiar. We know there are certain people that like to go downtown, that like to go to a first-run theatre, that will pay the price of a first-run theatre. We also know there are other people who prefer to wait 21 days or 25 days, in their own neighborhood theatres, to go to see a motion picture at a lesser admission. That condition has existed as far back as I can [fol. 866] remember. It certainly is nothing new, and it has proven very successful in the past, and I can see no reason why at this late date, in our industry, we should start breaking down the clearance against the downtown first-run houses, with their terrific operating expenses, in favor of neighborhood theatres. To me, it just is not good business.

Q. The great mass of the public that attends motion pictures are the lower-income brackets?

A. That is correct.

Q. And the admission prices get progressively lower as they go down the string to the last-run houses?

A. As the runs go, the prices drop with them; to each run or particular theatre group of 21, 28, 35 days, as the run increases, the prices as a rule decrease along.

Q. And in that way you are able to service every portion of the public desiring to attend a theatre?

A. Motion pictures; that is correct.

Q. When a picture is exhibited, like a Gone With The Wind, or a Quo Vadis, or any important picture, or any lesser picture, isn't it a fact that it is exhibited in the last-run houses at the lowest admission price, in exactly the same manner it is exhibited at the downtown deluxe theatres?

A. That is correct. The pictures are not cut or edited. They are run as they were run on the first-runs. The public paying the lower admission has the same picture as that [fol. 867] shown at the higher admissions.

Mr. Raftery: Witness with you.



Cross-examination.

By Mr. Rome:

Q. Mr. Grimes, how many theatres are there in the Warner Bros. Circuit Management Corporation under your supervision?

A. I have 18 theatres.

Q. And, of that number of theatres, how many are first-run theatres?

A. Well, in the smaller towns, Mr. Rome, of course, they are practically all first-run houses.

Q. Just the number, Mr. Grimes?

A. There are approximately 12 of that group.

Q. How many theatres are there, in all, that are operated by the Warner Bros. Circuit Management Corporation?

A. You mean nationally?

Q. Yes.

A. Well, as far as I know, there are in the neighborhood of approximately around 400 theatres.

Q. Do you know how many of those 400 are first-run theatres?

A. I would not know.

Q. Many of those theatres are located in the downtown sections of large cities, are they not?

A. There are theatres located in the downtown sections, [fol. 868] but certainly the majority of them in your larger cities, I would say, would be neighborhood theatres.

Q. You say there are 400 theatres operated by Warner Bros. Circuit Management at the present time?

A. I say, approximately.

Q. In the not too distant past, the number was a great deal larger, wasn't it?

A. Not a great deal. I think it was around 480.

Q. Have you any information, Mr. Grimes, concerning the number of theatres operated by Warner's in cities of over 100,000 population, which are first-run theatres?

A. The city of Washington, the City of Baltimore. That would be the extent of my knowledge.

Q. You don't know anything about any of the other areas of the country?

A. I do not.

Q. Are you familiar with the fact that the other members of the so-called Big Five also operate theatres throughout the country?

A. That is my understanding, that they do; yes.

Q. And those companies are Paramount, Metro, Fox, and RKO; isn't that so?

A. That is so.

Q. And, to your knowledge, those companies own hundreds of theatres throughout the country, do they not?

[fol. 869] A. To my knowledge, I couldn't say.

Q. Have you no idea?

A. As to the number now, no; I don't.

Q. Have you any idea about the number of those theatres at any time?

A. No; I couldn't tell you. I know they operated a substantial number of theatres, but as to the exact number, I do not know.

Q. Of course, not the exact number, but you have no information, even, that it runs into hundreds of theatres?

A. Yes, definitely. I just stated that Warner's operated 400.

Q. In your theatres operated by Warner Bros. Circuit Management Corporation, you exhibit the product not only of Warner's but also of the other distributors who are defendants in this action; isn't that so?

A. What theatres are you speaking of?

Q. All the theatres that come within the jurisdiction—let me put it this way, Mr. Grimes: isn't it a fact that in a number of the theatres operated by you, under your supervision, the product of all of the distributor companies is exhibited there from time to time?

A. No. Out of 11 towns that I operate in, we have two towns at the present time that do exhibit all of the companies' products.

[fol. 870] Q. But in the 18 theatres, taken as a whole, you exhibit the product of all the companies somewhere along the line, don't you?

A. In two towns we exhibit all of the 8 companies.

Q. You know as a fact, do you not, that it is also true of the other distributor companies, comprising the so-called Big Five who operate theatres, that they also exhibit the

product of all of the distributor companies present in this action?

A. No, I do not. I do not know that. I have no contact in any of my towns, with the exception of one town, of any of the so-called Big Five.

Q. That is a fact that is generally known throughout the industry, isn't it, Mr. Grimes?

A. I couldn't say that it is generally known, Mr. Rome, that these companies play all of the other four major companies' products; no, sir.

Q. I am not suggesting to you, in each one of the theatres playing the product of all 8 companies, but what I *what I* am getting at, if you know, is whether or not some of the theatres, among the entire group together, taken together, do not play the product of all the companies?

A. I would think that is very possible, but definitely I could not say it as a known fact.

Q. You have heard of the case called the Paramount [fol. 671] case, haven't you?

Mr. Raftery: Now, if Your Honor please, I object to this. He is trying to bring in in another way the Paramount case into this litigation; and I further object to this line of interrogation, as it has nothing to do with what I brought out on direct. Furthermore, it is not an issue in this case as to whether one theatre plays this picture. We have a very simple issue, which Your Honor defined the other day, the first-run in the neighborhood, as against day and date downtown.

Now, he is talking about whether this witness knows about a theatre that it may operate in Kankakee, whether they take a picture released by Metro. I cannot see the pertinency, and I think we will be here an awful long time if he persists in going ahead with this line of questioning.

The Court: Mr. Rome?

Mr. Rome: I am simply attempting to establish information, intent, motive and knowledge with regard to this situation. Contrary to what Mr. Raftery has said, sir, I think this line of examination that I am attempting, generally, goes to the heart of the issue here, because our contention is that these people do not grant theatres, such as the Crest, first-run pictures, because they, themselves,

have the predominant possession of first-run theatres lo-
[fol. 872] cated in the downtown sections of cities and, therefore, they are not going to permit any other independent to enter that field of endeavor.

The Court: I will allow the question.

By Mr. Rome:

Q. My question was whether or not you have heard of the Paramount case brought by the Government against all the distributor companies?

A. I have heard of the case; yes, sir.

Q. I just ask you this one additional question: Don't you know that it was found as a fact in that case that every one of these distributors has as its best customer all of the other distributors?

Mr. Raftery: I object as incompetent, immaterial and irrelevant.

The Court: I will allow the question.

A. Mr. Rome, to be very frank with you, I have heard of the Paramount case, and I am not attempting to evade your question in the least. I am not a lawyer. My sole business is manager of theatres. I am not a producer. I am an exhibitor. Our legal questions are handled by our home office, and it does not concern me; and, to be very frank with you, I am quite busy, and I do not go into it. That, definitely, is my answer, and the only answer I can give you. I say that I have heard of the Paramount case, yes, sir, very definitely.

[fol. 873] By Mr. Rome:

Q. I appreciate you are a busy man, Mr. Grimes, but I take it from your answer that your answer is No, you do not know that to be a fact?

A. Would you mind phrasing your question again?

Mr. Raftery: Let the reporter read it.

(Question repeated by the Reporter.)

The Witness: No, sir; I do not know that.

By Mr. Rome:

Q. What product do you exhibit in the Stanley Theatre in Baltimore?

A. Seventy-five per cent of our playing time is taken up with Warner product. We exhibit a part of Paramount product, if and when we need pictures.

Q. Is that the only product you play?

A. We have, on occasion, where we were unable—of course, Paramount, we have been a customer of Paramount for quite a long time, and if we have been unable to secure a picture from Paramount, we have on occasion gone out and gotten a picture from some other company.

Q. At least 25 per cent of your playing time at the Stanley is not take up by Warner product?

A. That is due to the fact that Warner's do not produce that number of pictures.

Q. And, for the remainder of your product, you turn to Paramount?

A. To Paramount, primarily; yes.

[fol. 874] Q. When did you first learn, Mr. Grimes, that the Crest Theatre was seeking first-run?

A. When did I first learn it?

Q. Yes.

A. The first I learned of the Crest Theatre seeking first-run was when the Court action was brought. I have no occasion whatever, as an exhibitor, to deal with distributor matters. It does not affect me in the least.

Q. In other words, if the Crest were to have first-run product, you say it would not affect you in the least?

A. I did not say that. You are misinterpreting my answer.

Q. I am just trying to establish what you have said.

A. I said, I don't have anything to do with distributors.

Q. Who is it that actually buys or licenses the pictures which are exhibited in the Stanley Theatre?

A. Do you mean, from our operating company, who is it?

Q. From Warner or from Paramount?

A. Well, the Circuit Management Corporation, of which I am an employee, employs film buyers who buy the products for the Stanley Theatre.

Q. Where are those gentlemen located?

A. In Washington.

Q. Who is the person responsible, actually, for the [fol. 875] licensing of pictures for the Stanley Theatre?

A. Well, the film buyer in Washington is a Mr. Louis Ribnitzki.

Q. And he makes the arrangements with Warner Bros. Distributing Corporation, does he?

A. To exhibit Warner pictures.

Q. He does that?

A. He, and the zone manager. That is Mr. Crouch.

Q. And Mr. Ribnitzki also makes the arrangements to license the Paramount pictures when you get them?

A. He, and Mr. Crouch; yes.

Q. Do you have any information, Mr. Grimes, concerning the total number of patrons who attended the Stanley Theatre during those days in which you had this survey made?

A. The total number of patrons?

Q. Yes.

Mr. Raftery: Which is that exhibit?

The Witness: I think I have it. Roughly, there was around 40,000 people.

By Mr. Rome:

Q. Forty thousand people. And, in those six days in which you had the survey made——

A. There were nine days. There were 13 days.

Q. You gave us the dates of January 25 and 29?

A. Just one minute.

Mr. Raftery: He has the breakdown there.

[fol. 876] The Witness: The first number was January 25 through January 29.

By Mr. Rome:

Q. On each one of those dates. I inquired of Mr. Raftery concerning those, and he thought it was only those separate dates.

A. No; it was inclusive.

Mr. Rome: May I have the exhibit, which is in photostat copy form, or picture form, concerning the survey that was offered this morning?

Mr. Watkins: That is Defendants' Exhibit 16.

By Mr. Rome:

Q. Yes; that is it. There were approximately 40,000 people who attended the theatre at that time?

A. Roughly; yes.

Q. And you had cards filled-out, covering 2,555 people?

A. That is correct.

Q. About 6 per cent?

A. Around 6 per cent; that is correct.

Q. Can you tell me how many of those cards were actually filled-out by the individuals, themselves, to that question?

A. No; I couldn't. I couldn't tell you how many were actually filled out by the individuals. It would depend. The girls would fill out some, and the individuals would [fol. 877] fill out some. I could make no estimate and state how many.

Q. That compilation or survey was actually prepared for the purpose of this case, was it not?

A. Yes; it was.

Q. You had never made any similar survey in the period of 1948 or 1949 which has been produced or requested?

A. No; we have not.

Q. For how many years has the Ambassador Theatre in Washington been playing on this first-run day and date program?

A. Mr. Rome, I started in 1925 with Harry Crandall. At that time, the Ambassador was in Washington. However, it was not at that time a Warner Theatre. It was the Metropolitan Theatre, and the Ambassador Theatre, which were in common ownership at that time. As the years progressed, the Stanley Company of America bought-out Crandall. That continued as common ownership, the Metropolitan and the Stanley Theatres. In later years, when Warner's bought out the Stanley Company of America, that run continued in common ownership and was later moved to a day and date with the Warner Theatre, which at that

time was the Earle Theatre, and in later days the name was changed to Warner.

Q. Does the Ambassador Theatre charge the same admission price as the Warner house charges there?

[fol. 878] A. There is a slight differential in evening prices.

Q. What is the differential?

A. It is four cents.

Q. The Ambassador charges four cents less; is that correct?

A. That is correct.

Q. The calculations which you have submitted have taken into consideration, I suppose, Mr. Grimes, that differential in the admission price?

A. No; they did not.

Q. Have you any knowledge about the actual population in the area of the Ambassador Theatre, say, within a two-mile area of the Ambassador Theatre in Washington?

A. Within a two-mile area?

Q. Yes.

A. Why would you confine it to a two-mile area?

Q. Within any area that you choose.

A. No; as to the actual population, I would not be able to break it down into how many thousands of people are represented in that area.

Q. Have you any information concerning the number of people who are in the area which has been described and referred to as the area of the Crest Theatre?

A. Only as to what Mr. Myerberg said.

Q. Do you have any knowledge about the gross that [fol. 879] has been earned by the Crest Theatre on the first-subsequent-run exhibition of pictures?

A. The gross that Mr. Myerberg stated, and which, of course, I do not doubt. That is the only knowledge I have of it.

Q. What is the weekly operating expense of the Warner Theatre in Washington?

A. That, I do not have with me.

Q. Can you give me an approximation?

A. No; I could not. You see, the Warner Theatre in Washington is—I do not have the operating figures on that,

because I do not operate it. I do have this broken down into figures for the purposes of this hearing.

Q. Can you tell us whether it is as much or more than the Stanley Theatre in Baltimore?

A. Yes; I think it is slightly higher.

Q. Slightly higher than the Stanley in Baltimore?

A. Yes.

Q. Can you tell us anything about the weekly operating expenses of the Ambassador Theatre in Washington?

A. No; I do not have that.

Q. Would you say it is as much or more than the Stanley Theatre here?

A. No; it is much less than the Stanley.

Q. So that, also, it would be less than the Warner [fol. 880] Theatre in Washington?

A. Oh, yes; the operating expenses of the Ambassador are definitely less than the operating expenses of the Warner.

Q. Can you give us any approximation of the differential there?

A. No; I couldn't.

Q. Has the playing of first-run pictures in the Ambassador Theatre been a profitable operation, on the whole, for Warner Bros. Circuit Management Corporation?

A. You mean, between the two theatres?

Q. Taking the Ambassador, has the Ambassador been a profitable theatre?

A. Yes; it has been.

Q. And I assume that has been so over the years; is that correct?

A. With the exception of certain years; yes. At the present time, no.

Q. Do you recognize, Mr. Grimes, that the Crest Theatre, if it were to play first-run pictures, would have a larger gross than it has playing first-subsequent-run pictures at the first-subsequent-run admission prices?

A. Mr. Rome, do you mean the Crest Theatre as a first-run—for instance, as an exclusive first-run, or as a day-and-date first-run?

Q. Let me take it this way: if the Crest were to play [fol. 881] first-run pictures on an exclusive first-run basis,

charging first-run admission prices, in the same way that the downtown theatres charge first-run admission prices, in your opinion, would the Crest Theatre have a larger gross than it has today, playing first-subsequent-run pictures at first-run-subsequent admission prices?

A. I would say, if the Crest Theatre was able to secure an exclusive run, it is possible his gross would increase, but it is also possible his expenses would increase along with it.

Q. I am asking you solely about gross, at the moment. Would there be a greater amount of money coming in at the box-office if the Crest Theatre were to have an exclusive first-run in the City of Baltimore, charging first-run admission prices?

A. I think it is possible. He probably would show some increase in his gross.

[fol. 882] Q. Are you able to give us any approximation about the percentage of that increase?

A. I definitely would not. I do not guess on those things.

Q. If the Crest Theatre were to have access to first run pictures on a day and date basis with downtown, charging first run admission prices, in your opinion would the Crest Theatre gross more than the $122,000 which has been testified to here as its gross?

A. I think that the Crest would probably pick up some first-run customers from the Stanley Theatre, yes. If he was playing day and date with the Stanley Theatre he would probably pick up some of our customers. There is no doubt about it, but I think he will lose some of his.

Q. Taking it on the whole, would you say his total gross at the box office would be larger than it has been first subsequent run pictures?

A. I should think that he would probably increase his gross to some extent.

Q. I take it you are not willing to hazard a guess at that?

A. No, sir. I do not believe in guessing, sir.

Q. Going back to the survey that you had made con-
[fol. 883] cerning the Stanley Theatre, can you tell us if you have any information concerning the number of times that those particular persons whose names appear on these 2500 cards patronized the Stanley Theatre over any period of time?

A. No, sir. I mean I would have no manner in the world of telling that.

Q. You said that the Crest, if it were to have access to first run pictures, other fine theatres located outside of the downtown area of Baltimore would also seek access to first run pictures and that ultimately the Stanley Theatre would have to close. So that actually the basis of your complaint against this attempt on the part of the Crest Theatre to get first run pictures is the fact that it would hurt the Stanley Theatre and Warner Bros. Circuit Management Company; isn't that so?

A. Mr. Rome, I said in my opinion the other neighborhood theatres——

Q. That is what I am talking about.

A. ——would seek an equal run with the Crest Theatre, and that ultimately it would destroy not only the Stanley Theatre, I think it would destroy all the downtown theatres.

Q. And that is your basis against the complaint made by the efforts of the Crest; is that right?

A. Yes.

Q. In other words, what you were attempting to do or [fol. 884] would like to have done, if I follow you correctly, Mr. Grimes, is to stop any competition coming from the Crest Theatre?

A. No, sir, you do not understand me. That is not my thought at all. I think that the Crest Theatre as a 21-day house, is in substantial competition with us, but I do think that as a first run house it would be greater.

Q. And you do not want it to compete with the Stanley Theatre on first run?

A. That is correct.

Q. Now, returning to Washington for a moment, Mr. Grimes, the product that plays at the Ambassador and Warner Theatres is the product, the pictures, of Warner, Paramount and Columbia; is that correct, sir?

A. At the beginning time of 1948, yes. At the present time, that is not necessarily so. They play some of the Paramount product, some of the Columbia product now. Columbia is selling to other theatres, too.

Q. What other theatre on first run in Washington?

A. Well, they have sold to the so-called art theatres.

Q. Any other theatres in Washington?

A. Yes. There is a theatre in Washington, the Ontario.

Q. That is just within a couple of blocks of Warner's Ambassador?

A. That is correct.

[fol. 885] Q. But in the Ambassador Theatre you did not play the product of Metro or Loew's Incorporated, did you?

A. No, sir, we did not.

Q. And you did not play any product of Fox?

A. No, sir.

Q. And you did not play the product of Universal or United Artists or RKO?

A. To my knowledge, no.

Q. So that the gross of these two theatres, both the Warner and the Ambassador, was solely dependent upon the product of largely three companies: Warner, Paramount and Columbia?

A. That is correct.

Q. Those other companies I mentioned whose product you did not play, also put out very fine pictures, do they not?

A. That is correct.

Q. And in some years their product is actually more successful at the box office than the product of Warner or Columbia or Paramount?

A. That is possible.

Q. So that it is possible; is it not, Mr. Grimes, that a theatre playing first run product from all eight companies rather than only three companies, would actually have a greater potentiality at the box office for gross than would a theatre which limits its exhibition of pictures only to [fol. 886] the product of one, two or three companies?

A. Mr. Rome, when you speak of first run, do you mean exclusive or day and date runs?

Q. Either way, Mr. Grimes.

A. Either way, it can't be, because it would be impossible, in my opinion, it would be impossible for any day and date run theatre to use all of the eight companies unless the theatre they were day and dating were using the same number of companies. Now, that does not exist in downtown Baltimore.

Q. If a theatre playing on a day and date basis, having access on first run to the product of all eight companies, had the opportunity to license the best picture available at that particular time from all eight companies, would it not in your opinion have a greater potential gross at the box office than a theatre which limits itself to the product of only three companies out of the eight?

A. Mr. Rome, I just stated that in my opinion it would be impossible for a day and date neighborhood theatre to play all eight companies.

Q. In the calculation that you have made and which has been offered in evidence here concerning the projection of the gross of the Crest Theatre, did you take into consideration any additional patronage flowing to the Crest Theatre as a result of its having access to first run pictures on a day [fol. 887] and date basis?

A. Mr. Rome, in using a projected estimation there, we simply took the ratio of the Ambassador Theatre gross to the Warner Theatre gross in the City of Washington.

Q. I see. And isn't it a fact, recognizing the motion picture industry generally, Mr. Grimes, that a theatre which has access to first run pictures will, normally speaking, attract a greater number of people than a theatre playing only on subsequent run?

A. Mr. Rome, I would say that that depends upon the location of the theatres involved.

Q. But it is a possibility, having these other factors or circumstances in mind you just mentioned?

A. I still think it is location that would give you the answer to that.

Q. Am I correct in believing, Mr. Grimes, that your views and opinions would be the same no matter where the Crest Theatre might be located, so long as it was outside the downtown area?

A. I would say, Mr. Rome—let me get what you mean. So far as a first run is concerned?

Q. Yes.

A. Again, I just have to reiterate that I do not sell film. I have nothing to do with the selling of film.

Q. Very well.

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# Vol. II

# TRANSCRIPT OF RECORD

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# Supreme Court of the United States

OCTOBER TERM, 1953

## No. 19

THEATRE ENTERPRISES, INC., PETITIONER,

*vs.*

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO PICTURES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 9, 1953

CERTIORARI GRANTED MAY 25, 1953

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[fol. 888] Mr. Rome: Thank you, Mr. Grimes. I have no further questions.

Redirect examination.

By Mr. Raftery:

Q. Just one question. The admission price at the Ambassador at night is 70 cents, is it not?

A. During that period it was.

Q. And the downtown was 74?

A. During that period. Saturday afternoon, from 1:00 o'clock to 5:00, the admission price at the Ambassador was 44 cents, and the Warner Theatre was 55. Those prices include Federal taxes.

Recross-examination.

By Mr. Rome:

Q. May I ask one further question, sir?

Despite the fact the Ambassador Theatre has access to first run pictures in Washington on a day and date basis, there are still a number of subsequent run theatres in the City of Washington, are there not?

A. Yes.

Q. And those theatres charge reduced prices as contrasted with the prices charged at the Ambassador?

A. Yes, sir.

Q. And those theatres exhibit pictures which have played at Warner's and the Ambassador?

A. The theatres immediately adjacent to the Ambassador do not as a rule give the preferred playing time to pictures [fol. 889] that have played the Ambassador.

Q. But many theatres in Washington playing subsequent run, do exhibit Warner, Columbia and Paramount pictures on subsequent run, do they not?

A. Yes.

Mr. Rome: No other questions.

Redirect examination.

By Mr. Raftery:

Q. I have something I forgot to straighten out, that the falling grosses indicated on exhibit 20—these falling grosses at the Ambassador, where you had a net of $435,000 in 1946 and dropped down to $244,000 in 1951 and where you dropped from 963 at the Warner down to 592 in 1951, those——

A. Those are first run houses.

Q. Yes. And those grosses had been falling constantly generally in the motion picture business since the advent of the television?

A. Correct.

The Court: Have you finished with this witness?

Mr. Raftery: Yes, sir.

(Witness excused.)

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The Court: We will take a recess now until 12:00 o'clock, ten minutes.

(After a short recess, the following proceedings were had:)

[fol. 890] Mr. Raftery: Mr. Robert Smeltzer, please.

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Thereupon Robert Smeltzer was called as a witness for and on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name for the record?

The Witness: Robert Smeltzer.

Direct examination.

By Mr. Raftery:

Q. Now, Mr. Smeltzer, will you please talk right up so that the ladies who are members of the jury can hear everything you say?

A. I will, sir.

Q. Where were you born?

A. In Baltimore, Maryland.

Q. And you are a graduate of what college in Baltimore?

A. I attended public schools and I graduated from Baltimore City College. I spent about twenty-odd years in Baltimore City.

Q. And by whom are you employed at the present time?

A. Warner Bros. Pictures Distributing Corporation, Inc.

Q. What is your official position?

A. District manager.

Q. What comprises your district?

[fol. 891] A. The Philadelphia and Washington branches.

Q. How long have you held that position?

A. Eleven years.

Q. Briefly, Mr. Smeltzer, tell us when you started in the picture business, how long you have been in it, and with what companies?

A. I started in 1916 with the World Film Corporation, and was with Pathé, Associated First National, First National, and Vitagraph, which was then the trade name of Warner Bros., and then with Warner Bros. Pictures Distributing Corporation.

Q. And you have been with Warner or its predecessor companies all of the way back to First National, since what year?

A. Since 1921.

Q. And you have been engaged solely in the distribution side of the business? Is that correct?

A. That is correct.

Q. Mr. Myerberg, in his testimony, on page 58, testified:

"I went to see Mr. Bob Smeltzer first. I had known Mr. Smeltzer for quite a long time and knew he was probably in seniority the oldest person and probably one of the most capable in the film industry in Washington, and I wanted to talk to him first."

[fol. 892] Q. You are the Bob Smeltzer to whom he referred?

A. Yes, sir.

Q. Do you remember his coming to see you in early October, 1948?

A. I do.

Q. He also said, on page 59, that you said:

"You can't expect any first-run pictures from Warner Brothers because we have our own theatre in Baltimore. It is our policy throughout the country to play our pictures in our own theatres, and first-run situations, and it is our understanding that that is permitted to us by the courts."

Do you remember having any conversation exactly like that with Mr. Myerberg?

A. Mr. Myerberg came into the office, I think, in the afternoon. I had not seen him for quite a number of years. We chatted regarding what he had been doing in the interim between the last time I had seen him and his visit to Washington. And, after the personal conversation was over, he told me he was building a theatre at Reisterstown Road and Rogers Avenue, a very splendid, pretentious house, and he wanted first-run pictures.

So, I said, "Harry, you know that we have our own theatre downtown, the Stanley, there, and we have our own product. Quite naturally, it is a common ownership; and I [fol. 893] am not in a position to give you any Warner pictures."

He said, "I understand your position. I think I will visit some of the other distributors who are not in your position, or who do not have first-run theatres in the City of Baltimore."

I think he said he was going to RKO, which I told him was across the street. That was about the gist of the conversation.

Q. Did you make any statement to him substantially as follows:

"He said (meaning Smeltzer) 'However, I cannot see why any company that does not have a theatre in Baltimore would not like the opportunity of selling to your theatre.'"

Did you ever make any such statement to him?

A. Hardly, because I had never seen his theatre, I knew nothing about it, I didn't know whether it was a theatre that would be adapted to first run, subsequent run, or last

run; and I was in no position to tell him about any other distributor. I didn't know what product they would have available or what their sales policy was. I would hardly make that statement.

Q. Well, you never made the statement?

A. No, no, no; definitely, no.

Q. He testified that you asked him substantially to write [fol. 894] a letter, and he wrote the letter which is Plaintiff's Exhibit No. 1, which we have referred to as the World Premier- letter. Do you remember receiving that letter?

A. That I asked him to write me a letter?

Q. Yes.

A. No, sir.

Q. You told him definitely on his first visit that you had no first-run pictures available for him?

A. That is correct. I mean he understood our position. There wasn't any contention or discussion regarding that.

Q. But, still, he wrote you the letter, anyway?

A. Yes, he wrote a letter, I think possibly a week or two following his visit to Washington.

Q. You answered the letter?

A. I answered it a day or two after I received it.

Q. And, in your answer, you told him that you thought at that time you were quite explicit in your answer?

A. That is correct.

Q. And that is Plaintiff's Exhibit 2.

On page 275 he referred to the fact that you personally attended a cocktail party he gave two nights before the theatre opened, and at that time you, Mr. Adams of Metro, and Mr. Biersdorf, discussed first run pictures at his theatre, at the table while you were at the festivities.

Did you ever have any conversation about business of any [fol. 895] kind with Mr. Myerberg the night he had the cocktail party?

A. We were invited to a cocktail party, but I don't know whether it was two nights before the opening or when, but it was prior to the opening of the Crest Theatre. He had a very nice luncheon. They were very gracious as hosts. I think Mr. Myerberg and his brother or brothers were present. At our table where we were seated, I think was our Baltimore salesman, our branch manager, Mr. Biers-

dorf, and myself. Who else was there, I don't remember. There was a lot of joviality going on. I don't think there was any such thing discussed, because I don't think it was the time or place to discuss business, on an occasion of that kind.

Q. You have no recollection of talking business of any kind with this gentleman at his cocktail party?

A. That is correct.

Q. That night you made an inspection of his theatre, did you? You saw his theatre?

A. When I entered it, I went through it. I think it was before the cocktail party, and possibly also after the cocktail party.

Q. Have you any statement to make as to your impressions of the theatre?

A. To be candid, I was a little disappointed because, from what Harry had told me in the office and in the letter that followed, that I was led to believe that it was to be [fol. 896] an unusual theatre, something different, something more pretentious than what I saw. And I just figured that it was a nice suburban neighborhood house. I saw nothing to rave about. Naturally, I did not criticize the theatre to Mr. Myerberg, because I don't think that would have been very nice. After accepting his hospitality, then, to criticize his theatre would be like accepting an invitaton to dinner, and after the dinner telling the host his house was no good.

I thought he had a nice neighborhood theatre.

Q. Then, your entire distribution experience has been in this area, approximately, the Washington-Baltimore, and so on?

A. I have always been here, with headquarters in Washington. For Pathé, I had the entire east.

Q. But you have always had supervision over the City of Baltimore?

A. That is correct.

Q. No matter with what company or what position you had?

A. That is right.

Q. And you are thoroughly familiar with Baltimore?

A. I believe I am.

Q. From your knowledge of Baltimore, and forgetting that you have the Stanley Theatre downtown, do you con-
[fol. 897] sider Mr. Myerberg's theatre a suitable theatre for the exhibition of pictures exclusive first-run Baltimore, taking into consideration all of the factors that you normally consider?

A. I do not.

Q. Will you elaborate and tell His Honor and the members of the jury why you do not?

A. Well, the location, the transportation facilities. They have a small shopping district, but I do not think it would attract anyone but the neighborhood people. I do not think anyone would travel from South Baltimore or Southeast Baltimore, or possibly East Baltimore, over to the Crest Theatre to see a first run picture. I think his patronage would be drawn purely from that location where he is, and possibly over as far as the Ambassador or Reisterstown, or about the area that Mr. Myerberg stated his drawing area is—Park Circle—drawing first run pictures. That would be my idea of his drawing area. I do not think he could draw from the entire City of Baltimore for first run pictures. I do not think it is possible. So, I would not consider it as a first run outlet for Warner pictures.

[fol. 898] Q. Did he ever ask you for a day and date first run with downtown?

A. No. He never asked for day and date first run. He was primarily interested in an exclusive first run. The day and date issue never arose, to my knowledge never arose.

Q. He never spoke to you about it at any time, to your knowledge?

A. No.

Q. Now, the Stanley Theatre in Baltimore, you consider that the show case for Warner pictures, and have so considered it during this period?

A. That is correct.

Q. Do you share Mr. Grimes' opinion that it is the most beautiful theatre in the area?

A. In my opinion, I think it is a very pretentious, beautiful theatre from the standpoint of interior, the appointments. I think it is the prettiest theatre in this particular

territory which comprises Washington, the City of Baltimore, Virginia, and so forth.

Q. The grossing possibilities as contrasted with the Crest, Mr. Myerberg has testified here that his Crest Theatre on a day and date policy would outgross the Keith's, Stanley or the Century. Have you any opinion on that?

A. That is purely a guess on anybody's part. I do not think that is possible. I do not see how it could be possible, [fol. 899] because the Stanley Theatre, the shopping center of Baltimore, with transportation facilities converging into the center of the City of Baltimore, whereas with Mr. Myerberg's house, you have a limited transportation facility located in a suburban section. It is not downtown. It is not located downtown.

Q. In your opinion, the grosses would be nowhere comparable?

A. No. Nor I think the grosses could not be compared to the Stanley Theatre. Of course I do not know about the rest of the downtown theatres.

Q. Now, you are familiar with the Ambassador-Warner situation in Washington, are you not?

A. Yes, sir.

Q. And as Mr. Grimes has covered that so fully, I will ask you only one question. You concur in Mr. Grimes' judgment that the Ambassador draw area in Washington is far greater than the Crest draw area at Baltimore, out on Reisterstown Road?

A. I think Mr. Grimes' estimate was very conservative. I am very familiar with that Ambassador area. It is very densely populated, not only with regard to apartment houses, but they have some other large homes, possibly have anywhere from 25 to 50 people in those homes over there.

Now, around the Crest area it is a spread population [fol. 900] I mean the houses are not in the same category as those around the Ambassador area.

Q. You also have the Shoreham Hotel and the Wardman Park in the immediate area of the Ambassador Theatre?

A. The Shoreham, the Wardman Park, yes. But you have any number of apartment houses, too.

Q. Now, your transit around the Ambassador, is there

not a fast trolley line running all the way to Mt. Pleasant, which runs past it?

A. You have two trolley lines. One goes from Calvert Bridge downtown. The other one goes from Mt. Pleasant downtown, and then you are within three blocks of 16th Street, which has bus transportation north and south. They have pretty fair transportation facilities.

Q. On Reisterstown Road you have one bus running along Reisterstown Road?

A. That is the only one I know of.

Q. Now, what is the advantage or advantages to you as a distributor of having your pictures shown in a theatre such as the Stanley Theatre in downtown Baltimore?

A. The Stanley Theatre is, in my opinion, the finest show case for product in the City of Baltimore.

Q. Will you keep your voice up?

A. It is an outlet for our product. We have the opportunity of wide exploitation and advertising on pictures. [fol. 901] As a matter of fact, the distribution department spends money of their own in exploiting their pictures, and we also have a control of the playing time, which includes the holidays such as New Years, Christmas, 4th of July, Easter, and it is very advantageous for us, the Stanley Theatre to have our show case in the downtown area in Baltimore.

Q. When you broke into the business with World Film back in 1916, none of the distributors owned any theatres anywhere; is not that a fact, as far as you know?

A. I do not remember distributors owning theatres in those days.

Q. Is it not a fact as soon as feature pictures came in and you started handling them through World Film or Pathé, or whatever company you were with, silent pictures, before those theatres were owned by Warner's or anybody in this business, the feature pictures were generally exhibited first run downtown in each city comparable to Baltimore or Washington whenever it was possible to get a first run?

A. Always. Definitely.

Q. And it is not something which was created by an affili-

ated or integrated theatre company or an integrated distributor?

A. No. Our World Pictures first run, I think were in the Picture Garden, which is now—Mr. Myerberg operated there not as first run. That is our first run, which is on [fol. 902] Lexington Street, which is between Charles and Liberty, right opposite to the Century Theatre. That was our first run outlet. Then they had clearance over the subsequent runs, the same as they have today. There is no change in that. It was a downtown exhibition of the silent picture, and then after an interval of so many days it was made available to the subsequent run. That hasn't changed any.

Q. Then in those days World Film was one of the top distributors of film of the day?

A. Yes, World Film was an important company.

Q. Now, in arriving at your judgment that you would not license Mr. Myerberg first run pictures at his Crest Theatre, on an exclusive basis, did you consult with or confer with any representative of any other distributor?

A. I not only did not confer with any other representative of any other distributor, but I did not even confer with my own men on that decision.

Q. As a matter of fact, you told him the first time he came there?

A. That is correct. Mr. Myerberg appreciated that. He said he understood that.

Q. And he never asked you for day and date?

A. Never.

Q. Now, when it came time to licensing him some pictures out at the theatre on a 21-day first neighborhood run [fol. 903] availability, who made that decision for your company?

A. I did.

Q. Now, you tell His Honor and the jury the factors you took into consideration and how you happened to arrive at your judgment.

A. In December I was to attend a meeting, and I was to be away from the office possibly for two or three weeks.

Q. That is 1948 you are talking about?

A. That is 1948 I am talking about.

And prior to leaving I called in the branch manager and I asked him if his salesman had called on Mr. Myerberg of the Crest Theatre, and he advised me he had not, the theatre was still under construction, that there was no definite opening date set for the theatre.

I also asked him if Mr. Garman, who operated the Uptown, the Avalon and Pimlico, had asked for any clearance over his new, contemplated theatre, and the branch manager, much to my amazement, said, "No," because as a rule the exhibitor operating an established theatre in a community, when a new theatre is built within what he considers to be a competitive area, generally writes a letter or gets you on the phone and asks for clearance over the new theatre. That is always done as a rule.

I have been advised that there was no clearance demanded or requested by Mr. Garman.

[fol. 904] I advised Mr. Biersdorf, who was the branch manager of our Baltimore office, to see Mr. Myerberg at his convenience and set up what you call a 21-day—we don't call it 21-day, we call it first run availability for sub-runs in the City of Baltimore. To also endeavor to sell our short subjects and our Warner Pathé News. I believe that was carried out.

Q. Did you have a report at a later date that a deal had been made with them on some pictures and some shorts and some news releases?

A. We had what we call a daily sales report—I think I got back after the first of the year—so that Mr. Defazio, who was our salesman here, had called upon Mr. Myerberg and discussed only the short subjects and the Warner Pathé News, but not the feature, because we did not know what picture would become available when he opened his theatre, whether it would be our picture or some other distributor's picture.

Later I think Mr. Myerberg set an opening date, and our picture was the available picture, 21 days, as you just stated, and that was his opening picture.

Q. That was Don Juan?

A. Don Juan, yes.

Q. And he opened his theatre on the 26th of February, 1949, with your picture?

A. Well, he opened it with our picture. I am not positive that that was the date. I know it was in February. [fol. 905] I could look that up for you.

Q. Did you ever have any conversation with Mr. Myerberg with regard to a sliding scale for his theatre?

A. Yes. Yes.

Q. When was that?

A. That was after the theatre opened, after he possibly had played one or two pictures. He used to come into the office quite often. And I think that is when he started. And I advised him we had no experience in the house and after awhile, after we got knowing what the possibilities were, the grossing possibilities, and so forth, were, we possibly could sit down and discuss the scale with him.

Q. You wanted to know your experience in the house?

A. That is necessary, to arrive at a scale.

Q. How do you arrive at a scale, Mr. Smeltzer?

A. Well, we take our own pictures, generally six. Sometimes we limit ourselves to four of a given season's product, and we predicate our 40% on that average gross, and then we scale either three for one or two and one-half for one down to 30 and possibly up to 50, so that you have a range of a scale from 30% minimum to a 50% maximum.

Q. After you had some experience with him and had some grosses on which you could figure out the scale, did you figure out a scale or agree on a scale with Mr. Myerberg for that house?

[fol. 906] A. No, I think Mr. Myerberg was in and I had figured a scale of about $250 a tenth. I am giving you these figures. I am not positive that is the exact figure. But if my memory serves me right, I think it was 250, which would be based on 20 pictures of ours. I think there were possibly six or seven pictures. And Mr. Myerberg was not agreeable to that scale and said he had better scales with other companies. I said I wasn't interested in other companies' scales.

Q. Keep your voice up, Mr. Smeltzer.

A. We were selling our pictures at what we thought were equitable terms without any reference to any other companies' product. Eventually I think we worked out a scale with Mr. Myerberg on about—I think the scale now

is about 290. He could possibly answer that. I don't know what that was.

Q. It took some time to work it out?

A. Oh, yes. We had houses in Baltimore we wouldn't work out a scale for years. Walbrook Theatre is an example. We have theatres in Baltimore today, the Northwood, the Windsor, the Beacon, the Highway, none of those houses have scales. I just gave you a few. They have no scale at all.

Q. But you have worked them out when you and the theatre owner had gotten together and agreed on it?

A. If we could have a meeting of the minds, we always adopted the scale.

Q. And if you did not, you sold them some other way; is [fol. 907] that what you try to say?

A. Yes, we sold them straight percentage.

Q. But in dealing with Mr. Myerberg either on run or clearance or scale in connection with his 21-day run, did you in any way give him any other treatment than you gave any other exhibitor in the same 21-day position or first neighborhood run position in Baltimore?

A. He got the same treatment as any other first run theatre. I mean comparable with his theatre. That is as the other subsequent run in different zones.

Q. Now, let us assume just for the purpose of example that you were to sell Mr. Myerberg a day and date first run at the Crest, to play day and date with any theatre downtown, we will say with the Century, Mayfair or the Stanley, wherever you decided you would license your product on that day and date basis, now, as an experienced distributor in this area, what in your opinion would happen in the event Mr. Myerberg played on a day and date first run?

A. I think we would have an avalanche of protests and demands for similar treatment from the other what we call the key theatres, in these sub-run houses in the City of Baltimore. I don't think they would stand idly by and see their—these exhibitors are all very jealous of their playing position, whether he owns one theatre or owns five, and they believe that their theatre is entitled to just as much [fol. 908] consideration as any other theatre in a given city.

We have 20, I think, 25 theatres, that play on the first week of availability, and I imagine the majority of those 25 would ask for a day and date availability if Mr. Myerberg is given that.

Q. And what, in your opinion, would be the effect on the Stanley Theatre, or any other theatre downtown, playing first-run product, if that happened here in Baltimore?

A. Well, depending. The first-run theatre downtown, depending on neighborhood patronage, which I believe we all agree, and has been testified to, it would mean the elimination of the downtown theatre, total elimination of the downtown theatre. I don't think it could survive, with the limited patronage they would have in the immediate area of a downtown theatre.

Q. And, in your answer, you assume theatres like the Boulevard and Northwood and Edmondson Village, and these many other fine theatres in Baltimore, would seek to secure a day and date first-run with Mr. Myerberg's Crest?

A. They would either get it, or we would have a lot of trouble denying them. I don't see how you could deny them. I think you would have to accede to it, if their theatre is comparable, and all the factors that enter into giving a run of that kind, as it is here, whether a 21-day house, they are all comparable. They claim to be comparable as to being a 21-day theatre, and that is the reason they get [fol. 909] product in that first week after clearance with the downtown theatre.

Q. Now, in Norfolk, Virginia, there has been some testimony here about pictures playing first-run in the neighborhood and downtown. What is your situation on Warner product in Norfolk?

A. We play part of our product downtown, and we play the other part day and date with two uptown theatres called the Newport and Colley. That is a rather long story, Mr. Raftery.

Q. Don't go into any long stories. We want to shorten this as much as possible.

A. That was started years ago, when First National was—I will use the word "locked out of downtown". We were unable to get a downtown run on our pictures. I be-

lieve there were only two downtown theatres who had sufficient product, and we were unable to place our product in either one of these theatres, and Mr. Wilder was building the Newport Theatre at the time, and was going to run it as a subsequent-run house; but I made a visit to Mr. Wilder, in Norfolk, in company with our branch manager, and after a session of two or three days, convinced Mr. Wilder to exhibit a sub-run, give us the Newport Theatre as our first-run outlet in Norfolk; so he said, "I am taking a long chance doing that, but you seem to be convinced I can do [fol. 910] something with it, and I will try it." And he gave us the first-run outlet. Then, subsequently, he built the Colley Theatre to run after the Newport. They were about a mile apart and, again, I went to Norfolk and persuaded Mr. Wilder to put the Colley Theatre on a day-and-date with the Newport, so as to give him that additional number of seats in the two theatres, to compete with downtown. However, recently—when I say "recently", in the past few years—the policy has not been too successful. The grosses are falling-off in those theatres, and the downtown grosses have increased; and, today, we are selling a majority of our Warner pictures in the downtown area with the Newport and Granby, which are owned by Mr. Fabian, of New York.

Q. And you don't get any product shown in the Loew's house down there?

A. No. I think we had one picture in the Loew house, that we were short one time a picture and requested Mr. Wilder, or Mr. Vincent, for one picture. It was a pre-Christmas picture. It was an extra picture we had. That was the only picture, to my knowledge.

Q. If you had a preference in every situation, you would prefer to play your pictures, top pictures particularly, in a downtown first-run theatre, whether it is Norfolk, Richmond, Roanoke, Baltimore, or any other city under your jurisdiction?

[fol. 911] A. I would prefer not only to play the top pictures, but I would also like, and would work very earnestly, to get the other pictures in, because of the effect even of the average picture, which is not a top picture. You have a better chance to get the top exploitation and advertising

in downtown, and the possibility of getting a better revenue from the subsequent runs.

Q. Now, the situation over in Washington, from the time Crandall started, right up to the present time, you have always had common ownership between the Ambassador and the Warner, which has been played with the Ambassador?

A. That is right.

Q. And, unless you have common ownership, do you know any way in which you can conduct advertising, runs or clearances in any competitive area?

A. I don't know of any.

Q. Mr. Smeltzer, Mr. Myerberg has put in an exhibit, in which he says, in effect, that if he had played first-run pictures at the Crest Theatre during the period of this lawsuit, he would have held all his patrons, at the higher first-run admission prices, which he had been drawing-in at the 40-cent or lower admission price.

Have you any opinion on that subject?

A. I don't think that could be true, because neighborhood theatres are classified for the purpose of covering an [fol. 912] entire population. Those that can afford to pay 70 cents go to the 70-cent houses, and those that don't wait for the subsequent-runs, whether it be 50 or 40 or 60 cents, and then down the line, those whose incomes are limited will wait for the pictures in the last-run houses, which are generally the 10- and 15- and 20-cent houses. So, if you remove the neighborhood admission price from any neighborhood theatre, and charge the downtown admission price, you may acquire an additional number of customers, and you may also lose a number of your regular customers. That is purely a conjecture on my part, and I believe my guess would be just as good as Mr. Myerberg's.

Q. Isn't it a fact, in a neighborhood house such as the Crest, you play two changes in a week?

A. Sometimes three.

Q. And sometimes three?

A. That is correct; and you have three chances of getting people into the theatre, where, with one picture a week, you have only one chance, unless you get a few repeaters who may enjoy a picture and come back to see it a second

time. But, on the other hand, if you play two pictures a week, you have two opportunities of getting the same people, or three, as the case may be, depending on the changes you make per week in your theatre.

Q. And that would have some effect on the number of, [fol. 913] patrons?

A. Quite naturally, on the number of patrons.

Q. Mr. Myerberg has testified about Saturday openings. Did you have any talks with him about opening the pictures on Saturday in his theatre?

A. Yes.

Q. If you recall them, briefly tell us about them?

A. I have always been opposed to Saturday openings because, if you have got three or four pictures available in the same week, and your picture, in the estimation of the exhibitor, is not a top picture available in that week, you are going to lose a part of the preferred playing time by reason of the Saturday opening; whereas, if you have a Sunday opening, and also Saturday, you have two opportunities in that particular week, and your picture may unfortunately be the No. 2 picture.

Mr. Myerberg requested Saturday openings, and I think we furnished him one—several pictures; and then it got to a point where other exhibitors wanted Saturday openings, and we could not get sufficient available prints of these pictures for Saturday opening. The Washington branch, I think, has a quota of 8 or 10 prints, and in breaking a picture in Baltimore, we have to break anywhere from 12, we have to borrow anywhere from 12 to 16 prints to accommodate our Baltimore break, and a majority of ex- [fol. 914] hibitors at one time were opposed to the Saturday opening. But our problem was to get sufficient prints because, if we gave Mr. Myerberg a print, and couldn't give some other theatre a print, they would feel I was favoring Mr. Myerberg, and it would be a little contention about it; so, I just told him that we would discontinue until we could make arrangements to get sufficient prints for the Saturday break.

Q. In dealing with Mr. Myerberg on that problem, did you discriminate in any way against him or in favor of any other exhibitor playing the same run?

A. No; I think I gave Mr. Myerberg a little break on account of opening a new theatre. I think, on the Saturday opening thing, I think he got several where we had prints available for him.

Mr. Raftery: The witness is with you.

Cross-examination.

By Mr. Rome:

Q. Mr. Smeltzer, you have testified that you are the district manager covering the Philadelphia and Washington branches?

A. Yes, sir.

Q. There is a division manager over you, superior to you?

A. Yes.

Q. Who is that gentleman?

A. That is Mr. Jules Lapidus.

[fol. 915] Q. What is his title—what is his office?

A. Well, he is the eastern division manager under Mr. Kalmenson, who is the general sales manager.

Q. And both Mr. Kalmenson and Mr. Lapidus have jurisdiction over you and are superior to you?

A. Oh, yes.

Q. Actually, although you have said that you are the gentleman that made the decision as to the Crest Theatre, Mr. Lapidus or Mr. Kalmenson, the persons in New York, are the people with the final, ultimate authority in your company?

A. That is correct.

Q. And you simply carry out the directives or orders as laid down by the New York office; is that correct?

A. In the Crest case, that was not referred to the New York office, because I made the decision locally.

Q. Isn't it a fact that in your letter, which is Plaintiff's Exhibit 2, replying to Mr. Myerberg's earlier letter of October 1st, 1948, that you wrote that you were going to take up the matter with the proper executives and that Mr. Myerberg would be advised accordingly?

A. That was referring to the appearance of a star for the opening of his theatre, which he had requested.

Q. Actually, his letter had to do with getting access to first-run product, didn't it?

[fol. 916] A. Oh, no.

Q. It did not?

A. No; I would say that was not my letter. You say, my letter. I would take it up with the New York authorities.

Q. Isn't it a fact, Mr. Smeltzer, that the letter of Mr. Myerberg addressed to you requested Warner Bros.' access to first-run product for the Crest Theatre, and suggested the fact that in connection with the opening he would like to have the best picture available, even, if possible, a World Premier-, with all the fanfare that would go with it, including stars?

A. That is correct; but read my answer to that letter.

Q. You wrote to Mr. Myerberg:

"Enjoyed our chat when you were in the office last week, and the contents of your letter of October 12 regarding personal appearances of Stars for the opening of your Hilltop Theatre, will be taken up with the proper executives and you advised accordingly, however, I thought I thoroughly explained to you regarding Warner Products in our own Stanley Theatre, Baltimore, Md., which I thought at the time was quite explicit."

A. Correct. You have two things there; you have the appearance of a star, in the first paragraph, and you have my explanation, reiterating my statement to Mr. Myerberg, in person.

[fol. 917] Q. So that, actually, with regard to granting of first-run to the Crest Theatre, you did not have to take it up and did not take it up with New York; is that correct?

A. That is correct.

Q. Isn't that due to the fact that you well know that your company customarily licenses its product for first-run exhibition in the theatres located in the downtown areas of cities?

A. No; I don't know that.

Q. You don't know that to be a fact, Mr. Smeltzer?

A. No. You mean all over the country?

Q. Yes.

A. No. The only thing I could say that we had, the

Stanley Theatre is our first-run theatre in the City of Baltimore, and that our product, Warner Bros. Pictures Distributing Corporation pictures, there being common ownership between the theatre and producer, I could give Mr. Myerberg a very quick answer, and told him, and he understood that there wasn't a chance for him to get first-run pictures away from the Stanley Theatre. There wasn't any question about Mr. Myerberg's——

Q. I appreciate that, but isn't it a fact, to your knowledge, that your company customarily licenses its products for first-run exhibition in theatres located in the downtown areas of cities?

[fol. 918] A. Wherever it is possible, they make every effort to do it.

Q. That is a general policy of the company?

A. Yes. No; they want to do that, Mr. Rome, because it is the best showcase for your product, in the downtown area, where you have the proper shopping facilities, and you have a chance for both matinee and night performances, your grosses; and your grosses, as a rule, are far greater in the downtown area than they are in the suburban area.

Q. I recognize that your company wishes to do that. There is no question about that, but I simply want to establish the fact that, to your knowledge, your company actually does it. That is the policy throughout the country, to your knowledge; isn't that a fact?

A. Yes; I won't argue that point.

Q. You know, also, do you not, that Warner Bros. Pictures Distributing Corporation licenses its pictures not only to Warner theatres, but also to theatres operated by Loew's Incorporated?

A. Yes.

Q. And theatres operated by Paramount?

A. Yes.

Q. And RKO?

A. Yes.

Q. And Fox?

[fol. 919] A. Now, the latter company, I don't know; I couldn't answer that. I am just going, as you ask about these different companies, I am going over different cities,

nationally, to get the picture sure. I don't know about Fox. Yes; Fox, I think, possibly——

Q. And, actually, you know of your own knowledge, do you not, Mr. Smeltzer, that these companies pay to Warner Bros. Pictures Distributing Corporation very large sums of money by way of film rental each year for the licensing of Warner pictures?

A. That, I couldn't answer.

Q. You have no idea of the amount of money involved?

A. No. I can give you an answer in so far as Paramount-Publix, in Scranton, or Wilkes-Barre, which we serve out of Philadelphia, and RKO out of Trenton. In Washington, we serve Charlottesville a half of our product, and in Newport News, with Paramount, and in Danville we serve half of Paramount, and the rest to independents. Those are the only ones I have knowledge of, as to amounts.

Q. And, in those situations, these companies do actually pay large sums of money by way of film rental to Warner Bros. Film Distributing Corporation?

A. But the independents, in amount equal, picture by picture, to the other exhibitors. They do not pay any larger amounts, unless it is in a split situation. I would [fol. 920] say, about equal.

Q. But they do have more theatres, however, than independents, don't they?

A. Not in Philadelphia and Washington territory, by comparison with the number of possibilities, no. Nationally, I could not give you the figure.

Q. It is general information in the industry, is it not, that these five companies have owned, together, theatres running to more than several thousand; isn't that so?

A. Mr. Rome, there are so many changes in the theatre setup. I know, as far as Warner's is concerned, you may buy any or all of our theatres, and I don't know how many are being sold daily, or weekly; I have no knowledge of that.

Q. The sale of Warner Theatres stems from the decree in the Paramount case, does it not?

Mr. Raftery: That is objected to. It has nothing to do with the issues involved here.

Mr. Rome: This gentleman raised it. I did not touch on it.

The Court: I don't know that he knows the legal situation.

The Witness: I do not, Your Honor.

The Court: I sustain the objection.

By Mr. Rome:

Q. In line with the policy and the directives of Warner Bros. Pictures Distributing Corporation to get its product [fol. 921] in downtown theatres, first-run, it would not be your view that in the City of Baltimore, no theatre, no matter how fine it might be, no matter what it might offer by way of film rental, would have access to first-run pictures from your company, forgetting for the moment, now, Mr. Smeltzer, that Warner Bros. also owns the Stanley Theatre?

A. Well, Mr. Rome, I would prefer to put it this way: I would prefer to have a theatre downtown as my showcase. Now, if I am blocked-out or locked-out, then I at that time have to make a decision; but I think, in that case, possibly quickly, I would suggest to Parkway Theatre, which is at North Avenue and Charles Street, at a very busy intersection there, where the transportation field covers northeast, southwest, if I had to go into a suburban or residential section, or a sub-run area, I would prefer around North and Charles. I think that is a very active point around there.

Q. The Parkway Theatre is actually owned by Loew's Incorporated?

A. Loew's Incorporated.

Q. And you would prefer that?

A. I don't care who it is owned by. It could be owned by John Jones. That would be my preference. I would not prefer it, because Loew's Incorporated own the theatre.

The Court: Any other questions?

[fols. 922-923] Mr. Rome: Yes; I have some other questions.

The Court: We will take a recess now until two o'clock.

(Thereupon, at 1:00 o'clock p.m., a recess was taken until 2:00 o'clock p.m.)

[fol. 924] AFTERNOON SESSION

(Met, pursuant to the taking of the recess, at 2:00 o'clock p. m.)

The Court: Very well, members of the jury and counsel, we are ready to proceed.

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Thereupon ROBERT SNELTZER resumed the witness stand and, having been previously sworn, testified further on behalf of the defendants, as follows:

Cross-examination (Continued).

By Mr. Rome:

Q. Mr. Sneltzer, you testified that one reason why you were unable to give the Crest Theatre a sliding scale for its film rental was because you had no experience with the grossing of that theatre.

A. Yes, sir.

Q. There came a time, did there not, when the Warner Brothers gave the Uptown a sliding scale, did there not?

A. That is right.

Q. What experience had Warner Brothers had in the Uptown Theatre?

A. Mr. Rome, for years we refused to sell the Uptown Theatre on a scale. As a matter of fact, I don't think we played a picture in the Uptown Theatre up to a picture called Rope, in 1948, and our Baltimore representative came in to the branch manager, the Washington branch, and said [fol. 925] that he had gone over the figures of what the Uptown Theatre was then grossing and arrived at a scale that he thought was equitable and would like to try his pictures in there on that scale, which was done. I think the first picture was Rope.

Q. What figures did your Baltimore man go over, the figures of the Uptown?

A. The figures of the Uptown Theatre.

Q. But actually, as you say, with the exception of the picture Rope, Warner Brothers had not had any of its product appear in the Uptown Theatre for a number of years?

A. I don't think we had played any pictures in the Uptown, if my memory serves me right. We played the Avalon and Pimlico.

Q. Without any experience, Warner Brothers playing in the Uptown did give the Uptown Theatre a sliding scale, did it not?

A. That is correct.

Q. Now, you said also in your direct testimony, Mr. Smeltzer, that you were uncertain that it had not been brought to your attention that the Crest Theatre was seeking a day and date first run. If that fact had been brought directly to your attention would that have made any difference in the answer you would have given in regard to the licensing of Warner Pictures?

A. No, Mr. Kome, because in the first place we had an [fol. 926] existing contract downtown which called for the exclusive first run in the City of Baltimore, which would have prevented us from selling a day and date, and, secondly, there would have been, as I testified, any number of the subsequent run exhibitors in the City of Baltimore who would have desired and requested and demanded the same playing position as the Crest Theatre if we had granted them a day and date.

Q. So that your answer would have been a refusal even on the day and date basis?

A. For the reasons I just gave.

Q. Now, you referred to an existing contract calling for an exclusive run. What do you mean by an existing contract, Mr. Smeltzer?

A. A contract covering Warner Brothers pictures in the Stanley Theatre.

Q. Is that a contract which covers all of Warner's output?

A. Well, it covers all of the pictures we play in the Stanley Theatre, and up to the present time I think all of our pictures are playing first run in the Stanley Theatre.

Q. Doesn't Warner Brothers Distributing Pictures Corporation license its product picture-by-picture?

A. Yes.

Q. So that actually the existing contract would be one applicable to the particular picture; is that correct, sir? [fol. 927] A. That is correct.

Q. If the Crest Theatre, located where it is, had been owned by Warner Brother Circuit Management Corporation, would it have been able to get access to first run pictures from Warner Brothers?

A. Had we had the Stanley Theatre downtown?

Q. Yes.

A. And had taken them out of the Stanley and put them into the Crest; is that what you mean?

Q. Would it have been able to get access to first run pictures on a day and date basis if the Crest had been owned by Warner Brothers Circuit Management Corporation?

A. Well, being our own theatre—you are applying this now to the Warner Ambassador in Washington, which is a common ownership?

Q. My question is directed solely to the position of the Crest Theatre in the City of Baltimore, located where it is, assuming that Warner Brothers Circuit Management Corporation owned it, would the Crest Theatre, under those circumstances, be able to get access to first run pictures on a day and date basis?

A. Mr. Rome, I do not think so, because we had an experience on that some years ago when we owned the Metropolitan Theatre in Baltimore and we wanted to make the Metropolitan a first run with clearance over the sub-runs of [fol. 928] the theatres in the City of Baltimore, and, therefore, there was such a wave of protest on the contemplated action that we just simply dropped it and forgot it. And I presume the same thing would be applicable to the Crest Theatre if we had acquired that.

Q. Isn't it a fact, Mr. Smeltzer, that the Metropolitan Theatre in the City of Baltimore actually played Warner Brothers product on first run?

A. That was the only outlet we could get, Mr. Rome, at that time, for our product. I think that was during the time that Al Jolson made The Jazz Singer and we were not able to make a satisfactory deal and we had acquired the Metropolitan Theatre as our own theatre because we were

out trying to acquire theatres at that time, I think, all over the country.

Q. Well, now, going back to my question with regard to what would happen to the Crest Theatre if it were owned by Warner Brothers. I do not think I understood your answer, sir. Would you repeat it?

A. I am not positive we would play day and date.

Q. As you have testified, it is a fact that in Washington the Ambassador Theatre, owned by Warner Brothers, located about two and one-half miles from downtown Washington, does play day and date——

A. That is correct.

[fol. 929] Q. ——with the Warner Theatre?

A. Correct.

Q. Is there any reason why you would say that you would have doubts about it being done in Baltimore?

A. Yes, because the day and date at the Ambassador was started years ago by an independent exhibitor, H. M. Crandall, and it was an established policy for a good many years prior to Warner Brothers taking over the Ambassador Theatre. The exhibitors in Washington accepted that as an established run. There were no complaints and, of course, now it is common ownership with the Warner Brothers Circuit Management and Warner Brothers Pictures Distributing Corporation, and there has been no complaint in the situation in the City of Washington on that day and date there.

Q. And as a matter of fact, it has been testified here there are a number of subsequent run theatres in the City of Washington which follow the Ambassador Theatre and play Warner Pictures?

A. That is correct.

Q. You have testified, Mr. Smeltzer, that if first run were granted on a day and date basis to the Crest Theatre, that there would be this great demand by other theatres and that the ultimate result would be that the downtown theatres would be eliminated; is not that so?

A. The downtown theatre? The Stanley, I am talking [fol. 930] about.

Q. In those cities where there has been a playing of first

run pictures on a day and date basis with downtown, have the downtown theatres gone out of business?

A. Well, now, I do not know of any situation that you are referring to. If you are talking about Norfolk, you have two residential theatres playing day and date, but not with the downtown theatres. They are not playing day and date with the downtown theatre.

In Richmond we have a downtown theatre playing our product in practically all of our keys, with the exception of Norfolk, and that was of necessity that we had to play our product there because we could not play in a downtown theatre.

Q. But in those cities, the downtown theatres are still functioning, still doing business; is not that a fact?

A. Well, outside of Norfolk, Richmond and Roanoke, those are the only three I know of where any day and date is played first run and, of course, the downtown theatres are still functioning in those three cities.

Q. And the downtown theatres in the City of Washington are still doing business?

A. Well, do you mean the Warner?

Q. Not only Warner, but other houses as well.

A. Day and date at the Ambassador is only on Warner product, and the houses playing the Warner product. We [fol. 931] have no day and date with other downtown theatres in Washington.

Mr. Rome: That is all, Mr. Smeltzer.

Mr. Raftery: No questions.

The Court: That is all.

(Witness excused.)

Mr. Raftery: Mr Lichtman.

Thereupon ALEXANDER LICHTMAN was called as a witness for and on behalf of the defendants, and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your full name?
The Witness: Alexander Lichtman.

Direct examination.

By Mr. Raftery:

Q. State your name for the record.
A. Alexander Lichtman.
Q. Mr. Lichtman, will you try to keep your voice up so we can hear you?
A. Yes, sir.
Q. Where do you reside, Mr. Lichtman?
A. I reside at New York City.
Q. And what is your present position in the motion picture industry?
A. Director of distribution for Twentieth Century-Fox. [fol. 932] Q. And when did you join Twentieth Century-Fox?
A. March 7, 1949.
Q. Now, when did you first enter the motion picture business?
A. 1910.
Q. Briefly, tell us your experience.
A. Well, I started as a film salesman in 1910. I became sales manager of the Famous Players Film Company in 1912.
The Court: I cannot hear you. Raise your voice, please.
The Witness: I became the sales manager of the Famous Players Film Company in 1912. That company developed into what is now known as Paramount Pictures. I was the general manager of Paramount Pictures up until 1921, when I resigned, and I went in business with another man for ourselves and formed the company called the Lichtman Corporation, and made what is known in the trade as Preferred Pictures.
I then subsequently became the vice president and general manager of United Artists Corporation and eventually

its president, until November, 1935, when I resigned and I became the vice president of Metro-Goldwyn-Mayer, or Loew's, Incorporated, which is the holding company of Metro-Goldwyn-Mayer. I was there until March 1, 1949.

[fol. 933] By Mr. Raftery:

Q. During your tenure with Loew's from 1937 until 1949, were you engaged in production as well as distribution?

A. From January, 1938, until March 1, 1949 I was one of the executive producers and one of the executive committee operating the M-G-M studios.

Q. In Culver City?

A. In Culver City, California, yes, sir.

Q. Will you name a few pictures that either you produced or were produced under your supervision during that period?

A. Well, there was The Wizard of Oz, the Thirty Seconds From Tokio, Green Dolphin Street; Mrs. Parkington, with Greer Garson, and Kismet, with Ronald Colman, and many, many others, about 100.

Q. Now, you retired from Metro-Goldwyn-Mayer and intended to lead a life of retirement sometime early in 1949; is that right?

A. Yes, sir, I did.

Q. And how did you happen to join Twentieth Century-Fox?

A. Mr. Skouras, the president of Twentieth Century-Fox, is a life-long friend of mine and he prevailed upon me to join him and asked me to make a survey of his business because they were losing money in their production and dis-

[fol. 934] tribution business.

Q. The losses went back to 1947, I believe.

A. From 1947 on they were losing money. So, I consented to come for one year, and I am still there.

Q. Well, now, you did make a survey?

A. I did make the survey, yes, sir.

Q. Of the distribution business of Twentieth Century-Fox in the United States of America?

A. Yes, sir.

Q. And Canada?

A. Yes, sir.

Q. Now, briefly tell us what you did on the survey?

A. Well, I undertook to examine all their records of contracts which deal with exhibitors, by visiting their branches, talking to their employees and also talking to their customers or exhibitors. We also had meetings with the exhibitors, the first one in Boston, followed by one in New Haven and then in Philadelphia, and subsequently on the Pacific Coast. Then in Atlanta and New York.

[fol. 935] Q. You covered practically the whole country in that survey?

A. Yes.

Q. And personally visited it with your associates?

A. That's right.

Q. During this period of survey,—by the way, you undertook this survey immediately after joining Twentieth Century-Fox?

A. Immediately after joining that company; yes.

Q. And you were trying to find out why they were losing money on production and distribution?

A. I was trying to find out how we could increase the company's revenue.

Q. Did you meet with exhibitors?

A. Yes; I talked with hundreds of exhibitors. We had these luncheon meetings, as I stated before, in exchange centers.

Q. During the course of these various meetings, you addressed these meetings and held open forums and discussed these problems?

A. Right; we did.

Q. And Mr. Rome, who was counsel for Mr. Myerberg, put into evidence Plaintiff's Exhibit 16, a trade paper called, "The Film Bulletin", dated April 11, 1949, on page 7 of which there appears a story under the caption, "Fox [fol. 936] Meetings Forecast Changes in Old Patterns," and then he read from that trade paper.

Now, have you, since he has done that, secured a copy of that trade paper and read the article he referred to?

A. Yes; I did.

Q. Does that article substantially and correctly report the speech you made, either in New York or in Philadelphia?

A. Part of the speech.—This was a reporter's report.

Q. Will you tell His Honor and the jury, as best you can remember, what you told the meeting? And, by the way, do you recognize, by that article, whether he is referring to the New York or Philadelphia meeting?

A. I think it was the New York meeting.

Q. Tell His Honor and the jury exactly what you said, in the best memory you have got of it?

A. Well, I said, as one of the means of possibly increasing the revenue for the exhibitors, as well as Twentieth Century-Fox, would be to explore the possibility of possible day-and-date runs in similar large cities, and also to explore the possibility of reducing clearance of the first-runs in the big cities, and enabling the subsequent-runs in the large cities to play the pictures earlier, and that perhaps more of them playing concurrently, or simultaneously, than was then prevailing at that present time. It was early [fol. 937] in 1949.

Q. You were exploring not only day-and-date first-runs, but day-and-date neighborhood-runs?

A. That's right.

Q. And possibly the creation of more day-and-date first-runs, and possibly the creation of more and more day-and-date neighborhood runs?

A. That is correct.

Q. Were you also considering the possibility in a given situation of staggering runs, if you thought it would help your revenue?

A. Staggering runs? I don't understand what you mean.

Q. Assuming you had a situation where a neighborhood was playing on 21 days after downtown, and you had 25 of those runs; did you give any thought or consideration to moving some of them up to, say, 14 days, and keeping some at 21, and possibly creating a different setup?

A. Not at that time.

Q. Not at that time?

A. Not at that time.

Q. At that time, you were considering multiple runs?

A. That's right.

Q. After you had advanced these various thoughts, and had secured from exhibitors their reactions and what-not, did you delegate some of your assistants to make surveys in

[fol. 938] all of the large cities that you thought required surveys?

A. Yes, sir; I did.

Q. And was Baltimore one of them?

A. Yes; it was.

Q. Whom did you designate to make the survey in Baltimore and report to you?

A. Mr. Howard Minsky, who was the assistant division manager at that time, and subsequently became the division manager with Philadelphia, Baltimore and Pittsburgh; and Mr. Glenn Norris, who was then our branch manager in Washington, and is now the division manager in charge of Philadelphia, Washington and Pittsburgh.

Q. Did you receive a report from these associates of yours as to Baltimore?

A. Yes; I did.

Q. Now, will you tell His Honor and the jury the report that you got from Messrs. Minsky and Norris in regard to Baltimore on this question of multiple runs?

Mr. Rome: Excuse me, sir. Do you have a copy of that report, Mr. Raftery?

Mr. Raftery: Was that report oral or in writing?

The Witness: It was an oral report.

Mr. Rome: Will you fix it in time?

By Mr. Raftery:

Q. When you got your report, if you remember, when was it?

[fol. 939] A. Sometime in '49; I don't remember the exact date.

Q. In all probability——

A. And I got the report directly from Mr. Smith. Mr. Smith was the general sales manager, and these men reported to Mr. Smith, or one of them, Mr. Minsky, reported to Mr. Smith, and in turn Mr. Smith reported to me, as was his custom, daily.

Q. Was that the regular course of operation in your company?

A. It was a regular daily routine.

Q. By the way, Mr. Smith is no longer with your company?

A. Mr. Smith is no longer with us.

Q. Will you tell His Honor and the jury the sum and substance of the report you got through Mr. Smith from Norris and Minsky?

Mr. Rome: I object to that, as being pure hearsay as to this witness. These other persons, who actually made the report, would be better able to testify to it.

The Court: You are asking him the gist of his report?

Mr. Raftery: The gist of the report made by his associates in the regular course of business.

The Court: I will allow it.

The Witness: Mr. Smith told me that after Messrs. [fol. 940] Minsky and Norris had made a very thorough survey of the City of Baltimore, that the plan that I proposed was not practical. I asked the reasons, and they said the reasons were as follows:

In the first place, a downtown exhibitor, with whom we have been exhibiting our pictures first-run in Baltimore for over 20 years, would not agree to playing day and date with any subsequent-run theatre. In fact, they told me that the exhibitor threatened a lawsuit against us if we attempted it. That was the principal thing.

Then I asked them to survey the situation as to creating a better subsequent-run exhibition in the City of Baltimore, and they were for over a week in this city, in their attempt to do that, and they approached practically every important operator of subsequent-run theatres, and they were told by the most influential and most prominent ones, and those exhibitors who gave us the most revenue, that they did not want their conditions disturbed, they wanted to remain status quo, and did not want the exhibition condition in this city to change.

Q. Now, Mr. Lichtman, Mr. Rome has introduced some evidence about multiple runs in the city of Los Angeles. When you were with M-G-M, you lived there many years, and were very close to that situation out there, were you not?

A. Yes.

[fol. 941] Q. And you are thoroughly familiar with Los Angeles?

A. Yes.

Q. Tell His Honor and the jury what the situation is with regard to multiple runs in Los Angeles, and what has happened to it?

A. Well, the greater city of Los Angeles is really a city of about seven or eight different communities. In the greater city of Los Angeles, the population runs to approximately four million people, although only about 40 years ago the city had only a population of 300,000; so, in that period of time, it has grown to this tremendous metropolitan area. At one time we had only one first-run in the city of Los Angeles, because it only had one shopping area, and only had one area where all the people congregated for their shopping, as well as their amusement; and then, as the city grew, and these about seven different communities developed, such as what they call the "miracle mile," which leads into Beverly Hills, today that section of the city has the biggest department stores, who also have their stores downtown, such as the May Company, and others, and all the specialty shops have big shops there, and there are a few theatres.

Then there is another section, that just developed within the last three or four years, where every big department store has established a large branch. It is in the southwest [fol. 942] corner of Los Angeles. They call it the Crenshaw Section; and there are communities such as Inglewood, and Hollywood, which was the first of the large communities to develop.

At one time it was a separate community altogether, with a separate government. Now it has merged with the city of Los Angeles. But that, too, has a great big area of wonderful shopping centers, with all the big stores and fine theatres and fine restaurants, and everything else.

Then there is Inglewood, and Glendale, a short distance; and it is very widely spread-out. It covers a larger area than any other city in the United States. So, there, eventually, starting with that one first-run downtown, there developed, in some instances, with certain pictures, as many as five simultaneous runs. In most cases, it was first downtown Los Angeles, and then Hollywood. Then it developed into downtown Los Angeles, Hollywood, and a theatre

called the Uptown, which was in the mid-section of the city proper; and then a place called Westchester, another new development, which is toward Inglewood. They built a theatre there, and they ran on Fox pictures, together with three other theatres that were owned by the Fox Company, simultaneously.

That condition has prevailed, as far as Fox is concerned, up until now.

[fol. 943] Now, starting on June 7th, that will be changed, because the Fox Company will institute, will try to institute, a different system of distribution there, because the revenue for the theatres has diminished to such a great extent since 1949, by virtue of the large installation of television sets in the homes, that the business in Greater Los Angeles is so poor that the theatres that were formerly grossing as much as $30,000 a week are now grossing seven and eight and ten thousand dollars; and the theatres that were grossing as high as $10,000 a week, in some of the outlying sections, are now grossing $3,000; so, it is obvious that the revenue spread among that many theatres, carrying so much overhead, makes it impossible for other theatres, for either the theatres to be profitable or the picture companies to receive an adequate revenue, by showing in so many theatres. So, we are about to change that policy.

Q. In Denver, you have had a day-and-date policy on Fox product for some years past, in some theatres?

A. Yes. I don't know how that came about. I am not familiar with it, but the Fox Company operates a number of theatres downtown, and were habitually playing Fox pictures in two small neighborhood houses, that conflicted with no other subsequent-run theatres in that city.

Q. Denver, in population and area and character, is [fol. 944] in no way comparable with the City of Baltimore?

A. Denver has a population of about 300,000 people.

Q. In Kansas City, Fox has been showing pictures in the downtown Tower Theatre, and a neighborhood theatre called the Uptown, and a theatre out in the county, called the Fairway, for some time past, hasn't it?

A. Again, that was by virtue of necessity, because there is really only one first-class theatre, first-run downtown

theatre, in the city of Kansas City. That is the Midland Theatre, a good, big, fine theatre; and there are two or three other old theatres in the city of Kansas City, and they were not available for Fox product, because they were habitually playing other companies' products. So that, as a means of securing a decent film revenue, they went to this policy of showing on these theatres, only one of which is downtown, but it is an old, small theatre.

Q. The Tower is the old Pantages Theatre, and has the poorest location of any downtown theatre, and not near the capacity of a theatre like the Midland; is that a fact?

A. That is correct.

Q. And the only other product played in those two houses is Universal; is that a fact, if you know?

A. I don't know.

Mr. Rome: I object to this manner of Mr. Raftery testifying, rather than putting the questions to the wit-[fol. 945] ness.

By Mr. Raftery:

Q. All right, we will leave Kansas City.

Mr. Rome put in evidence a letter about your experience and, by "your experience", I mean Twentieth Century-Fox, in Cincinnati, last year.

Can you tell His Honor and the jury what happened in Cincinnati, what your experience was, and what the result is, today?

A. We were selling our pictures first-run to a firm—I don't recall the corporate name, but it was operated by two men, Mr. White and Mr. Lipson, and they operated three theatres downtown. One of them was closed at the time I speak of—the Shubert was closed—and they were operating the Capital and the Keith. The Capital was the best theatre of the three. Certain subsequent-run exhibitors, and one operator of a drive-in theatre, demanded that we reduce the clearance of the first-run; the clearance then established was the fifth Sunday after the completion of the run in the Capital or Keith Theatres. They demanded that their clearance be reduced to 21 days, so our representative went to Mr. White and asked him to agree to this,

which he refused; and he further stated that if we insisted on reducing his clearance, that he would not buy our pictures. And, after many negotiations, he still persisted in [fol. 946] that position. The exhibitors making the demand for this clearance had threatened at that time, and subsequently did file a lawsuit against all the film companies, for three million and some-odd-thousand dollars, treble damages, because of the unfair clearance they claimed. So, our representatives, after they were told by Mr. White that he would not buy our pictures with the reduced clearance, went to these exhibitors and negotiated with them to play our pictures simultaneously in those four theatres, plus this one drive-in, first-run, in the city of Cincinnati, because, after Mr. White refused to buy our pictures, we had no other outlet; and we said we would try it, and we sold them 14 pictures. And, when we sold them those 14 pictures, they took us out of the lawsuit; but they proceeded with the lawsuit against the other companies.

Now, then, during the time that we were playing these pictures with these four theatres, the subsequent-run theatres, and the drive-in, we had all sorts of difficulties. Some of the theatres only wanted to play the pictures three days, while others would play it for a full week, which way the provision of the contract. In other words, it was difficult to get them to agree; and, furthermore, we found that we did not earn as much money as they promised us they would, as we earned with first-run on comparable pictures. And, when the contracts for the 14 [fol. 947] pictures expired, we went back to sell our pictures with the reduced clearance.

However, Mr. White——

Q. And, not that this has anything to do with this incident, but Mr. White and Mr. Lipson have both died, in the interim?

A. Yes; they both died recently, very recently.

Q. Now, you were out to the Crest Theatre last night?

A. Yes.

Q. That is the first time you have seen it?

A. Yes.

Q. Up until then, you had reports on it from your organization. How did you make an inspection of the theatre?

A. Not a complete inspection, but I walked down one of the aisles; I saw the theatre from the back and from the front, looked up, and the manager of the theatre pointed out the different things about the theatre to me.

Q. You were introduced to the manager by Mr. Norris?

A. Yes.

Q. And you did not meet Mr. Myerberg?

A. No; I didn't.

Q. You have never met him?

A. I never met him.

Q. Now, from the reports that you have received from your associates and assistants, and from an examination of [fol. 948] the film rentals and grosses that your pictures have achieved in that theatre for the first neighborhood run, and from your personal examination of the theatre and the neighborhood, is that theatre, in your opinion, suited for an exclusive or day-and-date first-run in the City of Baltimore?

A. No, sir.

Q. During this trial—by the way, Mr. Lichtman, Mr. Grimes gave considerable testimony about shrinking grosses in the business. What have you to say on that subject, in relation to a city like Baltimore, or Washington?

A. The grosses of all theatres, generally, throughout the United States, except in a very few sections, where television has not been saturated to any extent, have been declining steadily since 1948, and I would say that, over-all, in the theatres throughout the country, gross revenues have dropped about 30 per cent as of now. They are 30 per cent less than they were in 1948, on a whole; and in some cases it is as high as 50 per cent.

Q. And that drop has made itself felt in first-run and second-run, and all runs?

A. All runs.

Q. And Baltimore is no exception?

A. Not whatsoever.

Q. During this trial, Mr. Myerberg, on page 498, testi- [fol. 949] fied as follows, in response to a question that I asked him:

"Fox Film has another picture coming up, Diplomatic Courier, I think. You are familiar with it.

"Q. I am not.

"A. Tyrone Power. Any time Fox Film wants an offer on that picture to play day and date or exclusive in the City of Baltimore, I will give them a $15,000 certified check, to be put up within 24 hours, either to play that picture day and date downtown, or exclusive in the City of Baltimore."

Now, on page 530, he said:

"A. No, sir; and I will return to the offer I made to you for Diplomatic Courier."

Then I said: "I do not sell pictures, I am sorry."

Now, taking into consideration that in your opinion the theatre is not suited for first-run pictures, if Mr. Myerberg were to come to you as the head of distribution of Fox Film, with a certified check for $15,000, payable to the order of Twentieth Century-Fox, with the further understanding that there would be no adjustment, if he played the picture,—what would your answer be to Mr. Myerberg?

A. I will accept the offer. I will accept it now, but I want to tell Mr. Myerberg, in all fairness, that the last [fol. 950] Tyrone Power picture, a good one, the name of it was Rawhide, only earned, out of 78 runs in the City of Baltimore, $14,200.

Mr. Myerberg: I would still make that offer.

The Witness: I will take your offer. I am glad to get it.

By Mr. Raftery:

Q. Mr. Lichtman, in accepting that offer, do you feel you are in any way experimenting in Baltimore on that picture?

A. Not at all.

Q. You [illegible] lose your first-run downtown?

A. I am prepared to lose every run. That is more money than I will get if I played all of them, today.

Q. That is your position in answer to that challenge given to me?

A. Yes, sir.

Mr. Raftery: You may cross-examine.

The Witness: I want a certified check.

Mr. Myerberg: You will have it.

Cross-examination.

By Mr. Rome:

Q. Mr. Lichtman, you have said that you were a director of distribution for Fox?

A. Yes.

Q. Who is the president of Fox?

A. Mr. Spyros Skouras.

[fol. 951] Q. Is there a president of the board of Fox?

A. No.

Q. Is there a gentleman named Schenk connected in any way with Fox?

A. We have, yes; he is an executive of the studio in California.

Q. That is Mr. Joseph Schenk?

A. Joseph M. Schenk.

Q. That Mr. Schenk is a brother of Mr. Nicholas Schenk?

A. Yes; a brother of Mr. Nicholas Schenk.

Q. What is the position of Mr. Nicholas Schenk?

A. He is president of Loew's Incorporated.

Q. Mr. Spyros Skouras, who is the president of Fox, has a brother named George Skouras?

A. That's right.

Q. And Mr. George Skouras is the head of a circuit of theatres; isn't that so?

A. That is true.

Q. Do you know approximately how many theatres Mr. Skouras' circuit comprises, sir?

A. Not offhand.

[fol. 952] Q. It runs into a great many, does it?

A. Quite a number, yes.

Q. Mr. Skouras has another brother named Charles, has he not?

A. That is right.

Q. Mr. Charles Skouras is associated in connection with running of theatres run by Fox itself; is not that so, sir?

A. He is the president of National Theatres, which presently is a subsidiary of Twentieth Century-Fox.

Q. And how many theatres comprise National Theatres, Mr. Lichtman?

A. Approximately 500.

Q. Those theatres are spread throughout the country, are they not?

A. There are a few in the East, but mostly in the West.

Q. And a great many of those theatres are first run theatres?

A. Quite a few.

Q. Located for the most part in the downtown sections of cities?

A. Many of them, yes.

Q. You mentioned Mr. Minsky who used to be with Fox.

A. That is right.

[fol. 953] Q. He is no longer with Fox, is he?

A. No.

Q. What company is he with?

A. He is working with Paramount.

Q. And Mr. Minsky is also the nephew of a man named Kalmine?

A. I don't know all his relatives, no.

Q. Mr. Kalmine is the head of the theatre division of Warner Brothers; is not that so?

A. That is right.

Q. Now, you testified that you were at one time the vice president and general manager of United Artists and subsequently the president of United Artists?

A. That is right.

Q. At one time there was a gentleman named Sears with United Artists; is not that so?

A. He was there after I was there.

Q. Do you know, Mr. Lichtman, that that gentleman named Sears was also with the distribution division of Warner Brothers?

A. Yes, sir, he worked there before.

Q. Who is the present head of the Metro sales division of Loew's Incorporated?

A. A man named Reagan.

Q. Charles Reagan?

[fol. 954] A. Charles Reagan.

Q. And Mr. Reagan was for a number of years in the distribution department of Paramount, was he not, sir?

A. Yes.

Q. And there is also a gentleman holding a high position in Paramount named Mr. O'Shea, is there not, sir?

A. I think so. I think that is right.

Q. And Mr. O'Shea used to be with Metro at one time?

A. That is right, sir.

Q. There is also a gentleman named Schwalberg presently with Paramount Pictures?

A. Yes, sir.

Q. Mr. Schwalberg for a number of years was associated with Warner Brothers, was he not, sir?

A. I don't know.

Q. You have no knowledge of that at all, sir?

A. No.

Q. Do you know whether or not Mr. William Scully, who has to do with the sales division of Universal, was also at one time associated with the distribution department of Metro?

A. That is correct.

Q. And there was a gentleman named Blumberg, who was the president of Universal; is not that so, sir?

A. Yes, sir.

[fol. 955] Q. And was that same Mr. Blumberg vice president of RKO at one time?

A. Yes, he worked for RKO Theatres at one time.

Q. Now, you know, do you not, Mr. Lichtman, that not only does Fox own theatres, but the other so-called Big Five own hundreds of theatres located in various sections of the country; is not that a fact, sir?

A. Yes.

Q. And those theatres also are in many, many instances first run theatres?

A. Yes.

Q. And those theatres are in the downtown section of cities; is that correct, sir?

A. They own all types and kinds of theatres.

Q. But their first run theatres are located——

A. Some are and some are not. Some are in the suburbs.

Q. Fox licenses its pictures to all of those companies?

A. Not all of them. We sell pictures today theatre by theatre, picture by picture.

Q. Now, over the years hasn't it been the fact, Mr. Licht-

man, that Fox has actually licensed and has exhibited its pictures in the theatres owned by Paramount?

A. Some places, yes.

Q. And by Warner Brothers?

A. In some places, yes.

[fol. 956] Q. And by Loew's, Incorporated?

A. In some places, yes.

Q. And by RKO?

A. In some places, yes.

Q. And actually Fox has received substantial amounts of money by way of film rental from those other companies?

A. Naturally.

Q. On the other hand, those other companies equally license their product for exhibition in the theatres owned by Fox; is not that so?

A. In some places they do.

Q. And the Fox theatres pay substantial sums of money to those other companies for the licensing of those pictures?

A. Depending on where they buy, what they buy, and when they buy. I have no direct knowledge of that. I have nothing to do with it.

Q. You are in charge of distribution, are you not, sir?

A. Yes. Now, you are asking me do I know what the Fox Theatre Company pays these other companies for film.

Q. Yes, sir.

A. I do not know that.

Q. Your duties in connection with the Fox would not bring you in any way in contact with that information?

A. No, sir.

Q. You know, however, that it has been found as a fact [fol. 957] in a case brought by the Government against your company, not only your present company, but the other companies with which you have been associated in the past, that each one of these distributors has as its best customers the other distributors?

Mr. Raftery: That is objected to, in an attempt to get in the finding from the Paramount case.

The Court: I will allow the question. Go ahead.

The Witness: No, I do not know that to be a fact.

By Mr. Rome:

Q. Are you familiar with the Paramount case, Mr. Lichtman?

A. Somewhat.

Q. Haven't you discussed it with your counsel on numerous occasions?

A. No, I have not. I have read the document, though.

Q. Have you made no attempt to revise your distribution policy since the finding in the decrees in the Paramount case?

A. We have, yes.

Q. In line with that, sir, hasn't it been brought to your attention that it has been found to be so that your company has actually had as its best customer all the other distributor defendants appearing in this case?

A. No, sir.

Mr. Raftery: I wish to object to this whole line, for all of the reasons I have heretofore stated.

[fol. 968] The Court: I think the witness answered the question before the question was ended.

Mr. Raftery: I just want an objection to the line, Your Honor. I do not want to be interrupting my friend here. I think we are getting far afield on it.

By Mr. Rome:

Q. Mr. Lichtman, the speech that has been referred to that you made, quoted you as saying that the distributor and the exhibitor might best be served by playing a picture first run in a number of theatres simultaneously and reducing the clearance for subsequent runs, and you were further quoted as saying, "We want pictures with a large expenditure of money for advertising, and we tell the public it can only see it in one theatre. They have to go great distances, at great inconvenience in transportation and other matters." That remains the fact, does it, Mr. Lichtman, that it is inconvenient for a great many people by virtue of the transportation problems in large cities today?

A. It seems so, by the great reduction in income in some of those theatres today.

Q. And one way of remedying that would be to bring the

product on first run to the theatres located in areas nearer the people, so they wouldn't have to struggle with transportation; is not that so?

A. But now we find that the revenue is so thin that even the places—I must say this so you get a clear understanding [fol. 959] of exactly what I mean and what I have in mind. You cannot set a national policy with things of this sort. Each city is different from every other city, and you must study each situation separately, and what may apply in one situation will not work in another. So, therefore, each situation has to be studied and worked out in concert and in agreement with your customers, because you can have all sorts of theories as to what may be good distribution practice, but if your customers do not agree with you, you cannot accomplish it. Do you understand?

Q. I understand.

A. O. K., sir.

Q. You were also quoted as saying that "after the run in that one theatre we place the picture in mothballs for a considerable period of time before that picture reaches the fine theatre in the residential sections of these large cities. By that time the advertising is forgotten and other pictures are being announced, with the result that we are losing a great portion of the patronage which, of course, means a great many dollars to all of us."

Your views still remain the same with regard to that, Mr. Lichtman, do they?

A. Not as a blanket proposition, no. You ask me about any specific city and I will answer it if I have information about it.

[fol. 960] Q. You were speaking generally when you made this statement either in Philadelphia or New York?

A. Yes, but immediately after that I set my organization to work to make studies of each city. For example, in Philadelphia, as a result of that speech, we reduced the clearance of the Fox theatre that had first run in Philadelphia and increased the number of subsequent runs simultaneously from 9 to 18. We set up 18 different zones. Now, today, I wish I didn't have 18, because the revenue is spread too thin, and if I were to make a speech today to the exhibitors in Philadelphia I would ask them to move some

of them back, and I would reduce my terms to those who would move back, because there are too many of them running day and date today, and I tried to do the same thing in Baltimore. There are too many running day and date in Baltimore. I tried to do it in Detroit. There are too many running day and date in Detroit. While in 1949, when I made that speech when business was much better, I felt that was the right thing to do.

Q. You recognize, do you not, sir, your burden is to sell picture by picture and theatre by theatre; is not that so?

A. Yes, sir.

Q. How, then, do you reconcile your obligation in that regard with your statement that you are considering the [fol. 961] over-all revenue as being spread too thin.

A. I do not understand your question, sir.

Q. Are you not failing to consider each theatre on its merits as to its right to have access to first run pictures if you consider that the total revenue derived by Fox from any particular situation is less than it has been in the past?

A. I still do not understand your question.

Q. Let me try it this way, Mr. Lichtman: You must consider the Crest on its own merits as a theatre, must you not?

A. That is right.

Q. And the fact that other exhibitors might protest has nothing whatever to do with the right on the part of the Crest Theatre as a theatre to have access to first run pictures or not; is not that so, sir?

A. No, sir, that is not so.

Q. What is your obligation, as you view it, sir, with regard to licensing or not licensing first run pictures to the Crest Theatre?

A. Well, sir, the theory of motion picture distribution from the inception of feature motion pictures, and I think I was one of the men who took part in establishing this thing nationally, was that we would have a representative first run theatre in each of the big cities of the country, [fol. 962] the so-called show case theatres, where we would exhibit the pictures where the greatest number of people in that community would have access to that theatre. Number one.

Secondly, it would act as the exploitation point for that territory, and then we would make the pictures available, based upon the location, class, condition of the theatre, down to the point where we would make the picture available to people of all classes, because as the runs became later the admission prices usually drop also. So, the fellow having only a dime to spend would have the opportunity to see it. That has been the theory of distribution ever since I have been in the business, and that has been almost since its inception.

Q. Has there been any change of that policy over these years, Mr. Lichtman?

A. Not basically, no.

Q. So it remains a fact that the exhibition of pictures on first run remains concentrated in the downtown areas of cities, particularly the larger cities of the country?

A. That is correct.

Q. And is it the fact that no theatre in the City of Baltimore, no matter how fine it might be, would be granted access to first run pictures by your company either on an exclusive or on a day and date basis?

A. I would not say as to the fact. I just accepted the [fol. 963] deal because necessity compels me to try to get the most money today, and here is a man willing to lose money, I know he will lose money, when he pays me $15,000 for a picture. But as you say in Latin, caveat emptor, if he wants to spend his money, let him spend it.

Q. Was there any reason why your company refused to do that before?

A. Yes. And I say it is bad business now from that standpoint. I do not know, I may get the enmity of every exhibitor in Baltimore by doing this, but I am willing to take that risk, because——

Q. I am sorry, sir, I do not understand your answer to my question. My question was: Why did you not do it before, in Baltimore?

A. Because I do not consider it good business to give a theatre, located where the Crest Theatre is, first run in the City of Baltimore.

Q. But you are now willing to do it even though you consider it bad business?

A. The reason I am doing it is because they, your client, made a big bluff here, offered $15,000 for a picture in a theatre which I do not believe will gross $15,000, even if he runs the picture three weeks, so I wanted to call his bluff.

Q. Was it never brought to your attention, Mr. Lichtman, [fol. 964] that several years ago this same offer was made through Mr. Smith of your company, at which time the Theatre Enterprises, Inc., the plaintiff in this case, offered your company certified checks by way of guarantee for the licensing of pictures? Was that never brought to your attention?

A. No.

Q. Mr. Smith never discussed it with you at any time?

A. I don't recall.

Q. Now, actually, Mr. Lichtman, there came a time when Mr. Myerberg himself communicated with you directly and informed you of the fact he had been seeking to get first run pictures from your company?

A. I knew that. He communicated with me, seeking first run product.

Q. And was there not enclosed with his letter at that time copies of his earlier correspondence and the correspondence with Mr. Smith in the course of which those offers had been made?

A. I don't recall it.

Q. At any rate, it never came to your attention?

A. I don't remember whether it did or not, but I do not recall it.

Q. But presumably if it had come to your attention, you would have been willing to grant the Crest Theatre [fol. 965] access at that time?

A. I do not say that I would.

Q. In these cities in which Fox has its own theatres and has licensed pictures on a day and date first run, there are also subsequent run theatres, are there not, sir?

A. Tell me what cities.

Q. In what cities you covered?

A. You cannot take cities and put them in——

Q. Denver?

A. There are a few.

Q. Kansas City?

A. Yes.

Q. Los Angeles?

A. A great many.

Q. Roanoke.

A. I don't know about Roanoke. I do not have theatres in Roanoke.

Q. But in those cities?

A. We do not have theatres in Roanoke. You said theatres with Fox.

Q. In those other cities we have just mentioned there are a number of subsequent run theatres. Am I correct in that, so I understand you?

A. Yes.

Q. And those subsequent run theatres continued in busi-
[fol. 966] ness and continue in operation despite the fact there are theatres playing a first run day and date engagement; is not that a fact, sir?

A. Yes, sure.

Q. And the downtown theatres in those areas still continue in business?

A. Some of them. Some are closed. Tell me where and I will answer you specifically.

Q. Mr. Lichtman, we were talking, I thought, sir, about Los Angeles, Kansas City and Roanoke.

A. Some theatres are closed, yes.

Q. Do you attribute that to the fact there has been a day and date policy?

A. No, not necessarily. I attribute it to bad business.

Q. But there has been a general falling off in grosses throughout the country?

A. All over the country.

Q. The practice that Fox has followed in licensing its pictures first run in Baltimore exclusively to the New Theatre is one that was followed for a number of years before the Paramount case; is not that so, sir?

A. I think so.

Q. And during the period of the Paramount case?

A. I do not know. I have only been with Fox since
[fol. 967] 1949. I don't know what happened before that.

Q. When you acquainted yourself with the Baltimore

situation, Mr. Lichtman, wasn't that brought to your attention?

A. I was out of the distribution for 12 years. I was with M-G-M Studio for quite a while.

Q. When you became director of distribution for Fox in anticipation of your coming here, as well as having in mind the reports made to you by Mr. Smith——

A. Yes.

Q. ——did you not learn for years both before and after the years, Fox licensed its pictures to the New Theatre?

A. That is my impression.

Q. And there has never been any alteration in that policy for 20 years?

A. Yes, I think recently there has been an alteration of policy which Mr. Norris, our division manager, can testify to more in detail or accurately than I can, because this is his job.

Q. That has occurred within the past year, sir?

A. Recently, yes.

Q. You have no personal knowledge with regard to the fact general competitive bidding has been instituted for Fox products?

A. That is right.

[fol. 968] Q. So, theatres other than the New Theatre have access to Fox product, as well as in the City of Baltimore?

A. That is correct.

Q. That competitive bidding, however, exists only among the downtown theatres; is not that so, sir?

A. Presently, yes.

Q. Was there any thought on your part, sir, that it might extend to theatres outside of the downtown theatres?

A. I am no fortune teller. I cannot tell what may happen in the future.

Q. In those few cities in which your company is actually granting first run to theatres outside of the downtown area, is not it a fact, Mr. Lichtman, that your company has done so in order to avoid the principle of uniformity so as to prevent the possibility of evidence being obtained of conspiracy and combination in violation of the Sherman Act?

A. I have no such knowledge of any such thing.

Q. Actually, weren't you so advised by your own counsel, sir, in connection with the city of Cincinnati?

A. No, sir, I did not consult my counsel in connection with Cincinnati. I acted upon my own initiative.

Q. Mr. Lichtman, I want to be fair with you with regard to this, sir. Your statement is you did not consult counsel in connection with the city of Cincinnati in the multiple [fol. 969] licensing in the city of Cincinnati?

A. No, I did not. I do not recall that, sir, no, sir.

Q. There has been offered in evidence here in this case, Mr. Lichtman, as plaintiff's exhibit No. 57; a copy of an office memorandum from your company addressed to Mr. H. Blackmer Johnson, from Mr. Gehring, which reads as follows:

"Note the attached which Andy Smith wrote Al Lichtman telling him of the decision we have made regarding the distribution of our pictures first run Cincinnati. Mr. Lichtman has asked me to have you give thought to the outline in Mr. Smith's letter and advise me, please, if you have not a legal problem involved."

Do you remember that?

A. That may be so. That does not mean that I consulted a lawyer. Mr. Gehring consulted the lawyer.

Q. It was at your request?

A. That is right. You asked me if I consulted a lawyer in connection with the Cincinnati case, but I have no recollection of it.

Q. Your statement now is you did not do it directly. It was done through Mr. Gehring?

A. Apparently, yes.

Q. Do you remember what advice you were given by [fol. 970] your counsel with regard to that situation in Cincinnati?

A. No, I do not.

Q. There has been offered in evidence, Mr. Lichtman, as plaintiff's exhibit No. 58, a copy of a memorandum from Mr. Johnson, who is one of the attorneys for Fox, is he not?

A. That is right.

Q. Which reads as follows:

"As requested"—this is addressed to Mr. Gehring, sir—"we have examined Mr. Smith's memo to Mr. Lichtman of April 6, 1951. Speaking generally, I see no legal objection to the playing policy outlined thereunder. In fact, a departure from established playing arrangements made individually by a single distributor usually appears excellent evidence of absence of conspiracy or combination."

Do you recall that now, sir?

A. I do not recall it, sir. It wasn't addressed to me, so I do not recall it.

Q. Mr. Gehring never discussed it with you?

A. I do not remember whether he did or not. I do not remember that.

Q. You recognize, do you not, Mr. Lichtman, that by the decision of your company denying access of first run pictures to the Crest up until Diplomatic Courier, you have thereby fixed the terms and the conditions under which this new $460,000 theatre is permitted to compete in the motion [fol. 971] picture industry; is not that so?

A. I do not quite understand what you mean.

Q. Your decision to deny access to the Crest Theatre to first run pictures, either on an exclusive or either on a day and date basis, has had the effect up until now, has it not, sir, of actually fixing the terms and the conditions and the manner in which this new $460,000 theatre can compete in the motion picture industry; is not that so?

A. I do not think my action had that effect, no.

Q. At least, insofar as Fox product is concerned?

A. It may be insofar as Fox product is concerned, yes.

Q. And actually, as I understand your views, sir,—please correct me if I misunderstood you—your view is that you wish to continue the operation of first run only in theatres located in the downtown area of cities; is that so, sir?

A. Yes, sir, for the present, sir.

Mr. Rome: That is all, sir.

The Witness: Thank you.

(Witness excused.)

The Court: How many more witnesses will you have?

Mr. Raftery: I haven't so many now, I am getting near the end.

The Court: How near?

[fol. 972] Mr. Raftery: About seven, I would say. Eight at the outside.

The Court: Are they of the same tenure?

Mr. Raftery: No. First I want to call a witness out of turn now. I think I will have him on and off in ten minutes.

The Court: Very well.

Mr. Raftery: Mr. Gerald Price.

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[fol. 973] Thereupon GERALD P. PRICE was called as a witness for and on behalf of the defendants, and having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name for the record?

The Witness: Gerald P. Price.

Direct examination.

By Mr. Raftery:

Q. Where do you reside, Mr. Price?

A. Silver Spring, Maryland.

Q. What is your present occupation?

A. General manager, Glen Echo Amusement Park.

Q. You are not connected with any of the defendants in this lawsuit, as of the present time?

A. That is right.

Q. You were branch manager of United Artists Corporation, were you not?

A. That is correct.

Q. And you resigned from that position when?

A. About March, 1950, the latter part of March.

Q. You were manager of United Artists Corporation when Mr. Myerberg wrote his form letter of October 12th, which we referred to as the World Premier- letter?

A. Yes, sir.

[fol. 974] Q. You remember that letter?

A. Yes, sir.

Q. And you continued in that position up until after he had opened his theatre, and for about a year after that?

A. That is right.

Q. United Artists Corporation is engaged solely in the business of distributing motion pictures?

A. That is correct.

Q. It produces no pictures?

A. No, sir.

Q. Owns no theatres?

A. That is correct.

Q. And it distributes these pictures for independent producers who use them as a factor or broker to get the pictures out to the public?

A. That is correct, sir.

Q. In addition, when you solicited a contract for United Artists pictures, and sent it into the home office for approval, did you have to get any separate and distinct approval, besides that of your superior in the home office?

A. Yes; we had to have the approval of the producer's representative.

Q. And every producer had a representative?

A. That is correct.

[fol. 975] Q. And each of your pictures, all of the time, was sold individually and separately, and on a separate contract?

A. Yes.

Q. And a separate approval from each separate producer?

A. That is correct.

Q. In addition, Mr. Price, you were Baltimore salesman for United Artists for a considerable period before you became branch manager?

A. That is correct.

Q. And you spent practically every week here in Baltimore?

A. That is correct.

Q. Are you thoroughly familiar with the Crest Theatre location?

A. Yes.

Q. You have been in the theatre?

A. Yes, sir.

Q. Did you form a judgment as to whether the Crest Theatre was suited for the exhibition of your pictures first run Baltimore exclusive?

A. Yes, sir.

Q. And what was that judgment?

A. Well, if I owned the pictures, myself, I would not put them in a location such as the Crest on the first-run picture, because there just isn't traffic in that area to [fol. 976] carry the burden and give you the proper revenue for the money you have invested.

The Court: I can't hear you.

The Witness: There just isn't traffic in that area to carry the burden and give you the proper revenue for the money you have invested.

By Mr. Raftery:

Q. Mr. G. L. Sears was your superior, and president of the company, and head of sales during this period that you made those decisions?

A. Yes, sir.

Q. By the way, Mr. Sears is now an invalid?

A. That is correct.

Q. And he has completely retired from the business?

A. That is right, sir.

Q. Did you report your judgment to Mr. Sears that, in your opinion, this theatre was not suited for a first run exclusive exhibition?

A. I really don't recall at this time whether I did or not.

Q. But you did report to somebody at the home office?

A. Yes, sir.

Q. And they accepted your recommendation?

A. That is right.

Q. In arriving at that judgment, did you consult with any other distributor of motion pictures in the Baltimore [fol. 977] area?

A. No, sir.

Q. That was arrived at separately and independently, from your own business judgment?

A. That is right, sir.

Q. Did United Artists during that period have any continuity of releases?

A. On the contrary, sir, they had very, very little continuity. We never knew when we were going to get pictures. Sometimes a month would go by before they would release a picture. We couldn't guarantee any theatre a steady flow of products.

Q. For any run?

A. That is right.

Q. As a matter of fact, during your stay here as manager of United Artists, you sold the great bulk of your pictures to the Mayfair Theatre, Baltimore?

A. That is correct. As a matter of fact, we sold them to practically every downtown theatre.

Q. Did you have any national policy or policies in your area as to either selling downtown, or uptown, or suburban, or in any way, in this area?

A. We sold where we got the most money.

Q. As a matter of fact, down in Roanoke you were not able to sell any pictures downtown, were you?

[fol. 978] A. That is correct.

Q. Do you know the reason?

A. Yes.

Q. What was it?

A. There was a breach of contract, and the owner of the American Theatre was taken into court, and a decision handed down against him; and, for that reason, he was mad at United Artists from that point on, and he would not buy their product, regardless of what stature it was.

Q. In Richmond you generally sold first run downtown?

A. Yes.

Q. And, similarly, in Norfolk?

A. That is right.

Mr. Raftery: The witness is with you.

Cross-examination.

By Mr. Rome:

Q. Mr. Raftery has asked you whether you had any national policy having to do with the licensing of pictures.

You were not the gentleman who made the policy, in any event, were you?

A. That is right.

Q. You simply carried out orders that were sent to you from New York; isn't that correct?

A. After a fashion.

Q. And there was a gentleman named Mark Silver who was your superior, wasn't he?

[fol. 979] A. That is correct.

Q. And Mr. Silver is still able-bodied and around, is he?

A. I would not know, sir.

Q. Do you remember whether it was to him that you reported your judgment concerning the Crest Theatre?

A. I do not remember.

Q. In any event, when the requests came from the Crest Theatre, you simply forwarded that along through channels to New York? Isn't that so?

A. Yes, sir.

Q. And you said you were interested in selling your pictures wherever you could get the most money?

A. That is right.

Q. Your company never even acknowledged Mr. Myerberg's letter, did it?

A. I would not know, sir.

Q. In any event, you were never informed of any such reply, were you?

A. No, sir.

Q. And nobody bothered telling you anything about what had happened to his request for pictures?

A. I don't know that there is anything in any law book that says you have to answer any letter.

Q. I am simply trying to point out the fact. Did they [fol. 980] ever tell you what decision was being made with regard to the request made by the Crest Theatre?

A. I do not recall.

Q. What was your main outlet for first run pictures in downtown Baltimore?

A. What was our main outlet?

Q. Yes.

A. Any downtown theatre.

Q. Isn't it a fact that your pictures played predominantly in the Century Theatre?

A. No, sir.

Q. Do you recall how many pictures played in the Century Theatre during 1948?

A. I wouldn't know; no.

Q. Do you know what film rental you got from the Century Theatre?

A. At this point, I cannot answer that question.

Q. You did know at one time, however?

A. I probably did.

Q. On the basis of information that has been furnished by United Artists, Mr. Price, it appears that during 1948 United Artists licensed nine pictures in the Century Theatre, from which it received an average film rental of $2,721. Would that tie in with your approximate recollection?

[fol. 981] A. Yes, sir.

Q. And in the year 1949 United Artists licensed four pictures in the Century Theatre, from which it received an average film rental of $1,163. Is that about according to your recollection?

A. I couldn't tell you off-hand.

Q. And in the year 1950 United Artists licensed three pictures in the Century Theatre, from which it received an average film rental of $1,345. Have you any recollection about that?

A. No, sir.

Q. But that is a kind of film rental that was the best film rental you could get out of the City of Baltimore? Is that correct?

A. That film rental was not obtained solely from the Century Theatre. We sold pictures to practically every downtown theatre. You are confining your argument to the Century Theatre. We sold films to Keith's, the Mayfair, and other downtown theatres.

Q. Did you get higher film rentals from those other companies?

A. Sometimes we did; sometimes we did not.

Q. As an average, have you any idea about the average film rental you received?

A. I couldn't tell you, at that time.

[fol. 982] Q. And isn't it a fact that that is the kind of film rental you received from the downtown first run houses?

A. Sometimes we received more; sometimes we received less.

Mr. Rome: That is all. Thank you.

Mr. Raftery: That is all.

(Witness excused.)

Mr. Raftery: Mr. Robinson.

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Thereupon Herbert L. Robinson was called as a witness for and on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name for the record?

The Witness: Herbert L. Robinson.

Direct examination.

By Mr. Raftery:

Q. Mr. Robinson, where do you reside?

A. Bronxville, New York.

Q. By whom are you employed?

A. Warner Bros. Pictures Distributing Corporation.

Q. And you do theatre accounting?

[fol. 983] A. Yes, sir.

Q. How long have you been doing theatre accounting?

A. About 36 years, I guess, or something like that.

Q. Sometime last January, were you asked by Mr. Watkins and myself to go over to Mr. Berenholtz's office and make an audit, if you could, and get a balance sheet, if you could, of a company called Theatre Enterprises, Inc?

A. Yes, sir.

Q. And did you go over and make an examination of all the books that Mr. Berenholtz turned over to you?

A. I did.

Q. What were those books?

A. The general ledger, which keeps all of the corporate accounts of the company, and the cash receipts and disbursements book, which had journal entries in the back of the cash receipts book. I believe that is the way it was.

Q. Did you find in the books any balance sheets for the company?

A. No, sir; not in the books. I didn't find any balance sheet anywhere, except the one I had to prepare.

Q. These were all of the books turned over to you by Mr. Berenholtz? Is that right?

A. That is correct.

Q. Did you, from whatever books were given to you, [fol. 984] construct a balance sheet as of 2/28/50 and as of 2/28/51, for a company named Theatre Enterprises, Inc?

A. I did.

Q. I show you a paper, and I will ask you if that is the balance sheet that you constructed of Theatre Enterprises, Inc., last January, over in Mr. Berenholtz's office?

A. It is.

Q. Now, in connection with this company, did you make an examination of the books and records to find out if anybody had put any cash into this thing?

A. I did.

Q. What did you find.

A. I find that the Berlo Vending Company put up $15,000 around the 6th of December, 1949, I believe it was.

Q. Or was it the 6th of February? Do you have a record that will refresh your recollection of that?

A. It is down at the hotel; but it was before the theatre opened.

Q. It was just before it opened?

A. That is correct.

Q. And it opened, according to the record, on the 26th of February, 1949?

A. Somewhere around that date. I do not have the date.

Q. What is this Berlo Vending Company, if you know?

A. It is a company whose main office is in Philadelphia, [fol. 985] that furnishes candy, and things like that, for the vending machines or counters in the theatre, on a basis

of allowing the theatre to take a percentage of such sales as are made.

Q. This was in the nature of an advance from a candy concessionarire who have the candy privilege in the Crest Theatre, and the advance was given against future earnings from candy by the candy company?

A. That is correct.

Q. Did you find a record of any other person, firm or corporation putting a nickel into this Theatre Enterprises, Inc., up to and including the last day you took off the balance sheet, February 28, 1951?

A. Nobody.

Q. What was the subscribed capital, as shown on the balance sheet?

A. $300; but the $300 was never put up.

Q. It had a stock subscription of $300, but whoever subscribed for that failed to put up the money?

A. That is correct.

Q. I notice on here, in the assets as of 1950, there is an item "Penn Construction Company, $13,854" listed as advances.

A. That is correct.

Q. Can you explain that?

A. Checks were issued and charged to this account in [fol. 986] the general ledger. But for what purpose,—I did not see any checks or any evidence as to why it was advanced.

Q. So the indication is that Penn Construction Company owed Theatre Enterprises, Inc., as of the date of entry, that amount of money?

A. That is correct.

[fol. 987] Q. And then you get down to the liabilities and you carry accrued rent of $14,800?

A. That was the unpaid rent, as I recall it, on the basis of $30,000 a year as of February 28, 1950.

Q. Well, now, the total assets shown at the end of the first year, the first fiscal year, on the balance sheet, amount to what?

A. $21,820.28.

Q. Now, under your liabilities and capital for the first year, is there a deficit figure?

A. There is a deficit of $12,413.52, which means that the company owed $12,413.52 more than it had assets.

Q. That is as of 2/28/50?

A. That is correct.

Q. As of 2/28/51, what had happened to the cash? By the way, how much of that $15,000 that Berlo put up was there in the bank as of 2/28/50?

A. The company had $611.49.

Q. That is 1951 I am talking of now.

A. Yes. You said they had banked—had cash in the bank—Is that your question?

Q. Yes.

A. $611.49.

Q. And that is as of 2/28/51?

A. That is correct.

[fol. 988] Q. Let us just look at one item at the end of the year. What was the deficit amount at the end of 2/28/51?

A. $24,178.11.

Q. And these books and records that you examined, the ledger and the cash book, did you find any entries on mortgages or chattel mortgages, or any others, that would show what this company owed?

A. Not at 2/28/51.

Q. And that was the full year they had books for?

A. That is correct.

Mr. Raftery: I offer this balance sheet in evidence.

(Balance sheet on assets and liabilities of Theatre Enterprises, Inc., as of 2/28/50, and 2/28/51, was marked Defendants' Exhibit No. 22.)

Mr. Raftery: You may cross-examine.

The Court: Any questions?

Mr. Rome: Just a few.

Cross-examination.

By Mr. Rome:

Q. Mr. Robinson, you were furnished all the books and records that you requested; isn't that a fact, sir?

A. I wouldn't say all the records; I would say, the general ledger, the cash book, both receipts and disburse-

ments of cash, together with what is known as general [fol. 989] entries, which means an entry affecting one account on another.

Q. Did you ask anyone for anything else?

A. Yes, sir.

Q. Whom did you ask?

A. Mr.—this gentleman there.

Q. Mr. Berenholtz?

A. Yes.

Q. What did you ask him for?

A. For the payroll.

Q. And that was not furnished?

A. No, sir.

Q. Did you ask for anything else?

A. I asked him, I think, for a few bills; and, as I recall it, they were not available in his office, if I am not mistaken.

Q. Did you make any inquiry as to who or what the Pem Construction Company was?

A. Well, I assumed that it was a company that was building the theatre. I didn't ask anybody about it.

Q. Do you know anything about the total cost of the Crest Theatre?

A. Well, it is recorded on the books of the Theatre Enterprises, Inc., or I wouldn't know it.

Q. Do you know who built it?

[fol. 990] A. I assume, Pem Construction.

Q. And you did not see any of the Pem Construction books; is that correct?

A. No, sir.

Mr. Rome: That is all, thank you.

(Witness excused.)

Thereupon GLENN NORRIS was called as a witness for and on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record?
The Witness: Glenn Norris.

Direct examination.

By Mr. Watkins:

Q. Where do you live, Mr. Norris?
A. I live in Virginia, Falls Church.
Q. What is your occupation?
A. At present, I am employed by Twentieth Century-Fox as their Atlantic Division sales manager.
Q. During the years 1949 and 1950, what was your employment?
A. I was managing the Washington branch of Twentieth Century-Fox.
[fol. 991] Q. What territory is included within the Washington branch?
A. The states of Virginia, Maryland, a portion of Delaware, West Virginia, and, of course, the District of Columbia.
Q. Did you have any conferences or discussions with Mr. Myerberg prior to the construction of the Crest Theatre?
A. Yes; Mr. Myerberg called on me sometime the early part of the year, January.
Q. 1948?
A. 1948; January, February, or March, I don't remember the exact date, and talked to me about his general idea and plans for a theatre and shopping center which, I believe, at that time he referred to as the Hill Top Theatre.
Q. Did he have any drawings or maps or blue prints at the time?
A. Yes; he had quite an elaborate set of drawings and plans that he had in mind. It didn't mean an awful lot to me, because I don't know much about the construction, and from the plans could not tell very much about what sort of theatre it might be. However, from his description, it would appear that he intended to build a very unusual and very fine theatre.

Q. Did he at that time make any statement with respect to the run of pictures that he hoped to get or expected to get?

[fol. 992] A. That he was—that the theatre was designed for first-run pictures and, obviously, a theatre of this type, in a shopping community of the type he was building, was designed for first-run pictures.

Q. Was there any statement by him at that time as to whether he intended to operate the theatre, himself?

A. Yes; his discussion with me was, while it was a general discussion, there was nothing specific, other than the fact that he was building a shopping center and theatre, and the impression on me was, certainly, it left the impression that he intended to operate the theatre, himself. However, he did indicate, during our conversation, that his primary business was that of building and construction; that he had had some experience in the motion picture business, some years previous. I did not get the impression from Mr. Myerberg that he, himself, actually intended to devote his full time to the operation of the theatre.

Q. Did you later on have any further discussions with him?

A. Yes; he called at my office one afternoon, later on in the year, probably September or October. I was in a conference at the time, and I came out of the conference and talked to him for a few minutes. He told me then that his theatre was well underway; that he expected to have it open within a matter of weeks, a month or so, and he was [fol. 993] very anxious to know what would be available for him in the way of first-run pictures, pictures first-run in the City of Baltimore. I explained to him at the time that while he had an attractive theatre, and all of the things he had said about the theatre apparently were developing to be a fact, from what I had seen [illegible]—it was not completed as of the time that I last saw it,—the location of the theatre was such that, actually, it was suitable primarily, regardless of its appointments, for only a neighborhood operation, because of the location of the theatre.

He wanted first-run pictures, and wanted to continue the discussion along the lines of securing first-run pictures, or consideration for exclusive first-run.

Q. Well, now, did you state to him at that time a final conclusion as to what basis Fox would furnish him pictures?

A. I told him we would offer him pictures on first neighborhood availability, in competition with the Uptown Theatre which, in our opinion, was directly competitive with the Crest Theatre.

Q. Was there any further discussion that you recall, before the receipt of the October 12, or October 14, 1948, World Premier- letter?

A. Well, I had quite a few discussions with Mr. Myerberg over the telephone, and I won't attempt to recall [fol. 994] specific instances. There were numerous—it is possible we may have had telephone conversations between that time and the time I received the World Premier- letter.

Q. But nothing different from the nature of the conversation you have detailed; is that correct?

A. No.

Q. When you received this letter, in which Mr. Myerberg described his theatre and stated the run he wanted, that he wanted World Premier-, and wanted the personal appearance of actors or actresses, what did you do; did you answer that letter, or did you send it to your superiors, or what?

A. I answered that letter. I think that is in the record here.

Q. Had you at that time examined the theatre?

A. Yes; I had seen the theatre on several occasions during its various stages of construction.

Q. Were you familiar with Baltimore City and the locality of the Crest?

A. Fairly well; yes.

Q. Would you state, very briefly, your reasons for the conclusion that you thought it should have first neighborhood availability in competition with the Uptown?

A. As far as the competition with the Uptown was concerned, the two theatres are located within a mile of each [fol. 995] other, have direct connection down Rogers Avenue between the two theatres. They are obviously competitive. They are even more competitive than might normally be the case, because of the fact that in front of the theatre is hardly any residential area at all. It is practically all, or

was at that time practically all vacant land, woodland, and obviously the Crest Theatre had to draw primarily from the general direction of the Uptown Theatre.

Q. Did you at that time have a downtown theatre outlet for your first-run pictures?

A. We were selling our pictures for first-run in Baltimore, and had done so, successfully, up to that time, to downtown theatres.

Q. That was the New Theatre?

A. Primarily.

Q. Were you satisfied with the exploitation your pictures were given by the operator of that theatre?

A. Yes. I think our pictures were given as good treatment, from an exploitation and advertising standpoint, as we had any reason to expect. We received very wonderful cooperation from our customer,—I think, as good as could be expected.

Q. Is that, in your opinion, of any importance in connection with establishing a picture for subsequent-run?

Mr. Rolle: Is what of any importance?

[fol. 996] Mr. Watkins: Exploitation of the picture in the downtown first-run theatre.

The Witness: As a matter of fact, it is of vital importance. In an area like Baltimore, the first-run "showcase", as we like to refer to it, is important in more ways than just the amount of dollars we might earn through the exhibition of the picture in that particular run, because during the showing of the picture on the first-run, the picture is sold to an entire area of in excess of a million people, a small percentage of whom actually see the picture on the first-run; but we know from experience that the most valuable medium of advertising is the word-of-mouth advertising, the praise of a picture on the part of a person who has seen the picture, to one who has not; and that word-of-mouth advertising is—again, I am using a trade expression—is of vital importance to the success of a picture, not only in the subsequent-run theatres in the immediate city, but in all of the outlying communities that are served by a city like Baltimore as a central shopping center.

Q. Mr. Myerberg referred to a conference in November,

attended by you, Mr. Contee, and Mr. Moon. Do you remember such a conference?

A. Yes; I remember the conference. I don't remember the exact date. I believe, however, it was in November. [fol. 997] Q. Where was it held?

A. It was held in Mr. Myerberg's office, at his construction or real estate office, I am not sure. It was not in the theatre.

Q. And was Mr. Myerberg present, this Mr. Myerberg here?

A. Yes.

Q. Anybody else?

A. Yes. His brother was there. I do not recall his name. He introduced him as a brother.

Q. Would you state very briefly the summary of what transpired?

A. Well, of course, the purpose of our visit to Mr. Myerberg was to assure Mr. Myerberg that the decision I had made in connection with the Crest Theatre, in connection with our pictures at the Crest Theatre, was the final decision of our company. Mr. Moon, the Eastern Division sales manager, could obviously speak with more authority with Mr. Myerberg than I apparently was able to do, and in addition to the normal courtesy of Mr. Moon's calling on Mr. Myerberg, since he had indicated a desire to talk to my superiors, the conversation more or less reiterated the position that I had previously explained to Mr. Myerberg.

Mr. Moon explained the position in a little more detail and gave Mr. Myerberg essentially the same reasons I had previously given him for having arrived at that decision, [fol. 998] the reasons why in our opinion we felt that it would not be in our best interest in a city like Baltimore to license our pictures for first run in a theatre, in a neighborhood especially as far out as the Crest Theatre.

Q. Was there any discussion as to the possibility of competitive bidding?

A. Yes, we told Mr. Myerberg again, rather, Mr. Moon reiterated the statement I had made to Mr. Myerberg, that we would make our pictures available to the Crest Theatre on first neighborhood availability subject to competitive negotiation with the Uptown Theatre.

Incidentally, in connection with this, his brother expressed vigorous opposition to any system of competitive negotiation, and pointed to the fact that any sort of competitive device of this nature was a device on the part of the distributor to exact more film rentals for the picture, and they were not under any circumstances going to have any part of it. That, however, was not expressed by Mr. Harry Myerberg. I am inclined to the belief that Mr. Harry Myerberg was not entirely in agreement with his brother's point, however.

Q. Did you thereafter offer your pictures on competitive availability?

A. Yes, we notified Mr. Myerberg some time later, and without refreshing my mind, I could not recall the exact [fol. 999] date. Our conversation with him came, I am quite sure, in November. Sometime in December we were advised of the approximate opening date for the Crest Theatre. We notified Mr. Myerberg of the availability of certain pictures and advising him if he is interested in negotiating for the first run in that zone, to advise accordingly.

There was considerable correspondence and ultimately a telephone conversation clearing up some apparent misunderstanding on the part of Mr. Myerberg as to the procedure, and so forth. Another indication of the fact possibly Mr. Myerberg was not as thoroughly familiar with the motion picture industry as he might have been.

The Court: I cannot hear you.

Mr. Watkins: Keep your voice up, please.

By Mr. Watkins:

Q. Did you in fact license any pictures to either the Crest or the Uptown on competitive bidding in the early part of 1949?

A. Not at that time, because after this considerable correspondence, several telegrams and a couple of telephone conversations, I talked to Mr. Myerberg at considerable length over the phone explaining in as complete detail as I knew how to explain, exactly how the procedure, what the procedure was, and so forth.

During this conversation he explained to me then that

the theatre would not open until after the middle of Febru-
[fol. 1000] ary, and since these three pictures about which we were discussing, for which we were negotiating, would be available prior to that time, that it was of no importance anyway, because he would not be open until after February.

Q. Was there any discussion whether or not he wished to have the opportunity to bid competitively for your pictures?

A. Yes. As a matter of fact, in the meantime I was advised through our Baltimore sales representative, in his various routine negotiations for pictures, that Mr. Myerberg had taken the position that they would prefer to license the pictures on equal availability with the other theatres in the zone, or what we considered to be in the zone, and as a matter of fact had already negotiated the license for quite a number of pictures on that basis.

I contacted the operator of the Uptown Theatre to ascertain his position as to the competitive bidding, whether or not the competition as between the two theatres was actually substantial. He took the position he did not want to condition the booking of his theatre on the operation of the Crest Theatre. He had been operating the Uptown Theatre there for a number of years, he was not responsible for the Crest Theatre having been built, he did not want to be placed in a position of bidding for pictures against the Crest Theatre, he did not express any opinion as to
[fol. 1001] whether the Crest Theatre was competitive to him or not. He wanted to run his theatre without any regard to the Crest Theatre, and he did not want us to permit our negotiations with the Crest Theatre to interfere with his operation of the Uptown.

Q. Well, the result of that is that neither indicated a desire to bid; is that correct?

A. In fact, both indicated the desire not to bid, which placed my opinion as to the relative competition of the two theatres somewhat in jeopardy. I am sitting here saying you are competitive to each other, you have the bid and both are saying we do not want to bid, we want to operate on an equal availability. So, we had to reverse our position and offer our pictures on equal availability.

Q. It would mean the two of them could license the picture at the same time?

A. The picture would be made available to each theatre as of the same date. We did not condition the booking of the picture in the theatre of the other, but we made the picture available to each theatre, in fact, every subsequent first run theatre in the City of Baltimore on the same date. It is available for that theatre on or after that date, as the exhibitor himself likes to book it.

Q. Was there any subsequent request for competitive bidding on the part of the Crest Theatre?

[fol. 1002] A. Well, recently, a year or maybe a year and a half ago—and here again I would have to refer to the record for the exact date—the manager of the Crest Theatre—well, our sales representative, first, reported that the management of the Crest Theatre was anxious to institute competitive bidding.

The manager of the theatre telephoned me and expressed a desire to negotiate competitively for our pictures, and some few days later called at my office. During this conversation he pointed out that they definitely were competitive to the Uptown Theatre and wanted to negotiate competitively for a clear first run in the zone.

He pointed out his reason as to why he felt that the theatre would be better off financially and thought under that arrangement that we as a distributor would benefit.

I had no particular argument with that, because that was my original position, and I felt that way and still do. We agreed to institute competitive bidding when the next picture became available in the zone, and when an availability was established for that next picture we so notified the Crest Theatre and the Uptown Theatre with a specified date on which we requested they have our offer in our Washington branch.

Q. What happened?

A. In the meantime Mr. Darensoll, the manager of the [fol. 1003] theatre, contacted me and told me he would rather not bid on this picture. He explained that Mr. Myerberg was out of town or was unavailable, and he did not

want to make a bid on the picture, would I make the picture available on an equal availability, as we had in the past.

I explained to him that I would dislike very much doing it, because it would place me in a rather embarrassing position with the customer at the Uptown Theatre, notifying him we were going to bid, and such action on my part did not meet with the approval of the operator of the Uptown Theatre. It was rather embarrassing for me now to have to contact the Uptown, and say we would like to continue the arrangement.

He came to see me on the following day or within the next two or three days, and after discussing it quite at length in my office, I contacted the Uptown Theatre and explained my position, and his position had not changed from the original position that I explained a while ago.

I notified both parties that in accordance with mutual agreement, we were withdrawing our offer to bid. We made the picture available on an equal availability, as we had in the past, and we have continued to do so since.

Q. Was there, after this second request for bids and then the withdrawal, any further request on the part of the Crest for competitive bidding?

[fol. 1004] A. One. Mr. Darensoll called at my office and attempted to reopen the discussion of competitive bidding, again asking me to institute competitive bidding, and I reminded him, probably a bit abruptly, that I did not care to discuss it further.

Q. Mr. Lichtman said he had requested that surveys be made of the large cities, including Baltimore, to determine the feasibility of instituting there either runs day and date downtown and neighborhood or a series of neighborhood simultaneous runs, and he said you and Mr. Minsky had been delegated to make the survey in Baltimore. Does that accord with your recollection?

A. Yes. As a matter of fact, such surveys as we made in Baltimore were being made throughout the entire country by the various divisional branch managers, in an effort to improve if possible the revenue from our pictures. We made quite an extensive survey in Baltimore.

Q. I wonder if you would take just a few moments and describe just exactly what you did.

A. We first analyzed the City of Baltimore from the standpoint of the possibility of establishing a multiple first run system, let us say, of multiple first run—"system" for want of a better word—our idea was, for the sake of something to work with, that we tried to establish four key neighborhood runs that might run day and date with [fol. 1005] downtown. I suppose we could have found—we did not actually find four exhibitors who were agreeable to such an arrangement. Mr. Myerberg was agreeable.

There was one, possibly two others who had not the most desirable locations. To be perfectly frank with you, had I had an open choice to select exactly the theatres that I wanted, I doubt very much if the Crest Theatre would have been one of them, because we think there are four other locations in the City of Baltimore that lend themselves much better to that type of an operation than the Crest Theatre could.

However, the Crest Theatre was one of the neighborhood theatres at that time that appeared to be interested in something along that line. We did discuss it with Mr. Myerberg. And we discussed it with, I would say, all of our other customers operating first neighborhood run theatres in the City of Baltimore.

In the main, we found opposition to the plan. I am speaking now of the neighborhood theatres. It would, however, possibly have been possible to find two, three or maybe four neighborhood theatres who would have been agreeable. But the one thing we did run into that we could not get across was the finding of a downtown theatre that would run day and date with those neighborhood theatres. Therefore, as far as I was concerned, Mr. Minsky [fol. 1006] concurred with that and subsequently our other executives concurred, so far as I was concerned, in any plan, we did what everyone was doing.

Q. You can have a day and date with one subject, can you not?

A. With one, and I think one of the most important things we are all overlooking here, no matter what distributors might have in mind with regard to a picture, whether it might be a film rental or availability or whatever

it might be, it is no good unless he can get an exhibitor to buy it on that basis.

Q. You could not get downtown to buy on the basis of playing simultaneously with neighborhood houses; is that correct?

A. That is absolutely correct.

Q. That is the first phase. Did you consider the second part of the possibility of having several neighborhood houses playing simultaneously?

A. Yes, with one, after we realized that it would be completely impractical to continue any further with any attempts at multiple first run, we explored even more extensively the possibility of doing something about changing the pattern of availabilities for the neighborhood theatres.

We attempted to develop a plan whereby we would, instead of making pictures available on the same play date, [fol. 1007] the same availability date for 25 theatres, 21 days after first run downtown, we might take and divide the city into maybe 6 or 8 zones and sell one theatre in each of those zones first run in the zone, of course on an equal availability date in each of the eight zones, on an earlier availability after downtown, maybe 7 or 14 days, whichever might prove to be practicable and workable.

We were unable to develop that plan because, very frankly and briefly, we found that the majority, practically all, in fact, of our customers in Baltimore were opposed to that element of competitive bidding which would of necessity develop as a result of that type of distribution.

Q. Why would that involve competitive bidding?

A. Because we were not in position to make arbitrary selection of one theatre in an area, and say we will award this picture to you on a certain play date, and arbitrarily say to the other theatres we will not permit you to show it until a period of time later.

Q. Let me see if I have it straight. You visualized the City as divided into 7 or 8 segments, and into these segments there would be several theatres, and the thought would be to have one of the theatres in each segment to play with relation to the run downtown, so you would have some 7 or 8 playing, as you said, on a 7 or 14 day availability instead of 21?

[fol. 1008] A. That is right.

Q. But what that would involve is the question of which one of the several theatres in each particular zone or area would be the earlier player; is that correct?

A. That is correct.

Q. And the way that would be determined, you say, in the event the theatres did not agree on it, would be by competitive bidding?

A. Yes, sir.

Q. What was the attitude of the exhibitors towards that?

A. Well, as I said, with very few exceptions they were very reluctant to enter into any arrangement that looked like it was leading in the direction of competitive bidding or what would ultimately result in competitive bidding.

Q. Did you reach any conclusion as to whether this plan of accelerated runs was feasible in Baltimore City?

A. I still say that accelerated runs are feasible in Baltimore City, but I cannot sell it.

The Court: I did not hear it.

The Witness: I say, I still say that accelerated runs are feasible in Baltimore City, but I cannot sell it.

By Mr. Watkins:

Q. About how much time was spent in the surveys you have been discussing, Mr. Norris?

A. I am actually still surveying them.

Q. Well, in the concentrated part, before you made a [fol. 1009] report.

A. About a month, I would say, altogether. Of course, we reported within a week the hopelessness of the multiple first run situation. Actually within another week the plan we were working on for the neighborhood reached the point, while we did not actually accept the fact it was hopeless, it actually reached that point, recognizing we would not be able to accomplish it.

Q. Does the print situation have anything to do with your desire to propose having an accelerated opening?

A. You mean for multiple first runs?

Q. Or for a small group of earlier runs.

A. Well, it would be much simpler to supply a city like Baltimore, the neighborhood theatres, that is, in a city

like Baltimore, on a staggered availability that would require the use of only 8 or 10 actual prints at any one time than to supply in the manner we do now where sometimes we require as many as 30 prints simultaneously.

Q. What is the normal allotment of prints to the Washington branch?

A. From 7 to 9.

Q. How do you get the extra prints necessary for your 26, 27 or 30 simultaneous plays on 21-day availability?

A. That is quite a complicated process. We have a pool of surplus prints for a period of time after a picture [fol. 1010] is released for the primary purpose of booking these big, multiple subsequent runs in key cities like Baltimore, New York City, Philadelphia, Detroit and so on around.

Q. You are not able to——

A. Those prints are transferred from Washington after we have used them in our break in Baltimore, for instance, to Philadelphia or vice versa. It involves quite a lot of expense from a transportation standpoint, and particularly here in Maryland, considerable additional expense from the standpoint of censorship, and so forth.

Q. One of Mr. Myerberg's complaints was that he wanted to run his theatre on the basis of opening pictures on Saturday and that in general Fox would not make its pictures available for such opening? What is the situation with respect to that?

A. Well, traditionally, as far as 1946, which is the beginning of my direct knowledge of distribution in the City of Baltimore itself, we have made our pictures available on the first Sunday after the 21st day after the downtown run.

Q. Do you regard the Sunday availability, from your standpoint, as good as or better than the Saturday availability?

A. Circumstances alter conditions. At the moment, no. There was a time, let me say, up until 1949 or 1950, when we had to take cognizance in spite of wishful thinking that [redacted] disastrous decline in theatre grosses, it was my [fol. 1011] opinion, and I still think under those circumstances it is smart distribution to make pictures available

on a subsequent run situation like Baltimore on a Sunday.

Q. Why?

A. Thereby dividing that important preferred weekend playing time over more pictures. Let me put it that way. We continue that policy and for that reason and also not forgetting the fact that that is the policy under which in the main the first neighborhood theatres in the City of Baltimore operate. If they had been operating on a different policy, our making it available at a different time would have had very little effect on it. The date on which we make a picture available does not of necessity control the operating policy of the theatre because, subsequently, due to declining grosses and the fact quite a number of distributors were making pictures available on Saturday, and we found ourselves in a rather untenable position from a competitive standpoint, and securing preferred playing time, that our pictures were coming to the realization that it was necessary for us to make our pictures available on Saturday on all occasions, that competitive advantage, in view of the fact considerable number of distributors were making theirs available and those pictures were getting preferred bookings. In addition to the fact that theatre grosses had dropped to the point where it had become necessary for us to reach for that Friday and Saturday gross on any pic-
[fol. 1012] ture which was of any substantial value, in order to stay in business.

The Court: Have you many more questions?

Mr. Watkins: I have perhaps 10 minutes more, Your Honor.

The Court: We will have to suspend until tomorrow morning at 10:00 o'clock.

(Whereupon, at 4:15 o'clock p. m., an adjournment was taken until Thursday, May 22, 1952, at 10:00 o'clock a.m.)

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[fols. 1013-1014] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 1015] TRANSCRIPT OF PROCEEDINGS—May 22, 1952, 10:00 A.M.

The Court: Very well, Members of the Jury and Counsel, we are ready to proceed with the pending case.

I believe you had not finished with Mr. Norris.

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Thereupon, GLENN NORRIS resumed the witness-stand and, having been previously sworn, testified further on behalf of the defendants as follows:

Direct examination (Resumed).

By Mr. Watkins:

Q. Mr. Norris, I believe you had been telling the jury the situation with respect to the day upon which pictures were made available for playing in first neighborhood houses. I am not sure whether I asked you the question or whether you made a statement with respect to this; but, Mr. Norris, were the Fox pictures which were available to the Crest Theatre made available at the same time or at a different time to the other houses in Baltimore playing neighborhood runs?

A. They were made available for first run in each neighborhood in the entire city on exactly the same date and the same day of the week.

Q. There was no difference between the Crest and the Boulevard or any other theatre?

A. No, sir.

Q. Mr. Norris, you have been in court during a great [fol. 1016] deal of the trial, and you probably heard the offer of $15,000 for the licensing of a Fox picture. Up to that time had there ever been made to you by the plaintiff any proposal to guarantee any particular sum of money for the right to license any particular picture?

A. You mean first run?

Q. Yes.

A. No, sir.

Q. On either exclusive or day and date basis?

A. No, sir.

Q. Considerable emphasis was laid by Mr. Myerberg on the claim that at a conference that he had with you and Mr. Moon and Mr. Contee, around November of 1948, he particularly requested Mr. Moon to come out and see the theatre, but that Mr. Moon failed to do so. Do you know whether or not that is correct?

A. No, sir; we saw the theatre. We visited not only the Crest Theatre but all of the other theatres in the area that Mr. Myerberg had designated as the drawing area of the Crest Theatre, and, in fact, several other neighborhood theatres around the city.

Q. Was that on the day of the conference to which Mr. Myerberg referred?

A. That afternoon and evening.

Q. Complaint was also made about the fact that the [fol. 1017] Crest Theatre did not procure a sliding scale until sometime about a year ago. Will you tell His Honor and the members of the jury with respect to the sliding scale with respect to the Crest?

A. A sliding scale is merely a form of film rental license agreement. It is rather difficult for me to remember specifically all of the various negotiations in which I might have been involved with Mr. Myerberg for the licensing of a picture. Secondly, the discussion of a sliding scale would have no particular significance to me as applied to any specific picture, any more than a specific firm percentage or a firm guarantee flat rental amount for a picture. I do know that about sometime in 1950, or the later part of 1949 or the early part of 1950,—The records will reveal the exact date, if necessary—we did enter into a deal for a picture on the basis of a sliding scale. And I believe that from that time until now we have continued to license our pictures in the Crest Theatre on some form of sliding-scale arrangement,—not necessarily the same control figures for every picture, and possibly not necessarily the same range of scale. By that I mean some may have started at 25 per cent and gone as high as 50 per cent; others may have started at 30 per cent and stopped at 40 per cent. I do not recall the details of those deals as applied to each picture. However, the record will reveal it.

[fol. 1018] Q. Mr. Norris, when the Crest was built, were

pictures ever licensed to the Uptown on a sliding scale?

A. I think so, yes.

Q. Are they presently being licensed to the Uptown on a sliding scale?

A. No, sir. Here, again, I do not recall the exact date, nor all of the details nor all of the circumstances surrounding the negotiations which brought it about. But quite sometime ago we began licensing our pictures to the Uptown Theatre on the basis of a firm percentage arrangement.

Mr. Watkins: May I have Plaintiff's Exhibit No. 61, please?

The Clerk: Here it is, Mr. Watkins (indicating).

By Mr. Watkins:

Q. Mr. Norris, what is the customary method of licensing Fox pictures for first run in Washington?

A. Do you mean to what theatre?

Q. Yes.

A. Well, my opinion is that the finest theatre in the city of Washington is the Palace Theatre. We always try to license our pictures to the Palace, if we can.

Q. If you license them to the Palace, does any other theatre play day and date with it?

[fol. 1019] A. No. We have never sold any other theatre day and date with the Palace.

Q. What do you do or what do you try to do as to the Palace?

A. I suppose I can best answer that by saying that we do the best we can, in trying to license our pictures to a theatre that we believe will give us the best return and will do the best job of selling the picture in the area as the showcase for the Washington area.

Q. I thought you had a transposition in your answer. You mean you try to license to a theatre that you believe will give the best return?

A. Yes, sir.

Q. I show you Plaintiff's Exhibit No. 61, which is a copy of a letter from you to Mr. Frank Boucher, at the K-B Theatres. Without rereading the substance, wasn't it in re-

you said that, in your opinion, the Fox pitcures were best served by showing them in the downtown houses, and not in a house like the Ontario, either day and date or exclusive? sponse to a plan by the Ontario for first run pictures, that

A. Yes.

Q. Did that represent your opinion?

A. Yes, sir.

Q. Does it still represent your opinion?

[fol. 1020] Q. Yes, it does.

Q. Have you played any Fox pictures at the Ontario since the date of this letter?

A. Yes; we played two pictures at the Ontario.

Q. Will you very briefly state the reasons for playing them, what they were, and what were the results?

A. The reason for playing them was it developed that the Ontario Theatre was the only available one we could get for the picture. We could not sell it to the Palace, and we could not sell it to the other downtown theatres, including the Playhouse, Plaza, Trans-Lux, and so on. The Ontario Theatre was available for a first run. They offered us a contract film rental for the picture, and we licensed it to them, and they played the picture.

Q. On what terms were they played?

A. One picture was called Let's Make It Legal. The picture was licensed to the Ontario Theatre for a minimum guaranteed run of two weeks, with the understanding that the picture would open either on or immediately preceding Thanksgiving.

Q. Is that supposed to be a good or a bad time for a picture?

A. I think Thanksgiving is probably the most preferred play date of the year.

Q. It was licensed on what basis?

[fol. 1021] A. On the basis of a guaranty of $8,000 against 40 per cent of the gross receipts.

Q. And to play for how long?

A. Two weeks.

Q. What were the results?

A. The picture grossed a total of $4,000 the first week. They terminated the engagement at the end of the first week, stating that they were losing money by showing it any

longer, and they could not continue to run it. They came to us with an urgent request that we revise the film rental that we reduce the guaranty of $8,000, which they had paid for the picture.

Q. Did you do it?

A. We reduced it to $5,000.

Q. Which was more than the gross take on the picture?

A. It was, yes, sir.

Q. What was the other picture?

A. Journey Into Life.

Q. What were the terms on which that was licensed?

A. This picture was licensed for a guaranteed minimum run of one week at $2,000, against 35 per cent of the gross receipts.

The Court: I am not sure I understand you. Is this to a downtown theatre?

The Witness: It was an uptown theatre.

[fol. 1022] Mr. Watkins: It was the Ontario, Your Honor.

The Court: Does the location in Washington correspond with the location of the Crest in relation to Baltimore, and with respect to downtown theatres?

The Witness: It would not, Your Honor.

The Court: Then, I don't think that is very relevant.

Mr. Watkins: Your Honor, they have used the Ontario as a proposed basis of comparison. If you will permit the witness to answer what he thinks the comparison is, I think the result will be even more significant.

The Court: Very well. Go ahead.

The Witness: I might explain the location, if it is permissible, by a comparison with, let us say, the Parkway location in Baltimore.

The Court: On North Avenue?

The Witness: Yes, sir.

The Court: And Charles Street.

By Mr. Watkins:

Q. Specifically, is the density of population greater around the Ontario or around the Crest?

A. Yes.

Q. Which is it?

A. Around the Ontario Theatre.

Q. How far from the downtown theatres is the Ontario?

A. Do you mean from the downtown area?

Q. The Capitol.

[fol. 1023] A. I would say a little less.

The Court: Was it apparent to you that the loss on this particular picture or the run that it has had may be due to the fact that it was a poor picture more than due to the fact it was shown not in a downtown area?

The Witness: I would accept that as it applies to Journey Into Life. That is the second picture of the two already proved to be a very successful picture. However, the other picture Let's Make It Legal, with Claudette Colbert, was a fairly successful picture generally.

By Mr. Watkins:

Q. I do not believe you stated what the playing result was of Journey Into Life, Mr. Norris. You licensed it on a $2,000 guarantee against 35%, and what was the gross receipts from admissions on that picture?

A. $1600.

Q. Was any adjustment made on that?

A. No revision in terms were made on that picture.

Q. Had the exhibitor had an opportunity to see the pictures screened before he licensed them?

A. Yes.

Q. Now, Mr. Norris, I believe that there are two locations within your territory in which there may be a simultaneous playing of your pictures in two theatres. Would you very briefly state the situation in Roanoke and Richmond?

A. Well, in Roanoke for the last possibly 15 years, we have licensed our pictures to, let us say, for the last 10 [fol. 1024] years, we have licensed our pictures simultaneously in two neighborhood theatres.

Q. What is the reason?

A. One located in South Roanoke and one located in North Roanoke.

Going back to the beginning, we licensed our pictures in only the theatre in South Roanoke for a period of time because there was no theatre in North Roanoke. When it was subsequently built, common ownership, they established a policy of a day and date first run with their South

Roanoke theatre in an attempt to afford a more satisfactory first run outlet, so to speak, for Roanoke.

The reason we sold the neighborhood theatre first run originally, the reason we continued to sell the two theatres first run today, is simply because of the fact that we cannot sell the downtown theatre.

Q. Now, how about Richmond?

A. Exactly the same condition obtains.

Q. Have you any experience with the result, so far as the playing of the picture in the outlying territory is concerned, with the fact that in Richmond you are unable to play in a large downtown theatre first run?

A. Yes. I am constantly faced with and embarrassed by the fact that in small towns, in the small communities surrounding Richmond—I am not referring now to the subse-
[fol. 1025] quent run theatres in the City of Richmond, but in the towns surrounding Richmond, in an area of 50 to 75 miles, where the people are directly influenced by the Richmond newspapers, where they are within the general shopping draw of the City of Richmond,—I find it difficult to obtain a film rental for our pictures that our customers tell me they can afford to pay for certain competitive pictures.

They explained their reason for this discrepancy by the fact that some of our pictures are not as valuable to them as pictures from competitive distributors as being that when patrons, people who live in their town and their community and patronize their theatre, attend a theatre in Richmond, which they quite often do in communities of that type, they invariably go to one of the two big downtown theatres to see the pictures, and our pictures never play in either one of those two theatres because we cannot sell them. At least up to this point we have been unable to, and as a result our pictures have less value to us in the smaller communities surrounding Richmond than the pictures playing first run in those big downtown theatres.

Q. Mr. Myerberg, when referring to the Ontario Theatre, said Song In My Heart had played at the Ontario. Now, Song In My Heart is a Fox picture, is it not?

A. Yes, sir.

Q. Where did it play?

[fol. 1026] A. It played the Palace Theatre. As a matter of fact, played the Palace Theatre for four weeks, and we had quite a successful engagement of the picture.

Q. Where is the Palace Theatre?

A. It is located at the corner of F Street and Thirteenth Street, Northwest, Washington.

Q. Now, Mr. Norris, in arriving at the terms upon which you dealt with the Crest Theatre and in determining what clearance, run and treatment would be given it, did you consult with the representatives or representative of any other distributing company?

A. I did not. As a matter of fact, when Mr. Myerberg first called on me and I explained our position, I did not even know at that time he had discussed it with any other distributors.

Q. Were the terms and conditions upon which you have dealt with and are willing to deal with the Crest the result of any conspiracy between your company or you and the representatives of or any of the other distributing companies?

A. No.

Q. What is the reason that you have licensed the Crest, on the basis upon which it has been licensed?

A. Because in our opinion the Crest Theatre—it goes back to what I said yesterday—the location of the Crest Theatre is such that its most value to us as a customer [fol. 1027] is its value as a neighborhood theatre.

Mr. Watkins: The witness is with you.

Cross-examination.

By Mr. Rome:

Q. Mr. Norris, you mentioned Song In My Heart as having played at the Palace Theatre and having had a very successful engagement there during four weeks. What were some of the other great pictures, some of the top pictures Fox has put out in the last several years?

A. Well, there are quite a number of them: Meet Me After The Show; David and Bathsheba; People Will Talk. How many do you want?

Q. I would like a few more, if you will. You said you had a number of them.

A. How far back shall I go?

Q. The last several years, two or three years.

A. Halls of Montezuma; The Desert Fox; The Black Rose; Prince of Foxes.

Q. Those were some of the most outstanding pictures produced by the entire motion picture industry, were they not?

A. No. I am speaking of our own pictures. I am making no comparison with any other distributor.

Q. You would recognize them as very desirable pictures?

A. I certainly would.

Q. David and Bathsheba is considered by a great many people as being one of the finest pictures the motion picture [fol. 1028] industry has made, is it not?

A. I consider it a fine picture.

Q. It is a fact that your company has made these, and I assume you can give us a great many more pictures put out by Fox, and your statement is that you have been unable to license your pictures in any downtown theatre in the City of Roanoke and Richmond?

A. That is absolutely correct.

Q. You could not find any houses willing to play Fox pictures both in the city of Richmond, particularly Prince of Foxes?

A. In the City of Roanoke there is only one acceptable house. That is the American Theatre.

Q. And it would not consider any pictures from Fox?

A. It would not.

As a matter of fact, Mr. Rome, I lived in Roanoke for seven years, which was my home, and I represented Twentieth Century-Fox in that area. The operator of the American Theatre was one of the best friends I had and have in the City of Roanoke, personally. We played golf together, we played bridge together, were members of the same club. I explained to Mr. Hines on many, many occasions that I had dedicated my business life to the proposition of selling him at least one picture for his American

Theatre before I died. At this point I still haven't sold that picture.

[fol. 1029] Q. What product does he play in the American Theatre?

A. I cannot be absolutely positive as to that. He plays, I am sure, Metro-Goldwyn-Mayer, Paramount, Warner Bros. I cannot be sure beyond that point. He does not play Twentieth Century-Fox, of course, and RKO. I am mentioning the one he does not play, and possibly United Artists.

Q. Does not play United Artists?

A. Not to my knowledge. I think not.

Q. But in addition to the three, Metro, Paramount and Warner that he does play, there is the possibility that he might play Universal?

A. I cannot answer as to Universal.

Q. When did you license Let's Make It Legal to the Ontario Theatre in Washington?

A. Let's Make It Legal opened in the Ontario Theatre the day before Thanksgiving. That would be November 21st.

Q. And how long was that after the Ontario Theatre opened as a first run house? Do you know?

A. I do not know when the Ontario Theatre opened. It was a matter of—I can't recall.

Q. Just a short time?

A. Just a few months.

Q. The Ontario Theatre has been opened a little over six months, has it not?

A. I don't know the exact date, but I would presume [fol. 1030] that is approximately correct.

Q. And isn't it generally recognized in the motion picture industry, Mr. Norris, that it takes a continuity of product for a theatre on any run, but particularly a first run, before a theatre can realize its full grossing potentiality?

A. Especially if it is an off-location theatre.

Q. And the fact that a house has had a poor gross on one or two pictures is no ultimate indication of its worth

as an outlet for any particular company's product; is not that a fact?

A. No. The performance of one picture would not necessarily indicate that.

Q. You know, do you not, that the Ontario Theatre is still playing as a first run house in the City of Washington?

A. It is my understanding that it is.

Q. Is it still seeking to license product from Fox?

A. I would assume so. They haven't approached me directly.

Q. Can you tell me, Mr. Norris, what the film rental paid to Fox was on Let's Make It Legal by the New Theatre in Baltimore that played there?

A. No, I cannot recall that offhand. The record would disclose it.

[fol. 1031] Q. Can you give me any approximate idea as to the film rental paid by the New Theatre on Let's Make It Legal? Did it approach 8 thousand dollars?

A. No.

Q. Do you know what the film rental paid by the New Theatre was for Journey Into Life?

A. I could not tell you what it was on Journey Into Life.

Q. That was one of your lesser pictures, was it not?

A. Yes.

Q. There has been some mention, Mr. Norris, about the fact that certain theatres that played this day and date policy were in common ownership. It it a fact, in your mind, that common ownership would more readily permit a day and date policy?

A. I do not see how it is possible to sell a day and date policy to competing theatres unless it is common ownership.

Q. In your view is one of the factors against granting a day and date first run to a theatre like the Crest the fact that it would affect subsequent run revenues?

A. Well, my position as to the Crest Theatre, its availability for first run, so far as our pictures are concerned, is that the location of the theatre is such that we are placing

too many hurdles in the way of people to get out to the [fol. 1032] Crest Theatre to see the picture.

Q. There are more hurdles in the way of people going to the Crest than there are in their way to getting downtown, are there?

A. It is my opinion. It is my theory in merchandising anything, which includes motion pictures, it should be made available to the public in the manner that is most convenient for them to see it.

[fol. 1033] Q. And your view would be the same, even though the Crest were to have access to first-run product on a day and date basis?

A. Well, the day and date proposition brings up another, a different point, Mr. Romeo. I think I explained yesterday, as clearly as I could, at least, the survey that we made in an effort to establish if such could be done, the type of exhibition similar to what you suggest, I think, not to the exclusion of all other theatres in the City of Baltimore in preference to the Crest, but in the interest of developing a pattern of availabilities which might improve our revenue in the over-all from the city.

Q. If I understand your position correctly, Mr. Norris, your view about the Crest Theatre turns upon the problem of location; is that correct?

A. Primarily.

Q. Does there enter into your consideration, in reaching your conclusion, any problem affecting the subsequent-run revenues that would be derived by Fox if a day and date first-run outlet were instituted with the Crest Theatre?

A. I think, if it were possible to develop a day and date arrangement with a representative number of theatres in the City of Baltimore, which would not preclude the possibility of our including a downtown run, we would be agreeable to attempting it. I think I explained that, [fol. 1034] yesterday, in the attempts we made to survey the city.

Q. Isn't it the fact that, actually, Fox instituted the multiple first-run on a day and date basis, including a drive-in theatre as one of the theatres playing day and date first-run in Cincinnati, without having a downtown theatre to do it?

A. I believe I heard—excuse me.

Mr. Watkins: Mr. Lichtman testified to that, fully, yesday, that they could not get a reduction in clearance. They tried it out on a 14-picture basis, and went back to the old system.

By Mr. Rome:

Q. I simply want to establish this witness' knowledge concerning the situation. Will you answer my question?

A. My knowledge is primarily what I heard Mr. Lichtman testify yesterday, to the effect that we were unable to sell a downtown run, and I would say, doing the best we could, in lieu of a downtown run, to sell a group.

Q. So, in your mind, if there had been in the City of Baltimore a downtown theatre agreeable to playing Fox product on a day and date basis with the Crest Theatre, and perhaps two or three other theatres located outside of the downtown section, Fox would have been prepared to go ahead and grant the Crest, and those other theatres, first-run in the City of Baltimore?

[fol. 1035] A. If such an arrangement could have been worked out in a practical manner, yes. However, the downtown theatres feel, and I feel convinced, pretty thoroughly, that such an arrangement was impossible from their standpoint.

Q. Whom did you talk with, of the downtown exhibitors who took that view?

A. All of them, I would say, with the exception of Loew's and Warner's.

Q. Who, specifically, Mr. Norris?

A. The New Theatre.

Q. You saw Mr. Mechanic there?

A. And the Hippodrome Theatre.

Q. Was it Mr. Mechanic you saw?

A. Yes.

Q. And then Mr. Rappaport?

A. Yes.

Q. Whom else did you see?

A. I don't recall any others. Yes; Mr. Schanberger, I did discuss it with Mr. Freddie Schanberger.

Q. Of the Keith Theatre?

A. Yes.

Q. Did you approach anyone else in the downtown exhibitors with regard to it?

A. No.

Q. Did you consult anyone concerning the Mayfair Thea-
[fol. 1036] tre as to the use of the Mayfair Theatre to do it?

A. I don't recall any discussion in connection with the Mayfair Theatre.

Q. Do you consider the Mayfair Theatre as an acceptable first-run outlet in the City of Baltimore?

A. Only if another—only if neither of the other theatres are available.

Q. The Mayfair Theatre is a theatre located right next-door to the Stanley Theatre?

A. Yes.

Q. And Mr. Mechanic and Mr. Rappaport and Mr. Schanberger all took the view that they were opposed to this idea and they would not do it; is that correct, sir?

A. They all took the position, from a financial standpoint, that it was not good business to do it.

Q. They did not want the competition of the Crest Theatre, or any other theatre, coming in?

A. They did not say that; they did not mention the word "competition".

Q. What did they say?

A. That it would not be financially profitable for them to do it. They were not interested in licensing any pictures from me on that basis.

Q. Did they say it would hurt them if you did it?

A. They did not say it would hurt them. They just
[fol. 1037] said they would not license my pictures on that basis.

Q. It would affect them financially, I understand you to say?

A. No. They said they would not license my pictures on that basis.

Q. You have stated, Mr. Norris, that if, however, one of the gentlemen who operates the first-run theatres downtown, one of those more acceptable theatres, the New Theatre, the Town, or the Hippodrome, or Keith's, had been

willing to go along, in all likelihood such a policy might have been worked out for the City of Baltimore?

A. I would have attempted to work it out. I don't know whether it is possible or even feasible to do it.

Q. Isn't it the fact that the requirement placed upon Fox in licensing its pictures is that it shall license its pictures picture-by-picture and theatre-by-theatre, without regard for any other theatre; isn't that so, Mr. Norris?

A. Theatre-by-theatre, I believe you are correct.

Q. So that, when you were considering the question of licensing the Crest Theatre first-run product on this day and date basis, you took into consideration whether or not you were also going to be able to license a downtown theatre; isn't that the fact?

A. Mr. Rome, I believe we are also in the distribution of our merchandise in the United States permitted to select [fol. 1038] a showcase in the area in which we want to show a picture.

Q. But isn't it the fact, Mr. Norris, regardless of whether or not you were permitted to select a showcase, that in considering whether or not you were going to license the Crest Theatre, you took into consideration whether or not you were going to be able to license a downtown theatre and other theatres outside of the downtown area in the City of Baltimore?

A. Mr. Rome, your question is certainly confusing, but I will answer it to the best of my knowledge. I refused to offer our pictures to the Crest Theatre for first run in the City of Baltimore, for the reasons that I previously stated, certainly, clearly enough. I also considered very carefully, made a very thorough and exhaustive survey and investigation of the circumstances, in an attempt to do something about a day and date run.

Now, what you have stated as being law—I am not a lawyer—I cannot sell a day and date run without taking into consideration two different exhibitors, and I cannot sell a day and date run without selling at least two exhibitors. Otherwise, it cannot be day and date. I did not want to sell the Crest Theatre exclusive first run, because, for obvious reasons, it is not a suitable first-run showcase for

pictures. I could not sell it a day and date run, because I couldn't get another suitable theatre to go with it.
[fol. 1039] I don't know whether that answers your question. To the best of my ability, that is the explanation of our position.

Q. I am happy to have it, Mr. Norris.

Yesterday, when Mr. Lichtman testified, he said the real reason why this day and date policy, or multiple first-run, was not instituted in the City of Baltimore was that Mr. Mechanic had protested against it and had threatened a lawsuit. Do you recall that testimony, sir?

A. No; I don't recall any instance of our decision being made based on a threat of a suit. That is as much of an answer as I can give you.

Q. Your recollection of that would differ with Mr. Lichtman's, if he so testified; is that correct?

A. If he testified that our position was based on that, yes.

Q. You have referred to this exhaustive survey that you made. Did you make such a survey of any other city outside of Baltimore in your exchange area?

A. Yes.

Q. What other cities?

A. Norfolk.

Q. Anywhere else?

A. That is the only other city where we were involved with the same problem. Of course, Norfolk is very much [fol. 1040] smaller than Roanoke, and it is hardly comparable.

Q. How much time did you spend in making this survey?

A. I believe I testified yesterday that, in so far as the multiple arrangement for neighborhood showing is concerned, I still survey, in attempting to do something about it.

Q. I have in mind, Mr. Norris, the amount of time you spent before the report was submitted to New York with regard to it, as to which Mr. Lichtman testified yesterday?

A. I reported to New York almost at least two or three times a week in our various conversations with our executives in New York during that time we were over here. Naturally, they were interested in what progress was being

made, what the picture looked like, what was being developed.

I would say, before a final decision was made to abandon any policy of a multiple first-run, possibly three weeks.

Q. Was it just you and Mr. Minsky who worked on that survey?

A. Our Baltimore sales representative was with us.

Q. Who was that?

A. The greater portion of the time, Gordon Contee.

Q. Is he still with your company?

A. No; he has not been with our company for some year or so.

Q. Do you know where he is now, sir?

[fol. 1041] A. Yes; he is here in Baltimore, I think. His home is here, I think.

Q. This actually represented a very important bit of work that you were undertaking in making this survey, did it not, Mr. Norris?

A. Not of any particular importance over and beyond the other work that we did. It was a part of our responsibility, to the best of our ability, to properly distribute our pictures in the Baltimore area.

Q. If this had worked out, it would have been what Mr. Raftery has referred to as a radical departure in the method of licensing your pictures in the City of Baltimore, would it not?

A. It would; yes.

Q. And, consequently, it was a matter of keen interest in working on it; isn't that so?

A. Yes.

Q. And did you make any memoranda concerning your conversation with Mr. Mechanic or with Mr. Rappaport or Mr. Schanberger?

A. No.

Q. Did you get any written memoranda or reports from Mr. Contee concerning it?

A. No; to my knowledge.

Q. Did you submit any report in a written form to New [fol. 1042] York?

A. No; I don't think so. No; there would not have been any written report.

Q. Despite the fact that if this policy had—if the facts as you learned them would have permitted the establishment of this new system in the City of Baltimore, you made no written report, and simply informed New York about it, orally, over the telephone, was it, concerning the facts you have described?

A. Well, Mr. Rome, that transaction was not exactly as you attempt to picture it. I probably talked to one or the other of my executive associates in the New York office on an average of three, four, five times a week. During these telephone conversations, I discuss any problems that might be involved in any of the branches over which I have supervision; personnel matters, or probably matters that have developed from some other source, are being related to me. I do not remember specific telephone conversations. I remember a telephone conversation with Mr. Moon and Mr. Smith regarding it, and I remember visits over here with Mr. Moon, the general picture of exactly what we did and why we did it, and what we were attempting to do, I have described as clearly, I think, as it is possible for me to describe it.

Q. What was the position of Mr. Moon at that time?

[fol. 1043] A. Mr. Moon merely reiterated the position——

Q. Excuse me. What was his official capacity in the company?

A. He was the eastern division sales manager.

Q. At a later time, Mr. Moon's office was switched to Chicago, was it?

A. Transferred to Chicago. I don't remember the exact date.

Q. And, in Chicago, he had the city of Cincinnati under his jurisdiction?

A. Yes.

Q. And it was while he had Cincinnati under his charge that the first-run plan of Fox pictures was changed in that city? Isn't that the fact?

A. Mr. Rome, I have to refresh my recollection—I have absolutely no contact with Cincinnati or with the Central Division. It would be my thought that it was; but I will not make the statement one way or the other.

Q. Your present position is not now branch manager, is it?

A. No, sir; it is not.

Q. Who is branch manager of Fox in Washington now?

A. Mr. Rosen.

Q. Where was Mr. Rosen before he came to Washington?

A. He was transferred to Washington from Cincinnati.

[fol. 1044] Q. You have said that, in the course of your stay, you talked to exhibitors in the City of Baltimore concerning the possibility of cutting down the clearance of first-run, so as to move up the availability of the first subsequent run theatres. Is that correct?

A. No; I don't believe I said that.

Q. What was the purpose of your conversations with the subsequent run exhibitors in the City of Baltimore?

A. We discussed with our customers the possibility of an arrangement whereby, instead of licensing our pictures in first neighborhood runs to some 25 theatres on that availability, on the first Sunday after the 21st day after the downtown run,—which is our general policy of distribution—I discussed with them the possibility of creating five or six or seven or eight, or maybe nine, zones in the city—I say "zones" for lack of a better word—to which we would offer a first run to some one theatre on an earlier availability after downtown, than the 21st day, the idea being that such an arrangement might possibly be worked out without too much damage to our first run in the area, since not too many theatres would be playing in the area. In essence, that is the idea that we were trying to develop, or were experimenting with, or were exploring the possibilities of.

Q. That was foreign to the plan advanced by Mr. [fol. 1045] Lichtman in the theatres that have been referred to, wasn't it?

A. Generally.

Q. What exhibitors did you see with regard to the possibility of establishing such a method of licensing your pictures?

A. Do you want me to mention all of them? There were some 25.

Q. I might put it to you in this way: what exhibitors did

you consult, whose theatres are located in that area which has been referred to as the area of the Crest Theatre?

A. I talked to the operator of the Ambassador and the Uptown. I believe they were the only two.

Q. Mr. Garman?

A. Yes.

Q. And the Ambassador?

A. Mr. Durkee.

Mr. Rome, you have confined my answer to that area. You understand, I talked to every exhibitor who operated a theatre on that availability, throughout the City of Baltimore and its environs.

Q. And all of those gentlemen, as I understand your statement, opposed such an idea because they feared the idea of competitive bidding?

A. I don't think any individual exactly expressed [fol. 1046] himself as fearing competitive bidding; and I don't think I said that yesterday. I said that the implication as to the competitive bidding, that it appeared might or would eventually develop under this type of distribution, was apparently not acceptable.

Q. What was the earlier availability that you had in mind as a possibility, if such a plan were put into effect?

A. I had no specific date in mind. We were merely exploring the possibility.

Q. But it would have been something earlier than 21 days?

A. I think it would.

Q. Clearance in the motion picture industry normally runs in periods of 7 days, doesn't it?

A. Generally speaking.

Q. So, it would probably have been perhaps 14 days instead of 21 days?

A. That could have been so, yes.

Q. And conceivably—although I am not attempting to suggest you had this specifically in mind—might have been 7 days?

A. That is conceivable; but I don't believe it is saleable.

Q. Do you think such a policy is still conceivable?

[fol. 1047] A. I did not say that. You asked if it might be possible. I said it might be, but I don't think it would be saleable.

Q. I understood you to testify yesterday that you thought the policy was more feasible, but that the problem was that you could not sell it?

A. You are talking, as I understand you, about availability 7 days after first run. Is that correct?

Q. No. I am sorry if I have not made myself clear. I was talking about this general idea of establishing a number of zones, in which zone the particular theatre would play on an earlier availability,—without pinning you down to just what earlier availability?

A. Yes; I did think, and I still think it a desirable method of distribution, if it can be developed and if it can be sold. I still feel that way.

Q. Isn't the necessary result of your recognizing that policy, or viewing it in your own mind as being feasible, a recognition of the fact that the present clearance existing in the City of Baltimore in favor of first run theatres over first subsequent run theatres, is unreasonable?

A. It is not.

Q. Why not?

A. Not in any sense of the word. I can answer your question by asking you another question. Is it possible for [fol. 1048] a theatre to show a picture in downtown Baltimore, first run Baltimore, at 75 cents admission, and then, less than 21 days later, that picture show in 20 or 30 theatres at 25 cents and 30 cents?

Q. Without answering your question, you are the gentleman on the stand. Your answer is that that is not a recognition of any unreasonableness in the clearance of pictures?

A. It is not.

Q. I gather from what you have said that the reason you did not proceed any further at that time with the possibility of such a change in your method of licensing, Mr. Norris, was that you had this implication of unwillingness to go along on the part of exhibitors?

A. Mr. Rome, you seem to be overlooking the fact that, in order for me to proceed, as you say, I must sell a picture

to somebody. If I cannot negotiate a deal on the basis that I want to negotiate it on, it becomes necessary then to negotiate that deal on a compromise as near to that as I can accomplish.

Q. I did not mean to cut you off.

A. Well, go ahead.

Q. Isn't it a fact, Mr. Norris, that in the City of Philadelphia this same plan was broached to the exhibitors, who protested vehemently and raised specific objections to [fol. 1049] competitive bidding, and Fox instituted that exact system in the city of Philadelphia?

A. As to Philadelphia, I do not believe I am adequately qualified to answer, because I had no supervision over the Philadelphia branch at the time that was done. However, in the interest of clarity, this should be stated: in the city of Philadelphia, what was done is the exact reverse of what we have been talking about for the City of Baltimore. As I understand it from Mr. Lichtman's testimony yesterday, we were showing our pictures in subsequent run Philadelphia, a city considerably larger in size and population than Baltimore, in exactly 9 theatres. The move that was made in Philadelphia was to reduce the size of these areas from 9 to some 18, I believe he testified—which is the exact opposite of what we have been discussing here today.

Q. But you don't know anything about any protest made?

A. I don't know any of the details, because I had no contact with the Philadelphia branch.

Q. With regard to the policy of opening Fox pictures on Saturday in the City of Baltimore, you have stated that it was your view at one time that Sunday was the preferable day, but that at the present time,—if I follow your testimony,—Mr. Norris, by reason of the drastic falling off of grosses and the necessity on the part of Fox to get in [fol. 1050] every dollar of revenue it can, you have gone to the Saturday opening when other distributors took a similar position?

A. As a matter of fact, I think we make our pictures available to the first neighborhood runs in Baltimore on Friday.

Q. But there was a time when you were doing it only on Sunday?

A. We made our pictures available on Sunday for quite a long period of time.

Q. Then, you were willing to license them on Saturday?

A. We found it to our best interest to license them on Saturday. Our licensing depends upon what we think is to our best interest in the disposition of the pictures.

Q. Now, you do it on Friday?

A. Yes.

Q. Your testimony yesterday was that other distributors had taken that position even before Fox came to the idea of the Saturday opening?

A. Yes. There were quite a number of distributors, as I understand it, who were making their pictures available on Saturday.

Q. And the reason you gave for your view was that that enabled Fox to spread the better playing time over a larger number of pictures? Is that correct?

A. Yes. During this period of time when business was [fol. 1051] a little bit less than it is today.

Q. And thereby, instead of getting two preferred playing days for any specific single picture, you spread it out over a number of pictures, over, perhaps, a season's playing time, and perhaps even a greater number of preferred days?

A. It would obviously have that effect.

Q. Are you required, Mr. Morris, to license your pictures for exhibition picture by picture and theatre by theatre?

A. I think, theatre by theatre. You are correct.

Q. And your view is that you are not required to do it picture by picture?

The Court: I do not understand the question.

Mr. Rome: I wanted to inquire of the witness whether he is not required to license his pictures picture by picture. That is, the picture comes along, and the man licenses that strictly on the merits of that particular picture, without regard to the fact that he has a number of other pictures coming along over a year, and taking them into consideration, with regard to the problem of playing dates.

The Court: When you say "required", you mean by his license contract?

Mr. Rome: I mean by virtue of the decree that has been entered against Fox, as well as against the other [fol. 1052] companies. This is in line with the testimony given by Mr. Lichtman yesterday that they license their pictures picture by picture and theatre by theatre.

The Witness: Now, what is your question?

By Mr. Rome:

Q. I am asking you whether or not you are so required to license your product picture by picture?

A. I will have to answer it in this way. I do not understand there is any such requirement. We do sell our pictures individually. We do not condition the sale of one picture on the sale of another, if that is what you mean. We do not do that. As to the requirement, however, I cannot answer that question. I am not a lawyer.

[fol. 1053] Q. It remains the fact, however, does it not, Mr. Norris, that when Fox wanted to change the opening of a picture in the City of Baltimore to Saturday, it did so, and when it wanted to change an opening to Friday, it did so?

A. When we decided that it would be in our best interest to make our pictures available to the first neighborhood runs on a Saturday, we did so. We met with no objection from anybody to that policy. There was no requirement on the part of any exhibitor to show the pictures on a Saturday. The picture was made available to them on or after that date as he himself saw fit, or on whatever basis he had arranged to show the picture.

Q. Actually with regard to the decisions made concerning the Crest Theatre, you referred the matter to New York?

A. In what instances?

Q. With regard to first run in the case of the Crest Theatre.

A. I told Mr. Myerberg the day he came to see me that we would make our pictures available to his theatre, as I saw it from our conversation, on the first neighborhood run.

Q. But when you received Mr. Myerberg's letter you sent that on to the New York home office, did you not?

A. Yes, I did. I sent that letter on to the New York home office.

[fol. 1054] Q. And actually the ultimate responsibility for the decision was in New York; was it not?

A. In the final analysis, they would have to answer for the decision.

Q. During the period of time you were branch manager in Washington, Mr. Norris, did you ever personally or through anyone working under you, attempt to license your Fox pictures to any theatre other than the New Theatre in the City of Baltimore on first run?

A. Yes, we have licensed pictures to other theatres in Baltimore for first run.

Q. What other theatres?

A. It would be quite difficult, Mr. Rome, from memory, over a period, to recall those pictures. They can be produced from the records if you want to put them into the record.

Q. How many pictures in the last three years?

A. I would say negligible number. Maybe half a dozen.

Q. Did you ever seek to approach, either through yourself or through any of your subordinates, any of the other exhibitors other than on these negligible number of pictures?

A. No.

Q. Were the pictures that you did license to other than the New Theatre, your top product?

[fol. 1055] A. In some instances.

Q. Do you recall any specific pictures?

A. People Will Talk.

Q. Where did that play?

A. At the Town Theatre.

Q. At the Town Theatre. When was that?

A. Last—sometime last year. The picture was released in August or September. I do not recall the exact date.

Q. At the present time, however, I think Mr. Lichtman testified that Fox pictures are available under competitive bidding for exhibitors downtown?

A. Yes, for quite some time now.

Q. How long does that go back, sir?

A. Here again, I would have to refer to the records for the exact date. Some time after the first of the year.

Q. The year 1952?

A. Yes.

Mr. Rome: No other questions. Thank you, Mr. Norris.

(Witness excused.)

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The Court: Any other questions?

Mr. Watkins: No, sir.

The Court: Members of the jury, we will take a recess [fol. 1056] now for six or eight minutes.

(After a short recess, the following proceedings were had:)

The Court: We are ready to proceed.

Mr. Watkins: Mr. Galanty, please.

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Thereupon Sam Galanty was called as a witness for and on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name for the record.

The Witness: Sam Galanty.

Direct examination.

By Mr. Watkins:

Q. Where do you reside, Mr. Galanty?

A. Washington, D. C.

Q. What is your present occupation or position?

A. Division manager for Columbia Pictures Corporation.

Q. That covers what territory?

A. Cincinnati, Pittsburgh, Cleveland and Washington branches.

Q. How long have you been in the motion picture business?

A. Over 25 years.

Q. How long have you been in or had the Washington branch under your supervision?

[fol. 1057] A. Under my supervision approximately 15 years, and in the Washington branch 23 years with Columbia Pictures.

Mr. Watkins: Plaintiff's exhibit 32, please.

(Document handed to counsel.)

By Mr. Watkins:

Q. Mr. Galanty, it has been stated that your company did not receive a letter of October 12 or 14, 1948 in which Mr. Myerberg set forth an account of his theatre and the run he requested, and asked for a world premiere and asked for a personal appearance of stars. You have no record of any such letter, have you?

A. I have no record of any such letter, no, sir.

Q. Were you familiar with the Crest's location at or before the theatre was opened?

A. I was familiar with the Crest location after the theatre had opened.

Q. Mr. Galanty, I show you plaintiff's exhibit No. 32, which is a letter from George M. Josephs. Who is he?

A. He is an assistant to our general sales manager.

Q. ——to you dated November 4, 1949, enclosing a copy of Mr. Rome's letter of November 1, 1949, which has been stipulated is a general letter sent in the same form to various of the companies, in which he refers to having been retained by the Crest, and asks that his request for first run pictures be considered in a favorable light.

Before the receipt of this letter of November 4 from [fol. 1058] Mr. Josephs, had you discussed with Mr. Josephs the Crest location and this request for first run pictures?

A. Before the receipt of this letter?

Q. From Mr. Josephs.

A. No.

Q. The statement appears in the letter, plaintiff's exhibit 32:

"Judging from the description of the theatre as contained in this letter, this seems to be a neighborhood house and it has been our policy not to recognize the requests of neighborhood houses for first run on our product."

Does your opinion coincide with or differ from the opinion expressed there, that this theatre was a neighborhood house?

A. My opinion then and my opinion now was and is that the Crest Theatre is a neighborhood house.

In deference to the theatre, I will say it has fine appointments, a well constructed theatre, but I believe that the location in which the builders elected to place the theatre is unquestionably in a neighborhood that did not show, in my opinion hope of having too much of so-called patronage, too heavy patronage that would justify such a theatre.

Q. Where at that time did you license your first run pictures in Baltimore?

A. To the Hippodrome Theatre, the Town Theatre and [fol. 1059] on some occasions to the Mayfair Theatre.

Q. The Hippodrome and Town were and are operated by Mr. Rappaport, are they not?

A. Yes.

Q. What has been your experience with Mr. Rappaport in the exploitation of your pictures?

A. We have felt and do feel now that we were privileged to have Mr. Rappaport exhibit Columbia pictures. I consider him and I know for a certainty that our New York office, as well as our studio, feels he is one of America's finest showmen. I believe a costly property placed in the hands of Mr. Rappaport will give us the best return we can anticipate from a city the size of Baltimore, that is, from a publicity return.

Q. And do you consider publicity is an important factor in the success or failure of a picture?

A. Well, I do know for a fact many times we give as much consideration to the way a picture is to be handled in a given situation as we do to the prospect of the dollars that might be returned.

Q. I refer to the fact, Mr. Galanty, that you did not receive the October letter and that the first communication with which you were acquainted was this November 1

letter or a copy which was forwarded to you. Prior to that time had any application been made to you on behalf of [fol. 1060] the Crest for first run pictures?

A. None whatsoever.

Q. Is that true as to exclusive or day and date?

A. That is correct.

Q. Now, Mr. Myerberg in his testimony referred to competitive bidding and that your company did not institute competitive bidding between presumably his theatre and the Uptown Theatre. That is correct, is it not?

A. That is correct.

Q. What is your company's attitude with respect to the institution of competitive bidding?

A. Well, first of all the decisions of that nature are made by our New York office quite frequently after they have had a discussion as to the decision they should make with myself or someone else. We do not seek competitive bidding. If we are requested to consider competitive bidding we weigh all situations, where they are located, and so forth, and after due consideration reach a decision.

In the instance of these two theatres I felt then and I feel now that the Uptown Theatre and the Crest Theatre could both play on a so-called 21-day availability Columbia pictures.

Q. With reference to Mr. Myerberg's desire to have a Saturday opening for his theatre, and without attempting to cover the ground of the various times when you may [fol. 1061] or may not have made your pictures so available, let me ask you simply this: In making pictures available to so-called first run houses, is there any difference in the treatment accorded to the Crest Theatre and any other neighborhood house?

A. None whatsoever.

Q. If you have the opportunity to exhibit your pictures first run in a downtown house, is it your preference to exhibit them there or elsewhere?

A. By all means it is our preference to first present our pictures in the downtown theatres.

Q. Now, there are within your territory three instances outside of the City of Washington in which you do not play your pictures exclusively in a downtown theatre. I

wish you would briefly explain the situations in Richmond, Norfolk and Roanoke with respect to the playing of Columbia pictures first run.

A. Well, in the instance of Richmond, Virginia, we owning no theatres, that is, Columbia Pictures, we were compelled to find the only market that was available to us. In Richmond, most assuredly, we would have preferred to play our pictures at one of the downtown theatres, but not finding that market, we naturally looked to the only outlet that was available to us. Our account there, Mr. Martin Thalheimer, is a splendid exhibitor, but unfortu-
[fol. 1062] nately I do not believe his theatres are capable of yielding to us the returns we might have enjoyed had we been fortunate enough to find a downtown outlet for our pictures.

Q. Now, how about Norfolk?

A. The same thing applies in Norfolk. We tried for many years, and we continue to try now, to place our pictures in a downtown theatre, but we have not been successful in doing so.

Q. And Roanoke?

A. Roanoke, the same situation applies.

Q. With whom do you play your pictures on first run exhibition in Roanoke?

A. In Roanoke we play with associates of Mr. Wilder.

Q. Is he associated with any film distributing company?

A. Not to my knowledge, no, sir.

Q. Do you play Hines' theatres?

A. We have played some of our so-called Western pictures with Mr. Hines, but we have never been successful in placing our important productions in Mr. Hines' downtown theatres.

Q. How many theatres does he own and operate, do you know?

A. He has two downtown theatres and he may have some other properties of less consequence.

Q. In Roanoke?

[fol. 1063] A. In Roanoke.

Q. He is also an independent exhibitor in the sense he is not associated with any distributing company; correct?

A. That is correct.

Q. What is the customary basis upon which you license your first run pictures in the City of Washington?

A. In the City of Washington our pictures have on the main been licensed to Warner Bros. Warner Theatre, which play on day and date basis with Warner's Ambassador Theatre. In many instances our pictures have played in Warner's Metropolitan Theatre.

Q. When they play in Warner's Metropolitan do they play day and date with any other theatre on first run?

A. I beg your pardon, when they play with Metropolitan?

Q. When they play first run at the Metropolitan, do they simultaneously play day and date with any other theatre in Washington?

A. No, they do not.

Q. It is only where they play first run at the Warner?

A. Quite right.

Q. There was testimony yesterday that where the Warner and the Ambassador play day and date on first run, that the Ambassador grosses are something under 50% of the amounts which are grossed at the Warner. Does that correspond with your experience?

[fol. 1064] A. That does correspond with my experience. Over a history in excess of 20 years we find that the returns from the Ambassador Theatre are from 40 to 50%, and I should say very close to the 45.

Q. Columbia has licensed some pictures for exhibition in the Ontario Theatre in Washington on first run, has it not?

A. That is so, we have.

Q. And in those cases in which you have licensed them first run at the Ontario, have you or have you not had available to you a downtown first run theatre for the exhibition of your pictures?

A. No, we have not.

Q. If you had had available a downtown first-run theatre, would you have preferred to have played your pictures in such downtown first run theatre rather than at the Ontario?

A. Yes, I should say so.

Q. Do you have a record of your experience of the play of pictures at the Ontario Theatre?

A. I do.

Q. You had experience with five pictures, I believe, Mr. Galanty.

A. At this moment that is the history.

Q. I wonder if you would give us a summary of your experience of the playing of those pictures at the Ontario?

[fol. 1065] A. The first picture we played at the Ontario was Song to Remember, a picture that was very successful when first issued possibly five or six years ago, but it was delivered to the Ontario as a so-called "reissue."

Q. What were the terms?

A. In the event that the gross of this reissue was less than $6,000 we were to receive as film rental 25%.

[fol. 1066] Q. What, in fact, was the gross?

A. The gross was $4,852 on a 7-day engagement.

Q. And, therefore, the 25 per cent rate applied?

A. $1,213.07.

Q. What was the second picture?

A. The second picture was one entitled Sunny Side of The Street.

Q. Licensed on what basis?

A. Thirty per cent of the gross.

Q. What was the gross?

A. The gross was $1,983.56.

Q. The picture played what dates?

A. It played December 19 to the 24th, 1951.

Q. What film rental was earned on that basis?

A. $595.07.

Q. Was any adjustment made?

A. It was reduced to straight 25 per cent. A 5 per cent adjustment was made in the terms.

Q. Why?

A. Well, I should say, because of the extremely poor gross that the exhibitor had experienced.

Q. What was your next picture?

A. The next picture was Ten Tall Men.

Q. What were the licensing terms there?

A. The license terms were $3,500 guaranty the first [fol. 1067] week against 35 per cent of the gross, with the stipulation that in the event the picture held a second week, we were to receive as terms $1,500 against 35 per cent of the gross.

Q. Thirty-five or thirty?

A. Thirty per cent, I beg your pardon.

Q. What was the play experience on that?

A. The play experience was that it played in what is considered very choice playing time. It opened December 25, 1951, and played a week with a gross of $8,284.70; was held over for the second week to a gross of $6,131.66.

Q. Did it earn the guaranty in the first week? It had to gross $10,000, didn't it?

A. It grossed $8,284. No; it did not earn its guaranty the first week.

Q. Was any adjustment made as to the second week?

A. The second week, we agreed or proposed to adjust it. It has not been approved, but it is now in the home office for consideration, to reduce the terms of the second week to $1,500 flat.

Q. What is the fourth picture?

A. The fourth picture was Boots Malone.

Q. What were the terms there?

A. $2,500 guaranty against 35 per cent of the exhibitor's gross. The picture played starting January 23 for 7 days to a gross of $4,349.88.

[fol. 1063] Q. Against a guaranty of $2,500 on a 35 per cent basis?

A. Quite right.

Q. And the guaranty was not earned, was it?

A. No, sir.

Q. Was any adjustment made on that picture?

A. We had—I have recommended to the home office that they give consideration to an adjustment.

Q. The fifth picture?

A. The fifth picture was Death of a Salesman.

Q. What were the terms on that?

A. The terms were $20,000 cash guaranty.

Q. For how long a performance?

A. For five weeks engagement.

Q. Was there a varying percentage on the weeks?

A. Fifty per cent for the first week; 50 per cent for the second week; 40 per cent for the third, and 35 per cent for the fourth and fifth weeks.

Q. Was this picture, Death of a Salesman, shown to the exhibitor before he licensed it on those terms?

A. Yes.

Q. How long did the picture play?

A. The picture played three weeks.

Q. Who terminated the performance?

A. The engagement was terminated—the exhibitor in-
[fol. 1069] sisted upon terminating it, based upon the grosses, which were failing so badly that we were inclined to agree with his position, that his position was all that could possibly be expected.

Q. What were the grosses?

A. The first week, $8,302.53.

Q. The second week?

A. $4,245 and the third week, $2,691.

Q. Subject to verification, that is a total of $15,238.54 gross against a $20,000 guaranty?

A. Quite right.

Q. Mr. Gaianty, in arriving at the conclusion you expressed with respect to the position which the Crest Theatre should play, as to terms and clearance and run, did you consult with the representatives of any other distributing company?

A. Most assuredly, I did not.

Q. In licensing the Crest on the terms upon which it has played Columbia pictures, did you do that as the result of any conspiracy with any distributing company?

A. Positively not.

Q. What was the basis upon which you arrived at your conclusion as to the terms to be given to the Crest?

A. Well, as we do with most pictures, it was a point reached after negotiations. We naturally attempt to sell
[fol. 1070] our pictures at the very best terms we can secure, and the exhibitor tries to buy them at the terms he feels he can best afford to pay and, through a discussion, we reach our contract terms.

Mr. Watkins: The witness is with you.

Cross-examination.

By Mr. Rome:

Q. Mr. Galanty, your position is that of division manager?

A. Yes.

Q. Who is above you in the distribution division of Columbia pictures?

A. Our assistant sales manager, Mr. Rube Jachter.

Q. Who is above Mr. Jachter?

A. Mr. A. Montague, vice-president and general sales manager of the company.

Q. Both of those gentlemen are located in New York?

A. Yes.

Q. And they are the gentlemen who have ultimate responsibility for decisions made with regard to licensing pictures, runs and clearance, and so on?

A. I should say so. There are others in the home office who weigh these matters, and it is from their recommendations that the final position is taken.

Q. Who are the others in the home office who weigh matters, Mr. Galanty?

[fol. 1071] A. Well, Mr. George Josephs.

Q. Actually, isn't it a fact, Mr. Galanty, that in your company, matters of this type are quite customarily referred to legal counsel?

A. Quite right.

Q. And that is the firm of Schwartz & Froelich?

A. We refer our matters to the home office, and they may elect to discuss it with Schwartz & Froelich.

Q. Who is Mr. Caplon?

A. Mr. Caplon is our local branch manager in Washington, D. C.

Q. And Mr. Caplon works under you with regard to Baltimore matters?

A. I should say so; yes.

Q. And there has been offered here and placed in the record a letter which is marked Plaintiff's Exhibit 34, on the stationery of Schwartz & Froelich, to Mr. Caplon, regarding the matter of the availability of the Crest Theatre.

In the course of this letter, Mr. Galanty, it is said—the record at page 234—:

"It would be preferable, Ben, if further communications relating to this situation and any others dealing with availability, clearance or related subjects be sent directly to Schwartz & Froelich."

Mr. Watkins: That is August 25, 1950?

[fol. 1072] Mr. Rome: That is right, sir.

By Mr. Rome:

Q. And that is not an unusual practice in your company, to have matters taken up with legal counsel; is that correct?

A. That is right.

Q. The letter from Mr. Josephs, which has been shown to you by Mr. Watkins, and refers to the fact that it is the policy of your company not to recognize a neighborhood house as an outlet for exhibition of your pictures on first-run, that is the policy of your company, is it not?

A. That letter so states.

Q. And that is true not only as to Baltimore but in other cities throughout the country?

A. I believe our policy is measured in the sense of each given situation. It is not possible to adapt a company that has no theatres to an over-all United States policy. We are trying to treat each situation with every consideration.

Q. Do you know of any cities or towns within your own division, Mr. Galanty, in which Columbia does license its pictures to theatres outside of the downtown area, other than the theatre in Washington, the Ontario, that has been mentioned?

A. Yes; I mentioned a few moments ago the city of Richmond, Virginia, and Roanoke, Virginia, and Norfolk, [fol. 1073] Virginia.

Q. They are unusual instances, are they not?

A. They are unusual, in that we find that our market.

Q. Your company licenses its pictures to the other distributor companies which are here, with the exception of Universal and the United Artists, in their theatres throughout the country, does it not?

A. We license our pictures to the other distributors who own theatres in various parts of the United States.

Q. And Columbia Pictures receives each year a substantial sum of money by way of film rentals for your pictures which do appear in those theatres?

A. I can only confine my statement to what we receive in the area in which my activities are confined. I would say, our returns from some of those deluxe theatres operated by other distributors is quite satisfactory.

Q. You said that although the Crest Theatre had fine appointments, and was a well-constructed theatre, its location was in a neighborhood which, in your opinion, did not show the hope of a heavy patronage?

A. That is my statement.

Q. Do you know what the population of the area of the Crest Theatre is, Mr. Galanty?

A. I do not. I have heard certain statements made as to their potential draw, and I did make it my business [fol. 1074] to make my own personal survey, and what I saw was a theatre that was located in an area that certainly did not show too much ahead, not remotely a theatre that could be classified or justified as a so-called first-run theatre.

Q. When did you make that inspection, yourself?

A. Very shortly after the theatre had opened its doors.

Q. Have you ever been out there since?

A. Yes; on another occasion.

Q. When was that?

A. I should say, three months ago, possibly longer than that; three to five months ago.

Q. Actually, the policy of your company is such that there would be no theatre in the City of Baltimore located outside of the downtown area, no matter how fine a theatre it might be, and no matter what it might be willing to offer by way of film rental, that your company would license first-run pictures?

A. No; I did not make that statement. I said we would prefer, wherever humanly possible, to have as our outlet a downtown theatre, particularly in a city with the importance of the City of Baltimore.

Q. You know, do you not, that, actually, the Crest

Theatre, or Theatre Enterprises, Incorporated, made bids to Columbia Pictures for Jolson Sings Again, and All The King's Men?

[fol. 1075] A. Those letters, I understand, were addressed directly to the New York office.

Q. They never communicated with you regarding it?

A. Who?

Q. The New York office.

A. The New York office discussed with me by phone the fact that they had received correspondence, but no copy of the correspondence was ever sent to my desk.

Q. The bids for those two pictures were substantial bids, were they not?

A. That can best be judged by the history of what has happened.

Q. You actually place your pictures in the Hippodrome or Town Theatres downtown because, as you have said, your usual practice, as phrased by Mr. Raftery, is to get the best returns you can get from the City of Baltimore?

A. We measure our returns, Mr. Rome, as I explained, beyond the actual dollar in film rental. I believe, a picture in the City of Baltimore, which is placed in the hands of a fine showman, will give us returns not only confined to the downtown area of Baltimore, but we find that success goes out with the neighborhood theatres, is better out there, and outside of the confines of the County of Baltimore, we have better success.

Q. And that is the result of the exploitation, the [fol. 1076] advertising, that flows from the downtown house?

A. A certain touch of showmanship that is applied in the theatres when Mr. Rappaport gives them his attention.

Q. If the Crest Theatre were to have access to the Columbia pictures, and play first-run on a day and date basis with either the Town or Hippodrome Theatres, in your opinion, would there be any less exploitation or publicity or advertising flowing from the two houses, rather than from just the one?

A. You are dealing with a factor that just cannot apply itself. Mr. Rappaport was not agreeable to continue to negotiate for Columbia pictures if we were simultaneously

offering the picture to a neighborhood theatre. And, in my opinion, his position was proper.

Q. Mr. Rappaport did not want anyone coming into the first-run field, competing with him, as he thought; is that correct?

A. You will have to ask his reasoning.

Q. You discussed it with him?

A. His position, I explained very clearly, that he would not negotiate further for Columbia pictures if those pictures were offered simultaneously to a neighborhood theatre.

Q. Do you know what the average film rental earned by Columbia Pictures has been from the Town and [fol. 1077] Hippodrome Theatres in the last several years?

A. Those figures are available, but I do not have them here. From my memory, I could not make that statement.

Q. If I may inform you, then, Mr. Galanty, from the information furnished by Columbia Pictures on interrogatories filed in this case, during the season 1948-49, 19 pictures played in the Hippodrome Theatre at an average rental to Columbia of $1,593, and 5 pictures played in the Town Theatre and paid an average rental to Columbia of $2,472; in the season 1949-50, 16 pictures played in the Hippodrome and paid an average rental of $3,648, while 6 pictures played in the Town Theatre and paid an average rental of $1,328; in the season 1950-51, 9 pictures from Columbia played in the Hippodrome at an average rental per picture of $993, and 10 pictures played in the Town Theatre at an average rental per picture of $2,939.

Those figures, as given by Columbia, would be in line with your own recollection of the rentals, wouldn't they?

A. I don't question those figures, Mr. Rome, but I should like to call your attention that all of Columbia pictures, with all deference to our producers, are not what might be particularly termed the best product. Despite that, in those figures, the averages you have given, there are many pictures which Mr. Rappaport played first-run that were generally, they did not meet with the same success [fol. 1078] in finding a first-run market.

Do I make myself clear?

Q. Yes. The fact that today all of your pictures are

not as fine as All The King's Men, or The Jolson Story, is part of the explanation or the reason why the Ontario Theatre in Washington was not in some instances able to gross enough to meet the guaranties. Isn't that also true as to the Ontario?

A. If you want to be specific, there are only five pictures in question. I can cover them.

Q. Was Boots Malone one of the finest pictures you made?

A. I would say Boots Malone was a very nice picture, an excellent picture.

Q. Have you any idea of the film rental received from Mr. Rappaport for that film's exhibition?

A. I am sorry, I do not.

Q. What about Sunny Side of the Street?

A. I would say that was not the best of our product.

Q. And Song To Remember; I take it, you are being charitable about Sunny Side of the Street?

A. Yes.

Q. Song To Remember, which was actually a reissue, having come out years before, actually earned Columbia a rental of $1,213 from the Ontario Theatre, which is more [fol. 1079] than the average rental Columbia received from nine pictures played in the Hippodrome during the season 1950-51; so that, actually, with regard to that——

A. If you take our returns on the picture called A Song To Remember, from the Hippodrome——

Q. No; I don't have them. I am going only on the information furnished by Columbia.

A. Yes.

Q. Sunny Side of the Street played Christmas Week?

A. I believe it played immediately prior.

Q. And Ten Tall Men played in Christmas Week, opened December 25?

A. I have to refer to these play dates, again. Ten Tall Men opened Christmas Day; yes.

Q. Isn't it generally recognized, Mr. Galanty, that the worst motion picture week of the motion picture year is Christmas Week?

A. I would say, immediately prior to Christmas is recog-

nized as very poor, prior to Christmas. Christmas Week, starting Christmas Day, is very choice playing time.

Q. And the week just before Christmas——

A. Is not desirable playing time.

Q. The picture, Death of a Salesman, was played in the Ontario Theatre, and earned Columbia a big rental of $15,000, and that was actually due to unfortunate diffi- [fol. 1080] culties that had nothing to do with the picture, itself, nor with the theatre in which it was shown; isn't that a fact?

A. You are mistaken as to the return. It was $20,000, and not $15,000.

Q. Mr. Watkins calculated the information.

A. I thought you meant our guaranty.

Q. Your guaranty was $20,000, and it grossed $15,000; that is right?

A. Yes.

Q. Actually, that picture encountered unfortunate problems that had nothing to do with the value of the picture or the theatre in which it was shown; isn't that so?

A. I regret to advise that it met with unfavorable reaction generally throughout the nation.

Q. Having nothing whatever to do with its being played in the Ontario Theatre?

A. Quite right.

Q. Have you any information concerning the total gross earned by the Crest Theatre from the playing of your pictures on first-subsequent-run day and date availability with the Uptown, Avalon, and Pimlico Theatres?

A. I am not acquainted with those figures sufficiently accurate to discuss them with you.

Q. From the information which has been furnished in [fol. 1081] this case by way of interrogatories, Mr. Galanty, I should like to inform you that the Hippodrome Theatre, during the season 1948-49, playing first-run pictures of Columbia and RKO, grossed a total of $132,699, playing at first-run admission prices, and the Crest Theatre, for the first 12 months it was open, playing first-subsequent-run, at first-subsequent-run admission prices, grossed a total of $122,000?

Mr. Watkins: Your Honor, I submit there is no proper basis for comparison there, because it has been thoroughly brought out that the Hippodrome played others, and did not play exclusively Columbia.

Mr. Rome: I am including in my figures, sir, the total gross earned by the Hippodrome Theatre, both from Columbia and RKO, which are the two companies that furnish that theatre with product, and that is on the basis of the interrogatories which have been answered by the defendants in this case.

The Court: You may ask the question. Go ahead.

By Mr. Rome:

Q. Having in mind, Mr. Galanty, that the Crest, playing on a first-subsequent-run, came within $10,000, $11,000, of matching the gross of the Hippodrome Theatre, would that lead you to revise your views in any way concerning the suitability of the Crest Theatre as a first-run theatre?

A. Not at all. I believe, if the Crest Theatre had had [fol. 1082] access to a particular Columbia picture during a given year for first-run outlet at the Crest Theatre, that the Crest, that the gross you just mentioned would not have been the case.

Q. And that, despite the fact that the Crest Theatre playing first-run would have increased its admission prices by almost 57 per cent?

A. I don't know what their policy would have been, but if that is the case, yes.

Q. Playing at first-run admission prices; so that it remains the view of yourself, speaking for your company, that you would prefer, not only in Baltimore but throughout the country, to keep your product located solely in downtown areas, where it is possible for you to do so?

A. Well, that is possibly because the potential, in my opinion, is so much greater.

Q. You recognize that thereby you are fixing the terms and conditions under which a new theatre, like the Crest, can compete in the motion picture industry?

A. Not at all.

Q. Not at all?

A. No, sir.

[fol. 1083] Q. Just one other question, Mr. Galanty.

If Mr. Rappaport had expressed a willingness to play on a day and date first run policy with the Crest Theatre, would your company have then been willing to consider favorably such a playing of your pictures in the City of Baltimore?

A. I do not know, sir, what position my company would have taken. That is something that would normally have been referred to the New York office, but I would, had I been privileged to make my recommendation as to playing in a neighborhood theatre in the City of Baltimore, truly I would have much preferred other Baltimore neighborhood theatres that now exist in preference to the Crest Theatre.

Q. If the matter had been opened up, however, and if the Crest sought access, you would have considered that it had a right to access on that basis along with other theatres that might have wanted it on first run?

A. That is a policy that would have to come from—the answer would have to originate in the New York office.

Mr. Rome: That is all. Thank you.

(Witness excused.)

Mr. Watkins: Mr. Josephs.

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Thereupon George M. Josephs was called as a witness for and on behalf of the defendants and, having been first [fol. 1084] duly sworn, was examined and testified as follows:

The Clerk: Please state your name for the record.
The Witness: George M. Josephs.

Direct examination.

By Mr. Watkins:

Q. Where do you reside, Mr. Josephs?
A. In New York City.
Q. And what is your position with Columbia Pictures?

A. I am in the New York home office, executive sales department.

Q. And what, generally, is your function?

A. Well, my function has been as assistant to the general sales manager. My duties are very varied, all involving national distribution problems and policies.

Q. Now, you are the one who sent to Mr. Galanty a copy of Mr. Rome's form letter of November 1, 1949, and in the forwarding letter you stated that you considered this to be a neighborhood house, not a first run outlet; is that correct?

A. That is correct.

Q. Was that your decision?

A. That was my decision taken after consultation with other people in my home office, my superiors, also after discussing the matter with Mr. Galanty, and I believe Mr. Caplon, the branch manager in Washington.

[fol. 1085] Q. And what, briefly, was the reason for the conclusion you reached and expressed?

A. Well, in discussing the matter with the people down here, Mr. Caplon and Mr. Galanty, they advised me that the theatre was located in a neighborhood area, that it was definitely a neighborhood type of theatre, it was in an area in which there were other subsequent run theatres located which were playing on 21-day availability or later, that it was their opinion that that theatre, the Crest Theatre, was not entitled to be accorded any earlier availability than a 21-day run.

Q. And did that coincide with your experience?

A. Yes, it did.

Q. Now, in the testimony given by Mr. Myerberg he referred to situations in which he says your company does license pictures on other than an exclusive first run downtown, and he mentioned with respect to your company Kansas City. What, briefly, is the situation with respect to Columbia Pictures?

A. We do not license any pictures except to a downtown theatre on first run in Kansas City, Missouri.

Q. Denver was another.

A. In Denver, we do license in Denver a day and date

first run in a downtown theatre and in a neighborhood located theatre.

[fol. 1086] Q. What is the ownership of those theatres?

A. There is a common ownership in those theatres.

Q. Could you sell the downtown theatre without also selling the neighborhood theatre owned by the same owner?

A. Well, some of our pictures have played in the past a downtown theatre owned by the same owners, on an exclusive downtown first run basis. However, in order to sell the particular downtown theatre that plays day and date, the only manner in which we could sell that theatre would be on a day and date basis.

Q. Then is it correct it is not a matter of choice on your part but that is the best basis upon which you can license your pictures?

A. In connection with that, in Denver, that is the situation as we found it. That has existed for many, many years. The theatre that plays day and date with this downtown theatre has been an established first run theatre for many years. The operator of those theatres, who is our customer and has been our customer in Denver for many years, operates those theatres in that manner, and that is the manner in which we sell it.

Q. Are there any substantial sub-runs in Denver?

A. No. There are very few subsequent run theatres in the City of Denver. As a matter of fact, most of the subsequent run theatres in the City of Denver are located [fol. 1087] in a completely separate section of town from this theatre which plays on first run day and date.

Q. And then the third city mentioned by Mr. Myerberg with respect to Columbia was Los Angeles.

A. Well, we sell a day and date first run in Los Angeles, but we do not consider it a day and date first run. An examination of the City of Los Angeles indicates, without a question of a doubt, that Los Angeles proper as distinguished from Hollywood, where we sell the other first run, are practically two separate cities. There is quite a wide distance between them. Hollywood is an area with its own shopping, its own stores. It is completely separate and has a completely private residential area as opposed

to downtown Los Angeles, which draws from that section of the town.

Q. Do you regard that as similar to the situation in Baltimore——

A. Not at all.

Q. —with reference to the downtown theatre and the Crest?

A. Not at all.

Q. Mr. Josephs, I show you plaintiff's exhibit No. 30, which is a letter from Mr. Rome of Gray, Anderson, Schaffer and Rome, dated December 20, 1949, addressed to Columbia Pictures, Inc., 729 Seventh Avenue, New York, New York, and call your attention to the second paragraph which is as follows:

[fol. 1088] "In this connection and as further evidence of the conviction held by our client that the Crest is entirely suitable for first run exhibition, we are authorized to submit to you a bid for the exclusive first run exhibition in Baltimore at regular first run admission prices of your picture Jolson Sings Again.

"Our client is willing to pay a $10,500 guarantee against 40% of the gross for this picture and will post the guarantee in the form of a certified check if that is deemed desirable."

Was that offer accepted or rejected.

A. Well, the offer was rejected because the picture had already played on first run in the City of Baltimore.

Q. How long?

A. What was the date of that letter?

Q. The date of the letter is December 20, 1949.

A. I believe that the first run exhibition of Jolson Sings Again took place in the month of September and October, which would conclude approximately two months prior to the receipt of that letter. As a matter of fact, the picture had also been sold and booked for a repeat first run prior to the time that letter was received.

Q. On receipt of the letter it had already played Baltimore and it was booked for another appearance in Baltimore, repeat run?

[fol. 1089] A. That is correct.

Q. Mr. Myerberg, in his testimony, referred to some 37,000—I believe it was read into the record from the interrogatories, the fact that some $37,000 in film rental had been received by Columbia from first run exhibition. Does that relate to the exhibition which had already occurred at the time this letter was received?

A. That is correct.

Q. Mr. Josephs, I show you plaintiff's exhibit 31, which is a copy of a prepaid straight telegram from Gray, Anderson, Schaffer and Rome, addressed to Mr. Abe Montague, Columbia Pictures, Inc., 729 Seventh Avenue, New York, New York.

"We request opportunity to negotiate for the Crest Theatre for All The King's Men will guarantee $7,000 against 40% of gross for extended first run. Alternative bid $4,000 against 40% of gross for extended run day and date with downtown Baltimore."

Mr. Josephs, first let me ask you is there any difference between those two offers?

A. Yes. I would say that the first offer, offering $7,000 against 40% of the gross for extended first run refers to an exclusive first run, whereas the alternative bid of $4,000 against 40% of gross for extended run day and date with downtown Baltimore, states that it is offered for a day [fol. 1090] and date first run with downtown Baltimore.

Q. He was willing to guarantee $7,000 if he alone played it in the City of Baltimore?

A. That is correct.

Q. But $4,000, if he played it with someone else at the same time in downtown Baltimore?

A. That would be my interpretation of that offer.

Q. Was that offer accepted or rejected?

A. Well, it was not accepted. It wasn't considered.

Q. Why?

A. It was not unsolicited offer. We had an established bidding. The offer, from a standpoint of the amount of money, was certainly insufficient, to start with. The theatre was a neighborhood theatre, not a theatre that we considered suitable for the presentation of the picture of an importance of All The King's Men. I doubt if the offer was given very much consideration at all.

Q. Mr. Josephs, in reaching the conclusions that you have expressed with respect to the Crest being a neighborhood theatre and with respect to the non-acceptance of the two offers, did you consult with or in any way discuss any of these matters with a representative of any other distributing company?

A. No, I did not.

Q. In reaching the conclusion as to the neighborhood [fol. 1091] run at the Crest Theatre and the failure to accept the two offers, did you conspire with any other distributing company to determine the policy?

A. No, I did not.

Q. What was the reason for according to the Crest the treatment it has been given with respect to Columbia pictures?

A. Purely our considered opinion that the Crest Theatre, being a neighborhood house in a neighborhood location, with a fairly sparse population, was not entitled to an opportunity to exhibit our pictures on first run in the City of Baltimore.

Mr. Watkins: The witness is with you.

Cross-examination.

By Mr. Rome:

Q. Mr. Josephs, you just said that the area of the Crest Theatre had a sparse population.

A. Well, perhaps the word is wrong. At least a population which is not dense. In other words, the area from which it would have to draw, from the information that was given to me, was not the dense area that we would like to have for a first run theatre.

Q. What information was given to you with regard to the population, Mr. Josephs?

A. No specific information as to figures except it was a residential area not very heavily populated.

Q. Do you consider a population of 100,000 people or [fol. 1092] 125,000 people enough to start a first run theatre?

A. It might be enough to support a first run theatre under

some circumstances, depending upon the picture that might be exhibited there, but not necessarily to support a first run theatre for all types of product.

Q. You referred to the fact that the offer by Theatre Enterprises of $7,000 guarantee for All The King's Men was simply insufficient, dollar-wise.

A. We would consider it insufficient if we were considering it at all. We would consider it insufficient for a film rental for first run Baltimore.

Q. Do you know what film rental you received from first run Baltimore from the exhibition of All The King's Men?

A. I am not certain.

Q. According to the interrogatories that your company have answered, Mr. Joseph, Columbia actually received from the first run exhibition of All The King's Men out of the City of Baltimore $7,182.52.

A. Yes.

Q. And you still consider the bid of a guarantee of $7,000 so insufficient, that you would not even consider it?

A. Well, definitely, Mr. Rome, in considering bids you cannot determine before a picture plays how much it is going to gross and how much it is going to earn. The basis [fol. 1093] of your decision with respect to any offer would be on past experience. We have earned in first run Baltimore out of the Hippodrome and Town Theatres on many of our pictures considerably in excess of $7,000.

Q. Have you been in court, Mr. Josephs, when I read to Mr. Galanty the average film rentals received from the Town and Hippodrome Theatres for the years 1948-1949, 1949-1950, and 1950-1951?

A. Yes, I heard your averages, Mr. Rome.

Q. And you still say, despite those averages, which are considerably less than $7,000, that the performance Columbia has had in the past out of the Hippodrome Theatre was such that you were able to look upon the $7,000 as so insignificant not even to give it a thought for that picture?

A. Mr. Rome, we have various classes of pictures. We have some pictures which we consider extremely important pictures. We have others that are average. We have some pictures which we do not consider have very much grossing possibilities at all. When we judge an offer made on a

particular picture it is with regard to the type of picture that it is. And in arriving at a conclusion we compare the offer made with film rental we have received on pictures which we judge to be in the same general classification.

All The King's Men, in our opinion, and as proven by [fol. 1094] the final results of the picture, was one of the top pictures, best pictures that we have ever distributed. It subsequently received the Academy Award, and as such, in judging an offer made on the picture, we would compare it with rentals which we have received on top pictures exhibited in the City of Baltimore on first run.

Q. But all that you made on its exhibition on first run was $7,188?

A. I think that we allowed the picture to play too early.

Q. Even though these bids submitted to you came unsolicited?

Mr. Watkins: Offers.

By Mr. Rome:

Q. ——offers came unsolicited, they were not even acknowledged, were they?

A. I do not believe that they were acknowledged. We received them on the letterhead of a firm of attorneys, and we do not as a general rule acknowledge letters that we receive from attorneys.

Q. Mr. Galanty was not able to give us information other than for his particular division, Mr. Josephs, but perhaps you can tell us whether or not it is not the fact that Columbia Pictures licenses its product to the so-called Big Five in their theatres throughout the country?

A. Well, Mr. Rome, in answer to that let me say we [fol. 1095] license our product for as much money as we can get in every city in the United States, to whichever exhibitor we find is willing to license our product and pay us those film rentals.

Q. I am perfectly willing to accept that, but won't you answer my question?

A. I will be glad to do so. In many cities of the United States the Big Five, as you refer to them, have theatres and they are willing to license our product in those theatres.

Q. But you do so license your product?

A. Yes, sir.

Q. And is it not a fact that Columbia each year receives from that licensing very substantial sums of money?

A. We are fortunate that we are able to receive substantial sums of money from these theatres.

Q. But is it not a fact that the theatres of these so-called Big Five, taken collectively, actually represent your best customers throughout the country, dollar-wise?

A. I would not say that that is so, necessarily.

Q. Don't you know, Mr. Josephs, that that has been found to be the fact by the court in the Paramount case?

Mr. Watkins: Objection.

The Witness: No, I do not know that that has been found to be the fact at all in the Paramount case.

[fol. 1096] By Mr. Rome:

Q. These theatres owned by the Big Five distributors, which are first run, are located in the downtown sections of cities?

A. Yes, in many cities they have theatres located in the downtown sections.

Q. And you license your pictures on first run in those theatres in those cities in many, many instances throughout the country?

A. Yes, in many instances throughout the country we license those theatres, that is correct.

Q. The City of Los Angeles was mentioned. To what theatres in the City of Los Angeles do you license your product?

A. At the present time?

Q. Yes.

A. Well, at the present time our pictures are being offered on competitive bidding in the City of Los Angeles.

Q. Before the competitive bidding was inaugurated, to what theatres did you license your product?

A. Our pictures are generally licensed to the Hill Street Theatre, located in downtown Los Angeles, and the Pantages Theatre located in Hollywood.

Q. And both of these theatres are run by RKO, are they not?

A. They are.

[fol. 1097] Q. And they are about eight miles apart?

A. I believe so.

Q. Have you any idea of the population of the City of Denver, which was also mentioned?

A. I believe it is something like 300,000.

Q. Actually, Mr. Josephs, according to the census figures, according to the almanac, the population of Denver is 412,000. Can you tell me how many subsequent run theatres there are in the City of Denver, approximately?

A. From my recollection I believe that Denver probably has in the neighborhood of 25 subsequent run theatres, perhaps.

Q. And those subsequent run theatres are still in existence, despite the fact that Columbia has been playing a day and date first run policy in the City of Denver?

A. I wouldn't know if they are all in existence.

Q. These 20 theatres?

Mr. Watkins: You said despite the fact.

By Mr. Rome:

Q. Are doing business today, their doors are open and they are showing motion pictures?

A. I imagine they are doing business.

Q. And the downtown theatres are also open in the City of Denver, showing pictures?

A. Yes, to the best of my knowledge, they are.

Q. Who is the exhibitor who has the common ownership [fols. 1098-1099] of the theatres in Denver in which you show your product?

A. Fox Intermountain Theatres.

Q. That is connected with Fox, which is one of the defendant companies in this case; is that so?

A. I believe so. It is connected with National Theatres.

The Court: We will take a recess at this time until 1:45 o'clock p.m.

(Thereupon, at 12:45 o'clock p.m., a recess was taken until 1:45 o'clock p.m.)

[fol. 1100] Afternoon Session

(Met, pursuant to the taking of the recess, at 1:45 o'clock p. m.)

The Court: Very well, Members of the Jury and Counsel, we are ready to proceed.

Thereupon George M. Jourras resumed the witness-stand and, having been previously sworn, testified further on behalf of the defendants, as follows:

Cross-examination (Resumed).

Mr. Rome: If the Court please, may I, in line with the occurrence of yesterday,—at which time Mr. Lichtman accepted the offer of Theatre Enterprises, Inc. of $15,000 for the right to exhibit the motion picture Diplomatic Courier on first run in the City of Baltimore—herewith tender to counsel for Twentieth Century-Fox a certified check of Theatre Enterprises, Inc., in the sum of $15,000 for the right to exhibit that picture on first run in the City of Baltimore.

The Court: I don't know that this is the place to have an offer or sale of movies, or to have any sale.

Mr. Rome: It was simply in order to carry through with what occurred yesterday, in view of the fact that Mr. Lichtman accepted it, and he mentioned the fact that he wanted to have the check. I want to demonstrate the good faith of [fol. 1101] our client, in herewith presenting it.

The Court: Mr. Watkins, do you want to say anything?

Mr. Watkins: If Your Honor please, we are dealing with what happened back in 1948, 1949 and 1950.

The Court: I thought what took place yesterday was sort of a behind-the-scenes affair and did not have anything to do with the case. I did not object to it, but I do not think present-day bargaining has anything to do with the issues in the case.

Mr. Rome: The only reason I mentioned it at all, if the Court please, is that Mr. Raftery had specifically directed Mr. Lichtman's attention to Diplomatic Courier, and Mr. Lichtman accepted the offer; and I wish to indicate the fact that we do have the check here.

The Court: No doubt, the check will keep. You can take that up afterwards.

By Mr. Rome:

Q. Mr. Josephs, if the Crest Theatre had been located downtown in the City of Baltimore, would your company have granted it access to first run pictures?

A. Yes.

Q. And, if that theatre had been owned by Mr. Rappaport, located where it is now at Reisterstown Road and Rogers Avenue, and if Mr. Rappaport had requested your company to institute a day and date policy in the Town Theatre, for instance, and in the Crest Theatre, would your [fol. 1102] company have granted that request?

A. I couldn't answer that. It is hypothetical. It would have to be decided, if at all, by others. I cannot answer the question.

Q. You would have to take it up with your superiors?

A. We would have to discuss the entire situation, and the effect that it would have on other theatres located in the same area and in other neighborhood areas in Baltimore which might be involved, which might result in our having to change our entire method of distribution in the City of Baltimore,—which is a very complex problem.

Q. In any event, you would consider it?

A. We would probably consider the request.

Q. The reason I raised the question with you, Mr. Josephs, is that I gathered from your testimony that the problem of common ownership, as, for instance, the Fox Theatre in Denver, seemed to make it easier on the part of your company to grant the day and date first run; and I think we should point out the fact.

A. With regard to common ownership, there is no doubt but that it is a lot easier to distribute pictures on a day and date policy. If you are going to do it, where you have common ownership, you can control the opening date of your picture, the closing date of your picture, and you have no problem with respect to the placing of your advertising; [fol. 1103] you have one exhibitor with whom you have to deal for the placing of your advertising. All of these problems are very important in dating a picture on first run;

with respect, particularly, to the closing date, we would want to know when the picture closed. To have it close in both places at the same time is very important to our subsequent problem, because of the first run closing.

Q. To your knowledge, has it happened in the city of Los Angeles, for example, that one house plays the first run day and date with another house who held the picture for a longer period of time than another?

A. No, not with Columbia pictures; we haven't had it happen.

Q. Has it ever happened with any other company, to your knowledge?

A. I would not know.

Q. You know, generally speaking, the fact that the other distributors in this action also license their pictures for the first run exhibition in the theatres located downtown in the city?

A. I do not follow your question.

Mr. Rome: Will you read the question, please?

(The question was then read by the Reporter.)

The Witness: In the City of Baltimore?

By Mr. Rome:

[fol. 1104] Q. No; generally, throughout the country.

A. Yes; generally, first run exhibition is licensed for downtown theatres around the United States.

Q. Isn't it a fact that your decision not to grant access to first run pictures on the part of the Crest Theatre actually resulted in fixing the terms and conditions under which that theatre could compete in the motion picture industry?

A. I don't know what you mean by "terms and conditions." It did result in a decision on our part that this theatre would exhibit, or would be privileged to license our pictures, on a first sub run availability.

Q. And thereby it fixed the run clearance for that theatre at the first run subsequent availability?

Mr. Watkins: On that picture.

By Mr. Rome:

Q. On that picture, and on any picture that Columbia has licensed to the Crest Theatre?

A. Yes. If our subsequent availability is a certain period after the first run, every subsequent run theatre would be fixed by that plan.

Q. The firing of that availability at the 21 days run after downtown actually stemmed from your policy, which you have described, to license your pictures for first run in the downtown area of the cities?

A. I don't follow that question, Mr. Rome.

[fol. 1105] Q. Let me put it to you in this way: you license to the Crest Theatre Columbia pictures on the first subsequent run availability 21 days after downtown? Is that so?

A. That is correct.

Q. And you do that because of the fact you have that policy in your company, as you mentioned in your letter to Mr. Galanty, not to license for first run in neighborhood houses or theatres located outside of the downtown area of the city?

A. We did that because we had arrived at a conclusion that, with respect to the Crest Theatre, it was not, in our opinion, entitled to exhibit our pictures on a day and date or exclusive first run. Accordingly, the next best run available to the theatre, with respect to the licensing of our pictures, would be the 21-day availability in the city.

Q. Mr. Watkins asked you whether or not you had consulted or talked with anybody concerning a decision, that is, with any of the other distributors concerning the decisions that are reached by your company with regard to the Crest Theatre; and you answered that you did not?

A. That is correct.

Q. It is a fact, however, is it not, that your company had been found guilty of violating the Anti-Trust laws of this [fol. 1106] country, in conjunction with the other defendants in this case, on a national basis, and had been found guilty of restricting and restraining the competition that may be offered by independent exhibitors?

[fol. 1107] Mr. Watkins: I object on the ground that it has nothing whatever to do with the situation in Baltimore.

The Court: The question was asked before, and I allowed it. I will allow it now. I think he ought to be a little more specific as to what was the restraint of trade found to have existed.

Mr. Rome: I will withdraw the question and put it another way, sir, so as to make it more specific.

By Mr. Rome:

Q. Isn't it a fact, Mr. Josephs, that Columbia Pictures has been found guilty, along with all the other defendants in this connection, of violating the anti-trust laws by either evolving or acquiescing in a fixed or uniform system of runs and clearances which had the effect of restraining or lessening the competition that might be brought about by independent exhibitors throughout the country?

Mr. Watkins: Your Honor, I make the same objection for the same reason, if found guilty carries with it the possibility of criminal responsibility.

The Court: You are talking about the Equity suit?

Mr. Rome: Yes, sir, it was an equity suit.

The Court: I will allow it.

A. Yes, we were found guilty.

By Mr. Rome:

Q. And the policy of your company which has been discussed here today is the same policy which has been followed before the Paramount suit, during the Paramount [fol. 1106] suit, after the Paramount suit; is not that so?

A. No, that is not so.

Q. What change has there been in your policy?

A. Insofar as what? What does it concern?

Q. In regard to licensing your pictures on first run exhibition only to those theatres located in the downtown areas of cities.

A. I do not recall that that particular matter was involved in the suit you talked about.

Q. I am asking you, though, Mr. Josephs, whether it isn't a fact that this policy about which you wrote to Mr. Galanty was a policy that your company had carried on years ago

and then during the period in which your company was involved in the Paramount case litigation and even today?

The Court: I think the witness ought to be allowed to give his answer. If it is his opinion that was not involved in the government litigation you speak of, he has the right to say so and give the reason why there has been no change or he feels that such a change was not necessary in that particular field that we are now concerned with here. He has a right to explain that.

Go ahead, sir.

The Witness: With respect to the exhibition of motion pictures in first run theatres located in the downtown areas, it is my recollection that we were permitted to seek what [fol. 1109] would be known as a show case theatre in large cities throughout the country, as we had in the past, and we have continued in many cases to sell our pictures in so-called show case theatres for very good reasons with respect to the proper exploitation of our motion pictures.

By Mr. Rome:

Q. Is that the whole of your answer, sir?

A. Well, to that part of your question.

Q. And that is the policy that has existed in your company for a number of years?

A. Well, it is not a matter of policy. You keep using the word "policy," Mr. Rome. A policy with respect to distribution of motion pictures has to be set up for each area in which we are operating. There can not be any nationwide policy with respect to distribution of all of our pictures. We will release one picture at a given time that we feel should be handled in one manner and at another time another picture we feel should be handled in an entirely different manner. So, there cannot be any definite policy.

Q. Isn't that the exact expression you used in writing to Mr. Galanty?

A. I do not recall the expression you mean.

Mr. Rome: Will Your Honor indulge me just one moment, sir?

May I have plaintiff's exhibit No. 32, please?

(Document handed to counsel.)

[fol. 1110] By Mr. Rome:

Q. I hand you you a letter which has been marked in evidence as plaintiff's exhibit No. 32, Mr. Josephs, from yourself, which was shown to you this morning, and ask you if it isn't a fact——

A. It was not shown to me this morning, was it?

Q. Will you look at it now, sir?

(Document handed to witness.)

Isn't it a fact, Mr. Josephs, in this letter you wrote to Mr. Galanty as follows:

"Judging from the description of the theatre as contained in this letter, this seems to be a neighborhood house and it has been our policy not to recognize the requests of neighborhood houses for first run on our product."

That is contained in that letter, isn't it?

A. That is correct.

Mr. Rome: I have no other questions. Thank you.

The Witness: May I explain what that means?

Mr. Watkins: Do you want to amplify your answer?

The Witness: Yes. In replying to that particular letter, that referred only to this particular situation?

Mr. Watkins: One further question.

Coming to the City of Baltimore, Columbia licenses its pictures for first run exhibition downtown only to independently operated theatres, does it not?

The Witness: That is correct.

[fol. 1111] Mr. Watkins: That is all.

(Witness excused.)

Mr. Watkins: Mr. Meyers, please.

Thereupon, FREDDIE MEYERS was called as a witness for and on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name for the record sir.
The Witness: Freddie Meyers.

Direct examination.

By Mr. Watkins:

Q. Where do you live, Mr. Meyers?
A. In New York City.
Q. And what is your occupation at the present time?
A. I am district manager for the United Artists Pictures, Metropolitan area, city of New York.
Q. Now, would you tell the Court and jury briefly your experience in the motion picture business.
A. I came into the motion picture business in 1912 and I have been in it ever since. I started as an usher in the theatre, have been a manager of a theatre and then as a film buyer and booker for the RKO circuit of theatres for years. In 1941 I joined Universal Film Distributing Com-
[fol. 1112] pany as Eastern Sales Manager, which comprises the following cities where we had branches: Philadelphia, Pittsburgh, Washington, Cleveland, Buffalo, New Haven, Albany, Boston and New York City.
Q. You have had experience, then, in both the exhibition and the distribution of motion pictures?
A. Yes, sir.
Q. Were you with the Century Circuit for a while?
A. Well, yes, I booked pictures for the Century Circuit.
Q. Was that an affiliated circuit or an independent circuit?
A. It was an independent circuit affiliated with RKO.
Q. Your position as Eastern Division Sales Manager with Universal was one you held in 1948, 1949 until the year of 1950?
A. No, it was up to the end of 1949.
Q. Up to the end of 1949?
A. December 31, 1949.

Q. By whom, on behalf of Universal, was the determination made as to what run of pictures would be licensed to the Crest Theatre in Baltimore?

A. By myself in cooperation with my district manager, who then was John Scully and the now deceased Harry Martin of the Washington office.

[fol. 1113] Q. I direct your attention, Mr. Meyers, to page 91 of the transcript in this case and to the testimony of Mr. Myerberg. The questions and answers are as follows:

"Q. Were you ever able to see any executive other than those persons in the Washington office of United Artists?

"A. Yes; Mr. Fred Meyers,"——

A. United Artists?

Q. Wait a minute. The next question:

"Q. Did you see anybody except United Artists?

"A. Mr. Fred Meyers, Eastern Divisional Manager of Universal visited my theatre when it first opened."

—. So you were out there when the theatre opened?

A. It was my policy.

Q. And you saw Mr. Myerberg at that time?

A. Correct.

Q. The next question and answer were:

"Q. Do you recall when that was?

"A. That was in either November or December, some time around that time, 1948, and he stated that he could not grant our theatre either a day and date policy with downtown or an exclusive first run in the City of Baltimore as it was their policy throughout the country to show their pictures in the downtown areas first run."

Does that correctly represent your recollection of the conversation?

[fol. 1114] A. No, it does not.

Q. What is your recollection?

A. In the first place, I cannot talk for the entire Universal company. I was only in charge of the Eastern part of the country, and as far as I personally was concerned, there was no policy. We sold pictures as we thought was the best way, and in the best interests of the company and the best interest of the exhibitors, as well.

Q. In fact, you were serving neighborhood theatres in Richmond at that time, were you not, sir, first run?

A. Correct.

Q. I wonder if you would take just a moment and explain the Universal Company's situation with respect to the exhibition of pictures in Richmond.

The Court: I would just like to interrupt. I am just a little confused. The jury may be, too. You say you are now with United Artists?

The Witness: United Artists Pictures, that is right, sir.

The Court: And you have been connected with Universal?

Mr. Rome: He was the Eastern Sales Manager of Universal up until December 31, 1949.

The Court: What are you now with United Artists?

The Witness: I am with United Artists as Metropolitan [fol. 1115] District Manager, New York City.

The Court: But you are now talking about what you did when you were with Universal.

The Witness: Correct, sir.

Mr. Watkins: Mr. Meyers, the witness, is connected with United Artists Corporation, but statements were made on the stand yesterday about the Universal practice, and Mr. Meyers is testifying as to Universal's treatment of the Crest Theatre at the time.

The Court: That clears it up.

By Mr. Watkins:

Q. I have asked you, Mr. Meyers, if you would tell His Honor and the jury what the situation was with respect to licensing first run pictures by Universal in Richmond at the time of this conversation.

A. Several of our pictures were sold to the Loew theatre downtown in Richmond. Several of our pictures were sold to the State Theatre downtown and the Byrd Theatre, which is a neighborhood theatre, day and date. Many times the State Theatre played our pictures downtown ahead of the Byrd Theatre, which was in the neighborhood. That was at the discretion of the people who owned the State and the Byrd Theatres. At that time it was called the Neighborhood Theatres. I don't know whether they still call them the Neighborhood theatres. That was the name of the firm then.

[fol. 1116] Q. Well, then, if I understand correctly, part of your pictures played on exclusive downtown first-run and some of your pictures played downtown and neighborhood day and date run in theatres owned by the same operators?

A. Yes; plus there were a number of pictures that played downtown in the Colonial Theatre, and in the National Theatre, which was an independent-operated theatre at the time, and still is owned by Fabian, or the Fabian Circuit, as it is called today. Our pictures played in practically all downtown theatres in the city of Richmond.

Q. When they played on a day and date and neighborhood, was it because you preferred it that way?

A. Correct.

Q. Now, the Washington situation, in general, what was the situation?

A. Up to December 31, 1949, for several years that I can remember, our Universal pictures played in the Keith Theatre, RKO-Keith Theatre, and also played in the Loew's Theatre downtown. An occasional picture might have played—and I am not certain about that—in the Metropolitan Theatre. I don't recall at any time, frankly, according to my memory, that we serviced the Warner Theatre, as I have heard here this afternoon or this morning, and the Ambassador Theatre.

Mr. Watkins: May I have Plaintiff's Exhibit 28?

[fol. 1117] The Clerk: Here it is.

By Mr. Watkins:

Q. Mr. Meyers, on what availability was Universal licensing pictures to the Crest Theatre?

A. Well, I am not sure. Toward the end of my administration with Universal, I believe that we serviced them pictures 21 days after downtown.

Q. What was the reason for servicing pictures on a 21-day or first-neighborhood-run availability?

A. The reason, frankly, in my opinion, he was not entitled to the 21 days. For some reason or another, only known to himself, this man or his organization decided to put a theatre in the middle, between theatres, in an area which, in my opinion, no theatre was entitled to be at that

particular time. Namely, I will be specific on one, and cite the fact that on one side is the Ambassador Theatre, and on the other side the Uptown Theatre, and mentioning the Pimlico Theatre, which was in the same area, but nevertheless we made a decision to service him 21 days after downtown, giving him the same right as anybody else had in that area.

Q. In your opinion, with the building of the Crest Theatre, was that neighborhood overseated?

A. Definitely so. I so told that to the gentleman.

Q. I show you, Mr. Meyers, Plaintiff's Exhibit 28, and since it was introduced sometime ago, it might be worth-[fol. 1118] while reading it to the jury. It is a short letter:

"November 26, 1948.

"Universal-International Film Corp.,
"913 New Jersey Avenue, N. W.,
"Washington, D. C.

Attention: Mr. Martin

"DEAR MR. MARTIN:

"Pursuant to my telephone conversation of November 22, 1948, I submit the following bid for your picture 'Hamlet' to play our Crest Theatre first run, City of Baltimore.

"Theatre Enterprises, Inc. agrees to pay Fifty Percent (50%) of the first Seven Thousand Eight Hundred and Fifty Dollars, ($7,850.00) gross box office receipts, and Sixty-Five percent (65%) of all box office receipts over Seven Thousand Eight Hundred and Fifty Dollars ($7,850.00). We will also place any reasonable guarantee, the figure to be mutually agreed upon. We will also set a minimum figure determining the completion of the engagement of this picture.

"It would be greatly appreciated, since time is most important, if you would reply at once to the above.

"Very truly yours, Theatre Enterprises, Inc., (Sgd.) by Harry D. Myerberg."

Now, Mr. Meyers, I would like to ask you two questions about the form of this. He refers to submitting a bid. Is that a bid?

A. No, sir. That was no bid to me, and I so told him. [fol. 1119] If I remember correctly, I think I answered that letter. I am not sure whether it was that letter or another letter that I replied to. We were not bidding for any pictures, and told him that. When we received that letter, I don't know whether the reply is—whether our reply was to that one, or some other letter, but I know I replied to him; but which letter, I don't remember.

Q. The offer is to pay 50 per cent of the first $7,850. Is that a guarantee of any sort?

A. It is not.

Q. It is a percentage against a particular figure?

A. A picture might gross $10,000, and it might gross $7,000, and it might gross more. If it grosses a thousand dollars, you get 50 per cent of that, or $500.

Q. Did you accept this offer?

A. I did not go into any discussion with the man, because I thought the man was—I thought he was joking about it. The first thing, the man didn't know his business, frankly, when he tried to buy a highly-specialized picture like Hamlet for a neighborhood theatre.

Q. You did not think that was appropriate?

A. When we were running that, we are going to specialty theatres, that cater to special people. I would not say the intelligentsia, but I would say special people who patronize this kind of picture in downtown theatres and, therefore, I [fol. 1120] did not take it serious. I thought he was joking, to be frank.

Q. At any rate, you did not accept the offer?

A. That's right.

Q. On page 222 of the transcript, you are quoted as saying that the theatre was in the wrong location. Was that your conclusion?

A. It certainly was.

Q. And is it?

A. It still is.

Q. Mr. Meyers, in two places in the transcript reference is made by Mr. Myerberg, or a claim is made by Mr. Myerberg, that Universal pictures which play the Parkway for 7 and 14 days ahead of other neighborhood houses.

From the time the Crest Theatre opened, and as long as

you remained with Universal, did any Universal picture play the Parkway?

A. As far as my memory goes, I don't ever remember playing a picture in the Parkway Theatre. The theatre that we played our pictures in at that time was the Center Theatre, and we played 21 days after downtown.

Q. Mr. Meyers, in reaching the conclusion that you have expressed as to the run to be given to, or the availability to be given the Crest Theatre, and other dealings with respect to it, did you discuss the question of what terms should be [fol. 1121] given, with any representative of any other distributing company?

A. The answer to that is only one: that I run my business for my company, and I did not consult with any other companies' problems but my own, and I did a fairly good job of it, after 8½ years.

Q. Did you discuss your problems with them?

A. I certainly did not.

Q. Was the treatment accorded the Crest the result of any conspiracy between you or your company and any of the other distributing companies?

A. The fact remains that—and I think it is a matter of record—that I wrote the man a letter, Mr. Myerberg, and told him that before I would make any decision as to his request of any kind, I would first have to visit his theatre, which I so did, look through his theatre with him prior to the theatre opening. In fact, I think the theatre was three-fourths completed, and then made my decision, and told him my decision.

Mr. Watkins: Thank you. The witness is with you.

Cross-examination.

By Mr. Rome:

Q. Mr. Meyers, if the Crest Theatre had been located downtown, would you have granted it access to first-run Universal pictures?

A. I say Yes; I would give him an opportunity, I cer- [fol. 1122] tainly would.

Q. So then, actually, the only reason why it was not

granted access to first-run pictures was because of its location, which you considered to be bad; is that so, sir?

A. Yes; that is so.

Q. Your company, Universal, for many years, has it not, has licensed its product for first-run in many instances to the so-called Big Five?

A. I disagree with you. In the first place, I take issue with you, and I don't like to take issue with you, because I am not a lawyer. There is no such thing as the Big Five. Let's eliminate that, right now. I heard you mention that several times. Today, we have three companies, motion picture companies, that have up to a certain time to dispose of their theatres; namely, Fox West Coast—let me say "Fox", not West Coast—but the Fox Theatres, the Warner Theatres, and the Loew Theatres. They have a certain time in which they have to divest their theatres from their production companies. So that eliminates the Big Five, completely; so there are three companies, Mr. Rome, not Big Five. I wish you would not apply that, because it is not right, as far as I am concerned.

Q. At the time that we are speaking of, back in 1948 and 1949, isn't it a fact, Mr. Meyers, that the term Big Five was a well-recognized term in the motion picture industry to [fol. 1123] designate Fox, Warner, Paramount, Loew's, and RKO?

A. It is not a fact, as far as I am concerned.

Q. You never heard that expression?

A. I never heard of it, and I never applied it in that sense, and I never heard of it in that sense, and I never heard of the Big Five. I heard you say that, this morning, and I was amazed.

Q. As of the time we are speaking of, back in 1948 and 1949, those five companies did own theatres throughout the United States, did they not?

A. I don't know when RKO Company was divested, and I don't know when Paramount was divested and, therefore, I cannot give you a correct answer, whether it was 1948 or 1946. I don't know which.

Q. This divestiture was ordered, these five companies owned theatres throughout the United States, did they not, before divestiture was ordered?

A. I imagine they did.

Q. And, in your capacity as eastern sales manager for Universal, you know, did you not, that Universal pictures were licensed for first-run exhibition in the theatres owned by those five companies over the years you were with Universal?

A. Yes; we did business with all theatres all over the United States; correct.

[fol. 1124] Q. Did you specifically do business with these five companies?

A. I imagine so, along with all the other theatres. There are 18,000 theatres in the United States, or were at that time.

Q. You say you imagine so. Don't you know?

A. I wouldn't know. I was only interested in my own part of the country.

Q. That is the part of the country I am talking about.

A. The eastern part of the country, there were some theatres doing business with us, with some of those people who own theatres, and also distributed pictures.

Q. And Universal, in that section of the country that came under your jurisdiction, receives very substantial sums of money each year by way of film rental?

A. I wouldn't know what the amount was. You say "substantial". I don't know. Some money.

Q. Would you characterize it in some other way?

A. I cannot.

Q. But you say you were just the eastern sales manager?

A. Correct.

Q. Was there some over-all sales manager who was superior to you?

A. Correct; there was.

Q. Who was that?

[fol. 1125] A. His name was William A. Scully. He was the general sales manager in charge of distribution.

Q. And he had ultimate supervision over the decisions you made, as well as the decisions made by other division managers in other parts of the country?

A. Yes; correct.

Q. Isn't it a fact, Mr. Meyers, that you consulted in one way or another with Mr. Scully, as well as with other gentle-

men in the home office of Universal, concerning the licensing of pictures to the Crest Theatre in the City of Baltimore?

A. The only thing, or the only person I discussed that with was with John Scully, a brother of William A. Scully, and Harry Martin. I might have mentioned, in an off-hand way, to Bill Scully, William A. Scully, to support what my opinion was, solely, and asking for a certain kind of run.

Q. Didn't you, as a routine matter in sending letters, send copies to Mr. Scully and to these other gentlemen?

A. I certainly did.

Q. And, consequently, Mr. Scully, as well as Mr. Friedberg and Mr. Gomersal and Mr. Jordan, were all kept fully informed?

A. Through copies of the letters; correct.

Q. And, actually, Mr. William A. Scully, who was the [fol. 1126] general sales manager, had the ultimate responsibility for the licensing of Universal pictures?

A. Well, I say, as the vice-president and general sales manager, he did; but he left it entirely in my hands to make each decision as we saw fit, on the ground where we were doing business. In this case, it happened to be Baltimore, in reference to the Crest Theatre.

Q. What information did Mr. Martin give you, if any, concerning the Crest Theatre?

A. He did not have to give me any information. I got on a rattler and came out here and saw for myself.

Q. Mr. Myers, isn't it the fact that Mr. Martin wrote to you and told you that he had seen the Crest Theatre, and that it was everything that Mr. Myerberg had claimed for it?

A. Correct; that is true. How would I know about coming out to look at it, unless he told me there was a new theatre in the process of being built?

Q. I just wanted to establish that he reported to you, because I understood from your previous answer that he didn't have to.

A. No; just a minute, I didn't say that. I said that when Martin first talked to me about the Crest Theatre—in fact, before I heard from Martin, I heard from Mr. Myerberg by phone, and I was surprised that I hadn't heard from Martin, [fol. 1127] and it was I who talked to Martin on the tele-

phone and said, "What about this Crest Theatre? Have you talked with Mr. Myerberg?" And that is the time he told me, and I told him to write me a letter; I told him to write me a note on it, which he did.

Q. You have said that, in your opinion, Mr. Myerberg had put his theatre in an area where a man was not entitled to put a theatre. Is that correct?

A. I didn't say "no man"; there are a lot of people in our business, as well as in other lines of business—he decided to put a theatre in that area. Why, I don't know. If it was me, with the experience I had, or other people, with the experience that they have had in the theatre business, they would not have put a theatre in that area.

Q. That is because, in your experience, first-run pictures, with the rare exceptions you have mentioned here, have always been licensed for exhibition in the theatres located in the downtown areas of cities?

A. I would say yes.

Q. Now, you have said that the erection of the Crest Theatre overseated the area?

A. That was in my opinion.

Q. Isn't it the fact, Mr. Meyers, that if the Crest Theatre had been playing on a first-run basis in that area, that there would not have been any change in the over-all seating [fol. 1128] of that particular area with regard to first-subsequent-run theatres?

A. It would still be my opinion it was overseated, whether he played first-run, second-run, or sixteenth-run.

Q. Would the creation of a new theatre located in the downtown section of Baltimore overseat the City of Baltimore?

A. Correct; it would.

Q. So that, in your view, no one should have the opportunity, or no one should be permitted to go ahead and erect a new first-run theatre in the City of Baltimore?

A. I don't say that. I say, it is every man's liking, to do as he pleases with his money. If some man wants to build a theatre downtown, that is his business. If this man wanted to build a theatre out in the suburbs of Baltimore, that was his business.

Q. But, in your view, he should not have access to first-run pictures?

A. In that particular spot; yes.

Q. Do you know anything about the population that is found in that area?

A. Mr. Rome, at the time when I was out there, I don't know what the population was. I heard here mentioned 120,000 people. That doesn't mean 120,000 people are going to go to that theatre for each showing of each picture, be-
[fol. 1129] cause in that population, which you have stated to be 120,000 people, there are a lot of children, maybe infants, that cannot go to a movie as yet, and there are old men and old women that cannot go to a movie.

Now, at the time in 1948 when I was there, it did not look like any 120,000 people to me.

Q. Have you any idea, Mr. Meyers, concerning the number of people who patronize any one of the downtown theatres on first-run each week?

A. I think, at this moment—I have been away from Baltimore for a little over two years, and I haven't those statistics, and I haven't taken time out to go into it.

Q. You have no recollection or thought at the moment concerning it?

A. No. All I know is this; some pictures downtown Baltimore will play two, five, six, seven weeks, and some pictures will play one week. For a picture to play two, or five, or six or seven weeks in Baltimore, that means an awful lot of people.

Q. You have said that the letter that Mr. Myerberg sent, containing the offer relating to HAMLET, did not impress you as a bid. Is there any particular use of the word "bid" that you have in mind?

A. In this particular case, there is none. The man took it upon himself, by advice of someone, to bid, to put the word [fol. 1130] "bid" in. Now, I talked to the man prior to that, and told him I was not interested in servicing him HAMLET in his theatre.

Q. You don't know that he talked to anyone prior to sending that letter, do you?

A. He talked to me.

Q. I mean, with regard to the use of the word "bid"?

A. I don't know anything about that; no.

Q. And, actually, no matter what offer had been mentioned in any letter sent on behalf of Theatre Enterprises, you would not have entertained it for the Crest Theatre; is that correct?

A. I don't agree with you.

Q. You mean you would have?

A. I don't know. I haven't any idea. The man didn't send any such letter. The man sent one letter, that I know of, where he used the word "bid", and he took it upon himself to say he would like to do so-and-so, and so-and-so. Let me clarify one thing: a bid is not in his own—he did not tell us who he wanted to bid against, or what he wanted to do. I don't remember the letter. When you read the letter, remember, you are talking about three years ago.

Q. Will you look at this letter that has been marked Plaintiff's Exhibit 28, Mr. Meyers?

A. November 26, 1948. Well, now, let me give you my [fol. 1131] interpretation.

Q. There is no question.

A. There is a question. Let me give you my interpretation of this letter. My interpretation of this letter is that the man says here—let's try to dissect it a moment—the Theatre Enterprises offers 50 per cent of the first $7,850 gross box-office receipts, and 65 per cent of all box-office receipts over $7,850. And then he says he will place any reasonable guarantee—the mere fact that the man says he will place a reasonable guarantee proves, in itself, that he is open for negotiations, and not to bid, because to me that is not a bid. He wants to negotiate. He laid himself open for negotiations.

Q. That you wouldn't enter into?

A. I don't know what the answer was—I don't know whether I responded to that letter or not.

Q. There is no doubt, is there, Mr. Meyers, that this letter was requesting the opportunity to license a Universal picture, HAMLET, for exhibition at the Crest Theatre on first-run in the City of Baltimore. The letter says that, doesn't it?

A. That is right; okay.

Q. And, yet, you treated it as a joke?

A. I certainly did, because I didn't think the picture belonged in that theatre at that particular time.

[fol. 1132] Q. Well, now, you thought that Mr. Myerberg, or Theatre Enterprises, Incorporated, was smiply having a little fun with you, when it wrote this letter?

A. I don't know what Mr. Myerberg was doing.

Q. Do you know what the picture HAMLET earned for Universal by way of first-run in the City of Baltimore?

A. I don't remember. Would you mind refreshing my memory?

Q. Yes; I will be glad to, Mr. Meyers. HAMLET paid, the exhibition of the picture HAMLET, paid to Universal a film rental of $7,872.82 for its exhibition on first-run in the City of Baltimore.

Mr. Raftery: What theatre?

Mr. Rome: It was played at the Little Theatre.

Mr. Watkins: On two additional runs there.

Mr. Rome: I am talking only about the exhibition at the Little Theatre on first-run.

By Mr. Rome:

Q. In your opinion, was that a large film rental to obtain, for Universal, for the playing of that picture?

A. For that theatre; yes.

Q. Was it a large film rental for Universal to get out of this picture on first-run in the City of Baltimore?

A. Frankly, we were a little disappointed in the results of Hamlet in the Little Theatre; yet, that is the sum of [fol. 1133] $7,872, and that is fairly good film rental.

Q. How many seats has the Little Theatre?

A. I imagine, a little less than 300.

Q. Have you any idea of the average film rental earned by Universal from the playing of its pictures on first-run availability in the City of Baltimore?

A. Mr. Rome, you cannot talk to me in terms of averages. If you want to be specific, and tell me what each picture grosses, I will discuss it; but on averages, no averages. And I will tell you why: Each picture has to be treated separately. They vary in quality, and they vary in terms; and I cannot discuss averages.

Q. I would like to ask you a question.

A. I cannot answer it, my good friend. We do not service pictures that way. If you are going back to 1939, my answer would be that now, I cannot answer it; and to me it is not a question that should be asked as of that particular time. You cannot discuss averages here, because we didn't sell block bookings.

Mr. Rome: Your Honor, may I have permission to ask the witness to answer the questions in the manner in which I would like to ask them?—and then, if his counsel wishes to object, I will be glad to have him make his objection.

The Court: Go ahead.

By Mr. Rome:

[fol. 1134] Q. Mr. Myers, according to the information which has been furnished by Universal, during the season 1947-48, there were 24 pictures that played at the Keith Theatre, and earned an average rental for Universal of $2,573, and 8 pictures played at the Century Theatre, and paid an average rental of $2,497; two pictures played at the Mayfair, and earned an average rental of $365.

During the season 1948-49, 17 pictures played at Keith's Theatre, and earned an average film rental for Universal of $2,270. Seven pictures played at the Century Theatre, and earned an average rental of $1,740. Two pictures played at the Mayfair, and earned an average of $738. There was one picture played the Stanley, and earned $1,158; one picture played at the Town, and paid $750.

During the season 1949-50, 17 pictures from Universal played at Keith's, and paid an average film rental of $1,747; six pictures played at the Century, and paid an average of $1,147; two pictures played at the Mayfair, and paid an average rental of $3,388; and three at the Hippodrome paid an average of $1,275.

Now, with that information, Mr. Meyers, which I recognize, sir, you consider to be an improper approach to the problem, I want to ask you, sir, whether or not, in your opinion, the Crest Theatre's offer concerning the picture HAMLET would not have returned to Universal a comparable film rental which you have earned from the playing [fol. 1135] of your pictures in the theatres downtown?

A. All right, Mr. Rome, let me ask you this question, as to what my rights are, in answering the question. I want to know, first, whether the Court insists that I answer the question, if you use it in terms of averages. If the Court says I must answer the question, I will.

The Court: I think you understand the question. If you cannot answer it—

The Witness: I do understand the question. Okay.

The Court: If you can answer in some other way, if you can honestly give an answer, go ahead.

The Witness: Thank you. My answer is, I would not have obtained or earned at the Crest Theatre, upon a 50 per cent, these things you call averages.

By Mr. Rome:

Q. Isn't it the fact that no matter what the Crest Theatre would have offered Universal for any of its pictures, that your company still would not have licensed it first-run pictures in the City of Baltimore, either on an exclusive or on a day and date policy?

A. I disagree with you completely. If I were still with the company, maybe I would have serviced the Crest Theatre. I don't know what I would have done. I left the company in 1949, December 31st; but up to that time I didn't think the Crest Theatre had a chance, in fair play, unless the man [fol. 1136] wanted to burn Uncle Sam's money, that he had a chance of returning to a film company, to the Universal Film Company, any kind of money that you are talking about.

Q. Well, then, if I understand you correctly, it would follow that if Theatre Enterprises had offered a sufficiently large film rental by way of guarantee, that Universal, or you, acting for Universal, would have licensed pictures?

A. I don't know what my position would have been after 1949. I don't recall—I don't know what I would have said then.

Mr. Rome: No other questions, thank you.

Mr. Watkins: That is all.

(Witness excused.)

Thereupon—

Edward K. O'Shea was called as a witness for and on behalf of the defendants and, having been duly sworn, was examined and testified, as follows:

The Clerk: State your name for the record, please?

The Witness: Edward K. O'Shea.

Mr. Raftery: Your honor, I want to straighten something out in the record with Mr. Rome. Did I understand you to [fol. 1137] say, this morning, that during the period the Crest Theatre grossed $122,000, that it was your contention the Hippodrome grossed $133,000, during the same time?

Mr. Rome: No, sir; you did not correctly understand me. What I wanted to say, and what I believe I did say, was that during the first 12 months of its operation, the Crest Theatre had a total gross admission of $122,000, and that according to the information furnished us by the defendants, the total gross of the Hippodrome Theatre during the 1948-49 season was $132,699.

Mr. Raftery: I would like, either counsel to tell us, or we will be forced to ask the Marshal to subpoena some records over here, because the impression was created for the jury this morning, on the examination of Mr. Josephs, and the other day, in the examination of Mr. Brecheen, and the question Mr. Rome asked the witness was, if he knew that the Crest Theatre, playing second-run, grossed within $11,000 of the Hippodrome; and would his answer have been the same?

Now, I have been furnished the information that the gross revenue of the Hippodrome Theatre, for the exact same period, of the $122,000, were in excess of a half-million dollars, and that the disparity is so great that I may have to ask Your Honor, or the Marshal, to issue a subpoena, because we have no control over the party who operates the Hippodrome Theatre. If my friend will stipulate that to be [fol. 1138] a fact, we won't go to the people and seek a long delay in this trial.

The Court: Are you able to agree on the figures by getting them from someone whom you believe reliable, and putting it in the case?

Mr. Rome: I can only say, I have attempted to follow,

and that I believe I have followed the information furnished us by the defendants, themselves, with regard to the gross admissions reported by the Hippodrome Theatre from the playing of Columbia and RKO pictures.

Mr. Watkins: The percentage.

Mr. Rome: That is correct; on percentage.

Mr. Raftery: And we have an exact statement in the answer, that this statement is limited to films licensed on percentage terms; and the Witness Brecheen said he had pictures flat-run in the Hippodrome; and the thing struck me so, this morning, when the question was repeated to the Witness Galanty, that I have checked to find out about it, and will have to produce evidence, if I have to produce it, about the gross receipts of the Hippodrome Theatre for the period commencing February 17, 1949, to February 15, 1950, amounting to $577,500, and the receipts of the Town Theatre, for the same period, on which similar questions were asked, amounted to $293,146. If you will stipulate that if Mr. Rappaport's bookkeeper is produced here, she will [fol. 1139] so testify, that is all I want.

Mr. Rome: Sir, I would like to say that from the very beginning, at which time these figures were produced and discussed, with regard to the answers to interrogatories, it was stated to the Court and jury that the figures furnished obviously had to do only with percentage pictures; that is, pictures played in the theatres on a percentage basis. I have always recognized the fact that these defendants did not know the grosses earned by playing pictures on a flat-rental basis, and I think, on the first or second day of the trial, I attempted to make a statement, and it appears in the record. I believe that is correct, when I asked the question, that it was formed in terms of the information furnished us by these people from the interrogatories, which presupposes—and, obviously, I have no information concerning anything else with regard to it—it presupposes, of course, the gross earned from pictures played on a percentage basis. As far as the actual gross of the Hippodrome Theatre, from the playing of all pictures, including those on flat-run, I have no knowledge; and if Mr. Raftery tells me so, I have always been willing to accept Mr. Raftery's word for that.

The Court: You should be able to get that figure.

Mr. Raftery: I do not want to delay the trial with an out-
[fol. 1140] side witness.

Direct examination.

By Mr. Raftery:

Q. Mr. O'Shea, what is your full name?
A. Edward K. O'Shea.
Q. Where do you reside?
A. New York City, now.
Q. What is your present position?
A. I am assistant general sales manager of Paramount Pictures.

Mr. Raftery: Your Honor, to make it clear, we have gone through, so far, all of the defendants except Paramount and Loew's Incorporated. Mr. O'Shea is going to be the only Paramount witness. We are trying to streamline it.

Q. (By Mr. Raftery): When did you first break into the motion picture business?
A. 1919.
Q. Where?
A. In Buffalo, New York.
Q. With what company?
A. Metro.
Q. At the present, it is Loew's?
A. Metro-Goldwyn-Mayer.
Q. What was your first position?
A. I was a combination shipper, packer and poster clerk,
[fol. 1141] and city salesman. It was a small company.
Q. How long were you with Metro?
A. Twenty six years.
Q. What position had you finally attained, from a shipper up, when you made, or when you left Metro?
A. I was eastern and southern sales manager.
Q. When did you leave Metro?
A. July 15, six years ago.
Q. With what company did you go then?
A. I went with a new company formed, called the Liberty Company, Frank Capra, and Wilder, and Stevens, three of the greatest names in the business; and we had a releasing agreement through RKO Pictures.

Q. What position did you have with them?

A. I was general sales manager.

Q. And that included not only the United States but the world?

A. Yes.

Q. What happened to Liberty?

A. Well, they produced a little unwisely. The three men, Capra, Wilder and Stevens, had been in the army five years each, and came back thinking things were the same; and they went into hiring big casts and producing big pictures, and spent a lot of money; and then the market reached a point where they could not make those expenditures and make money.

[fol. 1142] Q. And they made a deal with Paramount?

A. We released two pictures through Paramount, one with Jimmie Stewart, and one with Irene Dunn; and we released STATE OF THE UNION through M-G-M.

Q. But those three directors made a deal, where they would direct pictures for Paramount?

A. They really sold out to Paramount. They could not continue.

Q. At that time, Mr. O'Shea, you made a connection with Paramount; is that right?

A. Yes; I went to Paramount, under the contract I had with Liberty, as did the other men of the Liberty Film Company; and then Paramount extended my contract.

Q. When did you become a member of the Paramount organization?

A. I think it was November 3rd, four years ago. That is when the deal finally went through. I had been at work for several months.

Q. Now, what was your position with Paramount as of October 1st, 1948?

A. 1948, I don't think my position with Paramount was defined at that time. I think Charlie Reagan was still general sales manager, and I was there in a sales executive capacity, doing a little bit of everything.

Q. As an assistant to Reagan?

[fol. 1143] A. Yes.

Q. Then Reagan left, and you became what?

A. A man named Schwalberg became president of the

company, and general sales manager, and I was made assistant general sales manager.

[fol. 1144] Q. And you still occupy that position?

A. I still occupy that position.

Q. Then you were in that position when this Crest Theatre thing came into being down in Baltimore?

A. That is right.

Q. You received some kind of an offer from Mr. Myerberg, his lawyer or somebody for a picture called SORROWFUL JONES?

A. Yes, I recall that.

Q. And as I gather, you received an offer either by way of a letter or a telegram from either Mr. Myerberg or one of his several lawyers of $10,000 guarantee against 40 per cent to play the picture first run Baltimore? Do you remember that offer?

A. Yes, I recall it.

Q. Now, who was starred in the picture SORROWFUL JONES?

A. Bob Hope and Lucille Ball.

Q. I show you plaintiff's exhibit 45, a telegram sent to Ted O'Shea.

A. Yes, I recall it.

Q. And I show you exhibit 46 and ask you if you remember that telegram?

A. Yes, I do.

Q. And you were in Pittsburgh evidently when this telegram offer was sent to you; is that right?

A. No, that is not just so. I think the offer came to New [fol. 1145] York. Isn't it addressed to me in New York?

Q. Addressed to you in New York and answered from Pittsburgh.

A. And we were having a sales meeting in Pittsburgh and I knew that our manager was going to be in Pittsburgh and I took the wire along to there and then we sent Mr. Myerberg an answer from Pittsburgh.

Q. And you say this is a picture starring Bob Hope?

A. That is right.

Q. In the Bob Hope picture, or before answering this wire, did you find out what film rental you got out of the

immediately previous Bob Hope picture which played first run and sub-runs in Baltimore?

A. Yes, I did.

Q. What picture was that?

A. A picture called PALEFACE.

Q. What first run had you gotten out of PALEFACE as film rental in Baltimore? Have you those figures there?

A. I scribbled these down just last night. I came here from Philadelphia, so I had to get the figures on the fly. First I would like to mention that when we get an offer like that for a picture we find out the kind of policy it is, who owns the theatre, what pictures have been played and what area it is in—

Q. Hold up your voice.

[fol. 1146] A. Is it too low?

Q. Yes.

A. —and we get replies from our branch manager, the division manager, and we ask them the potentialities of the theatre and what he thinks of the offer. When we received that offer we thought it was quite an extravagant one. I don't know why it was made, but we had to check to find out before I answered Mr. Myerberg. That was all.

I will give you the PALEFACE figures. We played PALEFACE at the Keith Theatre, Baltimore, from December 24, 1948 to January 17, 1949. Now, that included Christmas, New Year's Days and those weeks which are about the best playing time in the year, about the best.

We grossed $46,526. Now, if there is anything wrong with these figures it is going to be my fault, because I scribbled these all down.

Q. And what film rental did you get from that first run engagement in Schanberger's Theatre?

A. We got $19,023.

Q. What sub-run film rental did you get out of the Baltimore area on that picture? By Baltimore area I mean the area—

A. Which controls the first run clearance.

Q. —over which the first run has clearance?

[fol. 1147] A. Yes. We got $16,917. That is a total of $35,930.

Q. Now, in evaluating an offer that comes out of the blue

like this one did, do you consider the performance of the immediately preceding star picture, meaning Bob Hope's picture, in determining whether the offer is adequate or inadequate?

A. Well, that isn't answered quite that simply. We have to look at the picture and find out what kind it is. They may make one great picture, then the next picture might be a pretty bad one with the same star combination.

Q. You have seen SORROWFUL JONES?

A. I have seen SORROWFUL JONES. That was a great picture and we thought the only things we did not have is Jane Russell in technicolor. It was in black and white. It was a great Damon Runyon picture and did a very fine business.

Q. It was one of your big grossers?

A. Yes. Yes. It really was. That is a matter of record.

Q. So, taking all those things into consideration and Benson's Theatres—

A. And my division manager is since dead, a fellow named Harry Goldstein. He has since died.

Q. You are in on this proposition?

A. That is right.

[fol. 1148] Q. And you rejected the offer?

A. Well, I did not think the house had a chance. It was my personal thinking and I discussed it with the branch manager here. He had been with Paramount some 13 years, and Harry Goldstein succeeded him as division manager, and he had been here a year and a half or two years, I think, before he died.

It was the conclusion that this was a neighborhood theatre situated in a so-called sparsely settled neighborhood by comparison with the whole city of Baltimore. That is with the whole population of Baltimore, that it has found its way downtown where the hotels are, where the shopping is, where all traffic converges, and we found to find their way out to this theatre, to accept a bid of $10,000 would be unfair to the owners of the Crest Theatre, and we so said at the time in our discussion.

Q. In other words, it was your considered judgment and that of your associates that Mr. Myerberg would have lost money on anything of this character?

A. More than he could have recouped.

Mr. Rome: Mr. Raftery, will you please let the witness testify, sir, instead of saying those things yourself?

Mr. Raftery: He is doing all right.

Mr. Rome: I am sure he is, sir.

By Mr. Raftery:

Q. The next bid, I understand, the next offer you got from Mr. Myerberg or his lawyers was on a picture [fol. 1149] called TOP O' THE MORNING?

A. Bing Crosby and Barry Fitzgerald.

Q. Who did you say was the star of that picture?

A. Bing Crosby.

Q. Was he one of Paramount's top stars at that time?

A. Yes.

Q. And still is?

A. Yes. Not as good now as he was then.

Q. And was Barry Fitzgerald in the picture with him, TOP O' THE MORNING?

A. Yes.

Q. That is the same combination as in GOING MY WAY; is that a fact?

A. That is right.

Q. Mr. O'Shea, it appears in plaintiff's exhibit No. 47 that in a letter dated August 12, 1949 Mr. James J. Lindsay, on behalf of the Theatre Enterprises, Inc., offered $12,500 guarantee against 40 per cent of the gross on TOP O' THE MORNING to play the Crest Theatre Baltimore first run City of Baltimore. Do you recall that offer?

A. Yes.

Q. What did you do in relation to that offer?

A. Well, I thought exactly about that offer as we had on the previous one except this one was for $2500 more guar- [fol. 1150] antee and the picture was not near as good as SORROWFUL JONES, and did not gross nearly the gross nationally as SORROWFUL JONES did.

Q. In your considered judgment, if Mr. Myerberg's offer had been accepted, what would have happened to him at the Crest Theatre?

A. I am sure he would have lost money.

Q. Now, by this time had Mr. Myerberg begun to play some Paramount pictures on first neighborhood run at the Crest Theatre?

A. That's right.

Q. Now, have you with you some figures which will indicate how your pictures were paying off and how they were grossing out there on first neighborhood run?

A. These again are scribbled, so you will have to bear with me a little.

The first picture I have a record of here is May of 1949. We played a picture called WHISPERING SMITH, in technicolor, with Alan Ladd.

Q. Was that an important picture?

A. That was an important picture at the time.

Q. One of your big stars?

A. Yes.

Q. When did that play?

A. March 26th to 29th it played.

[fol. 1151] Q. What was your experience on the play-off?

A. We played Saturday, Sunday, Monday and Tuesday to a gross of $1,734.67.

Q. How many units of playing time?

A. Has units been explained to the jury?

Q. Yes. The week is divided into tenths.

A. Here it played seven, but the units do not come out quite as the three, two, one, one, one, and the other five ones, because on Saturday and the ten units are not used nationally, either. But let us stick right to Baltimore.

Saturday it did $845. That is a two-unit day. Sunday $611.99, which is supposed to have produced three units of a gross of a ten-unit week.

On Monday it did $144.61.

On Tuesday it did $133.04.

That is for a total of $1,734.67.

Q. Now, does the dropping in gross from Saturday to Sunday to Monday to Tuesday indicate anything to you as to the drawing power of that particular house?

A. Well, not necessarily. But based on experience of thousands of records such as this, if the picture opened on Saturday and grossed $845 and $611.99, a perceptible drop on the three-unit Sunday, then it did $144.61 on Monday,

and $133.06 Tuesday, then the chances are if the picture had played Wednesday, Thursday and Friday to fill out the [fol. 1152] week, that the receipts would have gone down with possibly the exception of Friday, which might come up a little, because Friday today, on account of the 5-day week, is better than the other four days.

Q. Did you have any other experiences on play-offs at his house?

A. Yes. I would like to read this.

Q. Read them quickly and briefly.

A. Picture two is a picture called ALAIS NICK BEAL. It was a Ray Milland picture and not too good. It played Friday and Saturday. The Friday's receipts were $290, Saturday $420, a total of $710, for three so-c[illegible] units. It had a resulting film rental of $212.

CONNECTICUT YANKEE, another technicolor Crosby picture—I do not know from these records—when it played Thursday and Friday, mid-week and on Thursday, it grossed $126. On Friday, $200. That is stepped up on Friday, for a total of $326. The film rental to us was $129.86 of the $326.

Now, another picture played was a picture called EL PASO, a Western Picture in color. It played Friday and Saturday. The gross was $282 Friday and $369 on Saturday. It grossed $651 and we received as film rental $194.

STREETS OF LAREDO, I think is the last one. No, I have a couple more. STREETS OF LAREDO played [fol. 1153] Friday and Saturday. $253 Friday, $355 Saturday, for a total gross of $608, and our film rental was $181.84.

Q. Now, Mr. Shea——

A. I would like to give these other two I have here, one I was interested in getting to supply for the record.

SORROWFUL JONES played, including labor day, September 4, 5, 6 and 7, 1949, the Labor Day week-end, Sunday, Monday, Tuesday and Wednesday. On Sunday it grossed $739. This was on the 21-day break, I am quite sure.

Monday $634, which was Labor Day; Tuesday $223; Wednesday $201, for a total of $1797.62, with a resultant film rental to us of $715.

Q. That is the same SORROWFUL JONES that he made the bid or offer of $10,000 guarantee for first run?

A. That is right.

Q. And what was the next picture he made an offer on?

A. Let me finish this. We have one more, THE GREAT GOD DSBY, which wasn't a particularly good Ladd picture nationally, it wasn't too good, but it played Saturday, Sunday and Monday in the Crest which did $761 on Saturday, $628 on Sunday and $211 on Monday. That was the 10th, 11th and 12th.

Q. Saturday, Sunday and Monday?

A. Yes.

Q. What was your film rental on that?

[fol. 1154] A. $557.

Q. Now, Mr. O'Shea, on November 3, 1949, Mr. Rome wrote a letter to Mr. Thomas P. Gibbons, of Paramount, and in it contained two offers, one for a picture called THE HEIRESS and the other for SAMSON AND DELILAH. Now, first, we will consider THE HEIRESS.

A. Yes.

Q. What did Mr. Rome offer for THE HEIRESS?

A. He offered——

Mr. Rome: Excuse me, sir, I don't think Mr. Raftery intends to convey other than the impression that the offer was not by me as such, but on behalf of Theatre Enterprises, Inc.

By Mr. Raftery:

Q. What did Mr. Rome, acting as attorney for Theatre Enterprises, offer on THE HEIRESS in that letter?

A. He offered $10,500 guarantee against 40% of the gross for an extended first run of THE HEIRESS at the Crest Theatre.

Q. What do you understand the meaning of the words "extended first run" to be, exclusive or day and date?

A. Well, it had to be first-run. That was extended first run. That wasn't made clear in any of the offers I received. It just said extended run, and had we been willing to negotiate for first run in that neighborhood we would have [fol. 1155] had to finalize the deal as to the length of run because you just couldn't take the print and——

Q. Did you understand the offer to be for the exclusive first run in the City of Baltimore?

A. Yes, exclusive first run.

Q. Not day and date with anybody?

A. No, I could not read that into it.

Q. Tell us about THE HEIRESS. Tell us about the picture THE HEIRESS.

The Court: Now, haven't we gone into enough individual pictures? I rather assume that a number of these witnesses, including Mr. O'Shea, have been here during most of this hearing. Have you been here during this hearing?

The Witness: I was here only today, Judge.

The Court: Only today?

The Witness: Yes.

The Court: I do not think we need to go into them.

Mr. Raftery: There are only four pictures.

The Court: We do not need to analyse all the pictures. The offer was turned down, and why? It is the same old story from each witness. You could almost ask each witness if he heard the previous one and whether or not his company felt the same way about the neighborhood situation at the Crest. That is what it has come down to.

Mr. Raftery: In this whole trial you have had six offers, [fol. 1156] only six. Paramount got four of them, Columbia got two.

The Court: I think you can summarize it without going into every last picture.

Mr. Raftery: You heard all the hue and cry about the $35,000 offer made for SAMSON AND DELILAH. I will wager there are 50 pages in the record on that.

The Court: What is the name of this picture now?

Mr. Raftery: THE HEIRESS.

The Court: I suppose that sounded like it was worth more money. I do not think we need to go into that.

The Witness: Thank you very much, sir. It wasn't very successful, I am sorry.

By Mr. Raftery:

Q. You turned down the offer on the THE HEIRESS?

A. Yes.

Q. And you turned it down for substantially the same reason you did the other two?

A. No, I had different reasons on the other two. I thought we could earn considerably more on SORROWFUL JONES, but I did not think we would do too well in Mr. Myerberg's house. We did not need his money quite that much to take it on THE HEIRESS, which wasn't as successful. That is the truth.

Q. Let us go to the SAMSON AND DELILAH, which is [fol. 1157] the big one, according to Mr. Myerberg.

A. I will make this very brief.

$35,000 guarantee against 50% of the gross for an extended first run of SAMSON AND DELILAH at the Crest Theatre. We played SAMSON AND DELILAH a little bit differently than the ordinary pictures are handled. If this had been a bidding situation and the Crest Theatre had been included as a bidding theatre or a man who had been offered bids and allowed to bid, if there had been a comparable theatre or two comparable theatres, let us say, located in the downtown area, we would have sent them bidding requests instead of receiving the offer, and we would have asked 70% of the gross receipts and we would share in the same proportion of advertising.

The theatre had an overhead agreeable to us and it was accountable item for item. We would play them 70-30-10. If it wasn't an overhead out of line, with accepted expenses, we would play them 70-30 with 10 per cent of the gross receipts guaranteed as a profit. This was an advertising plan we had for the picture to have it known far and wide throughout the United States on a limited number of engagements, and then we were going to generally release the picture. When this offer came in we had a particular success with UNCONQUERED, a previous successful Cecil B. De Mille picture. We compare picture by picture with the previous one in evaluating them rather than setting them up across the country on an individual basis.

[fol. 1158] On UNCONQUERED we looked at the receipts and we did in the first week $36,528; the second week $27,047; in the third week $13,588. That was a total of $70,910. Our film rental.

Q. First at what theatre?

A. This was at the Keith Theatre, Schanberger's Keith Theatre. Our film rental was $34,098.

We believe we had a much better picture in SAMSON AND DELILAH, and it proved to be, than in UNCONQUERED. UNCONQUERED was critically rapped all across the country, and SAMSON AND DELILAH was acclaimed quite a little, and we grossed on SAMSON AND DELILAH in excess of $2,000,000 more than on UNCONQUERED, so far. So we assumed when we turned down even the offer, the extragavent offer, I considered for the Crest Theatre, after it had been explained to me—— I had not seen the theatre, I only saw it this morning. I went up to see it this morning, and on advice and from maps of the city and so on, I thought it was an extravagant offer for the Crest Theatre, not to give it to the Crest Theatre first run, but I thought I could do considerably more money downtown on this pre-release engagement.

Let us take a further look at the record. I think we ought to get this in because we are in a hurry.

I said that we did $46,794. Then we repeated the picture [fol. 1159] in Baltimore. It was unsuccessful. It did $8210.

Q. On the repeat?

A. On the repeat, yes. That is all it played. It was one week and we got $4105 film rental. It played the Stanley Theatre. This is SAMSON AND DELILAH I am talking about.

Q. How much film rental did you get on the first time around at the Stanley Theatre first run engagement?

A. SAMSON AND DELILAH?

Q. Yes.

A. We got $22,990.

Q. And how much did you get on the return engagement?

A. $4105.

Q. And how much did you get out of your subsequent runs?

A. $16,010, for a total of $43,105.

Q. Out of the City of Baltimore?

A. That is right.

Q. How much did Paramount spend on national advertising on that SAMSON AND DELILAH?

A. In excess of one million three hundred and fifty thousand dollars.

Q. Mr. O'Shea, how do you license your pictures in Washington first run at the present time?

A. At the present time we license them picture by picture.

[fol. 1160] Q. Do you license them for day and date exhibition at the Warner and at the Ambassador?

A. Yes, we do.

Q. Do you license any pictures to Loew's?

A. Yes, we do.

Q. And that is for either the Palace or Capitol or the Columbia?

A. That is right.

Q. And do you license to the Trans-Lux or the Playhouse, or any of those?

A. We have licensed specialized pictures.

Q. Recently have you licensed some pictures to that new theatre on Columbia Road about two blocks from the Ambassador, called the Ontario?

A. Yes, we have.

Q. And have you got, briefly, your results on those pictures?

A. Yes. I have them here somewhere. May I tell them my way?

Q. Suppose you go ahead and tell us what pictures you licensed, the terms, the play dates, the grosses, the rentals, and so forth.

A. They talked to our manager about licensing. I said: "Don't be ridiculous." I said: "I don't think the theatre has a chance, it is located two miles from downtown."

[fol. 1161] The Court: Raise your voice a little, please. I have difficulty in hearing you.

The Witness: Our manager said he had an offer from Kogod & Burka, the operators of several theatres in Washington, for pictures to open a new theatre, the Ontario, which he said was located adjacent or very near to the Ambassador Theatre. So, Frank Boucher, the buyer, came to New York to see me, and I said: "Frank, I don't think you have a chance. I don't think you can cut it. You are just adding another first run outlet in Washington and there

is a lot of first runs at the present time, all catering to the potential of situation of first run customers." And I said: "I think your interest would be better served and your company's interest would be better served if you run on the first sub-run break, you know, and play pictures clear of the Ambassador."

He said, no, he did not need to do that, that Kogod & Burka were insisting because of the nearness of the Ontario Theatre to the Ambassador, that they were going and willing to spend a lot of money to establish this beautiful theatre, the finest theatre in the United States, they told me, and I still haven't seen it. I haven't been to Washington in several years. They wanted to do it.

I said: "No, go back and talk to your principals and tell them they have talked to our man, that it just isn't in the wood in that neighborhood.

[fol. 1162] The Court: What happened?

The Witness: What happened, Judge?

The Court: Summarize your figures.

The Witness: They persisted with telegrams and other calls of the owners and the buyers to New York, and I said: "This is your own deal, brother." They gave $8,000 for DARLING, HOW COULD YOU?. In two weeks it grossed $7,635.

They bought a picture called RHUBARB, and they played it two weeks and about five or six days, it looks like. They paid $8,000 against 40%, and they grossed $13,892, made 58%, practically 58%, then they got real excited about a picture called DETECTIVE STORY, and they contracted for it for five weeks, I believe, with the result that the first week they had a good result for the theatre. They grossed $11,955; the second week, $8,603; the third week $6,493; the fourth week, $6,034, and the holdover playing time, which we arranged beyond their contract terms, it grossed $4,794 the fifth week.

The deal, I think, was $15,000 guarantee. It isn't here. I am pretty sure it is that. Oh, yes, I have it here. It was 70%; 50% the first week, 70% over $4500; 40% the second week and 70% over $4500; the third and fourth weeks were the same. And the fifth week was 35% of the gross, and we earned, with the extra week and the overage, $19,920.

They then bought FAVORITE SPY, a Bob Hope picture, [fol. 1163] $8,000 against 40%. They played it three weeks and took in $13,101.

Q. In the three weeks?

A. In the three weeks.

They have since contracted for—I will never know why—AARON SLICK, for two weeks, a guarantee of $6,000 against percentage. And MY SON JOHN is playing there now, with a guarantee of $16,500 against percentage terms, and the first week of MY SON JOHN is finished, the only one I have a record of here, and it did $7,716, and it has contracted for six weeks.

Q. Now, they contracted also for SOMETHING TO LIVE FOR, $6,000 against a percentage?

A. Yes.

Q. And that is not dated?

A. That is not dated. It is not even on my schedule.

Q. In your opinion have those results been satisfactory for the operators of the Ontario Theatre, Mr. O'Shea?

A. I do not see how they could be. I do not see how they could be.

The Court: Have you much more examination?

Mr. Raftery: Very little.

The Court: I suppose you have some, Mr. Rome?

Mr. Rome. I do have some cross-examination, yes, sir. [fol. 1164] The Court: How many more witnesses have you?

Mr. Raftery: Three. Just Metro, Loew's, one company, but it is both the theatre company and the distributor. So, we have to call three there.

The Court: We cannot finish this afternoon, I assume.

Mr. Raftery: I doubt it.

The Court: We certainly can finish tomorrow morning with all the evidence, can we not?

Mr. Raftery: Yes, sir.

The Court: I think we can have only a morning session tomorrow on account of it being motion day, and I have been giving part of Friday to the case in order to expedite it, but I do not think we can sit all day.

Now, with the understanding that all the evidence can be

put in tomorrow morning by 12:30 or 1:00 o'clock—do counsel think that is correct?

Mr. Raftery: Yes.

Mr. Rome: Yes.

The Court: Then, members of the jury, we will now adjourn until tomorrow morning at 10:00 o'clock, with one session tomorrow. That is we will not sit in the afternoon or after the luncheon hour tomorrow. Then that will mean that any law questions can be heard on Monday and the case argued partly, certainly on Monday, it would [fol. 1165] seem, and if it is concluded, the rest of the argument and instructions to the jury will occur on Tuesday.

Very well, you may step down. You are excused now until tomorrow morning at 10:00 o'clock.

(Whereupon, at 3:35 o'clock p. m., an adjournment was taken until Friday, May 23, 1952, at 10:00 o'clock a. m.)

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[fols. 1166-1168] Reporters' Certificate to foregoing transcript omitted in printing.

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[fol. 1168-A]

Transcript of PROCEEDINGS—May 23, 1952, 10:00 a. m.

COLLOQUY BETWEEN COURT AND COUNSEL

(The following proceedings were had out of the presence and hearing of the jury:)

The Court: Counsel in this case, just to outline what seems to be the situation with respect to the duration of the case, if we finish it today by one o'clock, that is, finish the testimony, there is still the question, which I understand you want to raise again, Mr. Rome, as to the admission of the decrees in the Paramount case.

Mr. Rome: That is correct, Your Honor.

The Court: I suppose counsel will want to be heard on that. With the exception of that question as to whether they will be introduced, I understand all you want to do, if

they are allowed to be introduced, is to have them read into the record to the jury and to argue them.

Is that your point?

Mr. Rome: I would read those four injunctions, the four sections of the decree, sir, in which these defendants are enjoined from doing certain things; and, if they do come in, I would like to ask leave to read that material from the Paramount case in my summation to the jury. Also, I have a relatively small number of points for special instructions which are directed to the findings.

The Court: Then, my understanding is correct that, even if you were permitted to introduce them, that would not [fol. 1169] mean you would want to introduce any additional testimony?

Mr. Rome: No, Your Honor.

The Court: Then, on the assumption that we will reserve that matter for further argument, if we finish the testimony before the luncheon hour today, the jury might be excused until Monday after the luncheon hour; and then we can take Monday morning, the entire morning, for argument on this point and also for any arguments on the requested instructions to the jury, with the idea that at two o'clock, or thereabouts, on Monday, the Court may instruct the jury. Under our rules, you know there are no separate instructions, as such, given to the jury.

I assume the arguments would, perhaps, not be concluded on Monday; and, if not, my disposition is never to let a case, unless it is a very short criminal matter, go to the jury at a late hour. The arguments could be begun, at least, and partly finished, and then continued on Tuesday, on the assumption that they would be entirely over by the luncheon hour on Tuesday, and then possibly the instructions of the Court to the jury. But, in any event, I should think the arguments should be concluded by the luncheon hour by Tuesday. That would mean that the instructions of the Court to the Jury would follow, and the jury could get the case in the early afternoon. That appears to me to be the [fol. 1170] general setup at this time.

Do counsel want to say anything?

Mr. Rome: That is entirely satisfactory to us, Your Honor.

Mr. Watkins: That does not preclude argument on the question of a directed verdict?

The Court: No; it does not preclude any legal argument. If I have omitted any, they would all follow Monday morning.

Mr. Rome, you have not given me a set of your requested instructions?

Mr. Rome: No, Your Honor. I expect to have it before we conclude today.

The Court: Very well. Then, have the jury brought in.

(The jury then returned to the courtroom and resumed seats in the jury box.)

The Court: Members of the jury, we are now ready to continue.

Mr. Rome: If the Court please, I should like, for a moment, to address myself to a question that was raised yesterday afternoon by Mr. Raftery, concerning certain questions regarding the gross admissions at the Hippodrome Theatre. I think Your Honor will recall, sir, that Mr. Raftery questioned the figures that I had used; and I got impression [fol. 1171] that he was attempting to raise the possibility that I had used erroneous figures, or figures that were misleading in some way.

I would like to reiterate, sir, that the question I put to Mr. Galanty, as well as Mr. Brecheen, was a strictly accurate question, based upon the records, and based upon the information coming from these defendants in the interrogatories. I should like to have it absolutely clear that there was no attempt to mislead, and no false information contained in the question; there was no intention to mislead Mr. Galanty in any way. The information used was put into this case back on May 13th, at which time it was made perfectly clear—because I read from the interrogatories—that the gross receipts reported by these defendants had to do with the licensing of first run pictures on a percentage of gross only. There were no flat film rentals involved in that. It is also in this record that the greater number of pictures licensed for first run in the motion picture industry are percentage pictures.

So, the jury and Your Honor had before you from the

beginning, at the time of using that information, that it was based only upon the report of gross receipts resulting from the exhibition of pictures on a percentage of the gross. That was done as a result of the interrogatories answered by Columbia and by RKO. The figure of $132,699 [fol. 1172] for the gross receipts of the Hippodrome Theatre for the season 1948-1949 comes from information furnished by these gentlemen, as a result of the exhibition of 28 motion pictures on first run, at a percentage of the total gross. There is no dispute, sir, about the fact that the total gross of the Crest Theatre for the first 12 months was $122,000.

My question to Mr. Galanty was, Your Honor, if he had known the grossing potentiality of the Crest Theatre, as evidenced by the $122,000, as contrasted with what the Hippodrome had grossed, as a result of information furnished by the interrogatories—meaning necessarily, therefore, Your Honor, the gross resulting from the exhibition on a percentage of the total—would his view of the Crest Theatre have been changed in any way.

Certainly, with all respect to my friends on the other side, I resent the implication that they raised yesterday as to the unfairness of the question and the inaccuracy of the information I was relying upon, because, if that information is inaccurate, Your Honor, it is because these gentlemen or their companies furnished the inaccurate information.

The Court: There ought not be any further dispute over the point, if these figures come from the interrogatories, unless it is not correct, or if they do not really show what Mr. Rome says they show.

[fol. 1173] Mr. Raftery: If Your Honor please, page 781 of the record shows this question asked by Mr. Rome of Mr. Zimmerman:

"Q. According to the information furnished you by your company and the other companies in interrogatories, Mr. Zimmerman, it is shown that the Hippodrome Theatre, during the season 1948-49, grossed $132,699, and it has been shown that the Town Theatre during that period of time grossed $267,288. Now, in your opinion, is a gross of

$132,000 the kind of gross that you expect from one of your showcase theatres?

"A. Very disappointing; . . ."

The Court: What volume is that?

Mr. Raftery: That would be Volume VII.

The Court: Go ahead. I do not seem to have that volume right here.

Mr. Raftery: You may have mine, Your Honor, since I have read it. It is towards the bottom of the page.

The Court: Well, go ahead.

Mr. Raftery: Now, if Your Honor please, the question asked implied that we had furnished them with the gross of the Hippodrome Theatre in the interrogatories. That we have never done. What we furnished them was the gross receipts on percentage pictures played in the Hippodrome Theatre by RKO—an entirely different figure. [fol. 1174] The Court: There ought not to be any dispute over that, as I have just said. What is the question in the interrogatory, and what is the answer?

Mr. Raftery: They asked in the interrogatories for the film rentals and the gross on percentage pictures. And we gave them that. That does not state the gross for the year for the company. That only tells, for the few weeks we had percentage pictures in the Hippodrome Theatre, they grossed so much money and they paid us so much film rental.

The Court: You mean Mr. Rome is misinterpreting the figure?

Mr. Raftery: Yes.

The Court: Read the figures.

Mr. Rome: I have no issue with Mr. Raftery concerning the question asked in the interrogatories and the answer given; but I differ vigorously with any contention that I am misinterpreting, because Mr. Raftery uses the expression "just a few of our pictures playing in the Hippodrome Theatre". That is not so. The Hippodrome Theatre played 28 pictures during the season 1948-1949 on a percentage of the gross. I contend, and I believe Mr. O'Shea would confirm the fact that by far the greatest number of pictures played first run in downtown houses are played on a percentage of the total gross by way of film rental, and not

on a flat rental. Consequently, when I used the figure [fol. 1175] $132,000 as the gross of the theatre, I was within my rights in expressing that question, because that is the rental received by RKO as a result of the exhibition of its top pictures.

The Court: You can recall Mr. Galanty, if you want to, if he is here.

Mr. Rome: I have no wish to, because Mr. Galanty answered my question; and there was no difference of opinion on his part; it was only by Mr. Raftery, later on, attempting to raise those implications.

Mr. Raftery: My point, Your Honor, is that at no point in the question to Mr. Zimmerman or in the question to Mr. Galanty yesterday, did Mr. Rome point out that these grosses were on percentage pictures. He never mentioned the fact that he was omitting from the gross of the Hippodrome Theatre the flat rentals. The grosses, I think, throw off the whole thing.

The Court: You are arguing the matter. The witness has answered, and it will have to stand, unless it is corrected by some testimony.

Mr. Raftery: I want a concession, or else I am going to subpoena and bring over the owners of the Hippodrome Theatre.

The Court: Well, you can do that. There is no use arguing the point. If you think the testimony stands [fol. 1176] in an improper shape, get the figures.

Mr. Raftery: I will get them.

The Court: Mr. Rome stands on the figures.

Mr. Raftery: Those are not the figures of the witness. He represented to the witness that the gross in here for the year amounted to $132,000.

The Court: The witness did not correct it. If you think it ought to be corrected, put on testimony to correct it.

Mr. Raftery: I am going to ask Mr. Rome if he will concede that, for the period from February 17, 1949 to February 15, 1950, if the person in charge of the fiscal records of the Hippodrome and Town Theatres were called to the stand, that person would testify that the gross receipts of the Hippodrome Theatre for that period were

$577,500, and the gross receipts for the same period at the Town were $293,146.

Mr. Rome: I concede nothing, sir, because those figures include, apparently, something other than the playing of first run pictures on a percentage basis. My question was based upon the information from the interrogatories, the playing of first run pictures on a percentage basis.

The Court: Well, gentlemen, the only way to resolve this difficulty or this difference would appear to be to have the figures.

[fol. 1177] Mr. Raftery: Well, if you put me to that bother, I might have to get out a subpoena today and have the witness here the first thing Monday morning.

Mr. Rome: It is not necessary. Where did Mr. Raftery get those figures? He had no subpoena when he got those figures.

Mr. Raftery: This party has definitely told us he will not testify in this case unless subpoenaed.

Mr. Rome: That is a completely unfair statement. I think, if Mr. Raftery wants to produce those, he can have them produced.

The Court: You can have a subpoena issued for him right away.

[fol. 1178] The Court: We do not want to extend the case just for this.

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Thereupon, Edward K. O'Shea resumed the witness stand and, having been previously sworn, testified further on behalf of the defendants as follows:

Direct examination. (Resumed.)

By Mr. Raftery:

Q. Now, Mr. O'Shea, I believe that SAMSON AND DELILAH was the picture upon which Mr. Myerberg offered the $35,000; is that right?

A. That is right.

Q. Did he ultimately play the picture at the Crest Theatre?

A. Yes, he did.

Q. And how many days did he play it?

A. I would like to verify my memory on that. He played it four days.

Q. Opening on what day?

A. Saturday, Sunday, Monday and Tuesday.

Q. And what did he gross?

A. He grossed $1,406.

Q. And how much film rental did he pay?

A. $456.77.

Q. And that was on a 21-day availability after first run? [fol. 1179] A. I assume, sir.

Q. Now, you told us the returns on DETECTIVE STORY playing first run in the Ontario Theatre in Washington. You told us that yesterday.

A. Yes.

Q. Were those grosses disappointing to you?

A. Yes, they were disappointing.

Q. Now, can you tell us the picture that you would place in comparatively the same category as DETECTIVE STORY that played Washington during the last season?

A. A PLACE IN THE SUN. We sold that to the Trans-Lux Theatre in Washington.

Q. By the way, where is that theatre located?

A. It is in the downtown area. I do not know exactly the street.

Q. In the downtown area?

A. That is right.

Q. And how many seats has it?

A. 500 and some or over 550. 550, or something like that.

Q. Now, playing in that downtown theatre, what did A PLACE IN THE SUN gross?

A. A PLACE IN THE SUN grossed $101,389.

Q. And what was the total gross on the other one?

A. The total gross on the other one was $37,919.

[fol. 1180] Q. And what was your film rental on A PLACE IN THE SUN?

A. $52,775.

Q. What was the film rental when that played in the neighborhood?

A. $19,920.

Q. Now, Mr. O'Shea, where do you sell your first run product in Richmond?

A. To the downtown Fabian Theatres.

Q. And in Norfolk?

A. To the Fabian Theatres downtown.

Q. And in Roanoke.

A. To Elmore Hines in the downtown area.

Q. In Los Angeles how have you been licensing your product for the past several years; generally?

A. Well, we had a long term contract with Paramount in Los Angeles downtown and the Paramount Theatre in Hollywood and the results that we have been having from those two theatres have been very, very disappointing in ratio to the business that was in California, years ago.

Q. By the way, you tried to get out of that long term contract, did you not?

A. Yes, we did.

Q. And you had a court action?

A. And it was held that we could not get out of it.

Q. In fact, you brought an action to have your rights de- [fol. 1181] clared one way or the other under that contract?

A. That is right.

Q. And the Court held that the contract was a valid, binding contract and you had to service those theatres until the end of the contract?

A. That is right.

Q. You say the results were very disappointing?

A. Yes.

Q. And have you recently tried to work out some other plan for handling the pictures in Los Angeles?

A. Yes. I would like to state along with these questions——

Q. Before you go to the question, is the City of Los Angeles, distribution-wise and exhibition-wise in any way comparable to any other city in the United States?

A. None. There is no city like it.

Q. Will you tell His Honor why you make that statement?

A. I would like to read you the changes in population, the changes in the city itself and in the County of Los Angeles.

In 1920, Los Angeles proper had a population of 576,000.

Ten years later, in 1930, it had 1,238,000. In 1940, from the records, it had 1,504,000. In 1950, it had a population of 1,957,692.

Q. That is the city proper?

A. The city proper. Los Angeles County, according to [fol. 1182] the same statistical record, has a population of over 4,000,000 people, Los Angeles County.

Q. How many square miles are there in Los Angeles City?

A. According to the Encyclopedia Britannica, which we verified, it says the City of Los Angeles has over 453 square miles.

Q. Will you proceed and tell His Honor and the jury why that city is different than any other city in the United States?

A. Well, it holds a number of communities that ordinarily would be separate cities by themselves. There is a downtown area which has disintegrated, it has become strictly downtown, it is mostly Mexican and Colored. The downtown people living in that area, the people there have moved considerable distances from downtown, and as a consequence the motion picture business down there has been suffering very much. We have been working on a long-term contract of ours that was expiring. One theatre's contract expired late last year and one expired in March of this year at the two theatres. So we have been trying to evolve a plan to try to get appropriate revenue out of these millions of people and from this very, very extensive area.

Our West Coast Division Manager, George Smith, is a man very well acquainted with the Coast, and in consulta- [fol. 1183] tion with the home office people, the company, he was asked to draw up some sort of a plan that he thought would give us a greater opportunity with our pictures for the greatest number of people in that area, in this tremendous area.

I might mention, too, it is a matter of record in the City of Los Angeles, in the papers and in the talks of officials, that transportation in Los Angeles is far, far behind the growth and extension of the city, greatly behind.

The City of Los Angeles, covering over 400 square miles, is literally several cities and not just one. We have de-

veloped an experimental plan—I would like to make the word "experimental" rather forceful. We are taking four—we are going to offer four pictures under this plan: THE GREATEST SHOW ON EARTH, regular release in July; JUMPING JACKS, with Dean Martin and Jerry Lewis, in July; CARRIE, a William Wilder production, starring Laurence Oliver and Jennifer Jones, and SON OF PALEFACE, in color, with Bope Hope, Jane Russell, and we better put it in there in the billing, Roy Rogers and Trigger.

These are the most valuable pieces of property we will have in our fiscal release year, and if the plan works we intend to continue the plan. If the plan is a failure then we have gambled with four of our most important, most expensive, best box office attractions.

Q. Now, when you say they are separate municipalities, [fol. 1184] in reality you have downtown, as it is known, downtown Los Angeles is one, and you have Hollywood; right?

A. Right.

Q. Name the others.

A. We have the Western District, as number 3, which includes Beverly Hills, Westwood, Santa Monica and Culver City. Englewood is the southern area. That is really known as a large city by itself, Englewood in the southern area of the County.

Number 5, towards Long Beach, there is the Huntingdon Park-Compton area, Longwood, Southgate. It is a huge area. That must have a population of well over 400,000 contained in that area.

Number 6 is Pasadena, Alhambra area. That, according to the record, has over half a million population.

Q. Then, Pasadena is an entirely separate municipality, with its own mayor and its own government?

A. So I understand.

Q. What is the next one?

A. Seven is the northeast section of the area, which is called the Glendale area. It goes out as far as San Fernando, Burbank and other towns in that direction.

Q. What is your plan, to try to license a separate and

distinct day and date run if possible in each of those situations?

[fol. 1185] A. To license a separate and distinct day and date run in the 7 districts, we call them, for the 2-week exhibition. The clearance to the succeeding run, the second runs, will stem from the first day of exhibition of the 2-week run.

If the theatres only play the pictures two weeks in the first run in the district, then the second run theatres in those areas will get the picture 14 days, at the conclusion of the 14-day run. If some of them elect to play the third week, the second run will get the picture 7 days after the 3-weeks, and if they wish to play less than a month, then the second run will follow immediately.

Q. Each of those communities are wholly self-contained communities, are they not?

A. Yes, they have their stores, their shopping centers. They are completely separate cities, as far as we know cities in the East.

Q. Is Los Angeles in any way, from a distribution or exhibition standpoint, comparable to the City of Baltimore?

A. To the City of Baltimore? No. In size, as I say—— I do not know what the size of Baltimore is in area, but I do not think it is comparable to the 453 square miles. Neither do I believe it has a drawing population in the County of over 4,000,000, and we know by the same record that these were secured from, that it does have a population of over 1,957,000.

[fol. 1186] The Court: If Los Angeles keeps on, they will have to try to negotiate to buy a piece of Mexico.

The Witness: They will have to get some of them out of there.

Mr. Raftery: Your Honor, from the population increase downtown of the Mexicans, I do not think they need Mexico out there now.

By Mr. Raftery:

Q. Now, Kansas City has been mentioned in this case. Do you license any day and date runs in Kansas City?

A. No, we do not. We play one theatre downtown.

Q. So as to straighten Mr. Myerberg out, he had the Paramount Theatre downtown, somewhere out past the country club district. Where is that Paramount Theatre?

A. It is right downtown. Do you agree?

Q. Now, Denver.

A. Denver, we license one theatre first run, the Denham Theatre, operated by a man named Dave Cochrill.

Q. Then you have never licensed any runs to any day and date in Denver?

A. No sir.

Q. How about Cincinnati?

A. Cincinnati, we just have a first run, one first run downtown.

Q. And Wichita?

[fol. 1187] A. Wichita is rather a complex explanation, which I will have to refer to some notes on, if the Court will allow me to take this much time.

There are 4, 5 or 6 downtown runs in Wichita, the Orpheum, the Miller, the Crawford, and two or three others that play action, Western pictures. The Orpheum Theatre is owned by the Fox Mid-west Corporation. The Miller Theatre is owned by the Fox Mid-west Corporation, and the Crawford downtown is operated by a man named Sullivan, who was formerly the mayor of Wichita. Then there is the Crest Theatre, which is four miles from downtown, the Boulevard, which is a little more than two miles from downtown. There are 7 other sub-runs and 5 drive-ins, and 4 more or less unimportant sub-runs.

Mr. Sullivan built the Crest Theatre and then he wanted to bid for a day and date first run in the Crest and the Crawford, bid against the Miller or Orpheum and the Boulevard.

I want to make this clear. It is a complex thing. Exhibitor Sullivan then acquired the Tower Theatre, which, through a Mr. Hunt, the former owner, had asked for bidding, and that was an inferior theatre to the Crest, located right in the same area, four blocks away.

Hunt sold the Tower Theatre to Sullivan and Sullivan changed it to a sub-run and continued to run the Crest as [fol. 1188] a first run. Sullivan then abandoned the day and date request of the Crest and the Crawford——there

are a lot of owners in here—and he asked to bid the Crest Theatre against all other first run outlets individually in town.

I think for consideration that the Miller Theatre is considered the best theatre in Wichita. The Orpheum Theatre is considered the second best. The Crest Theatre is a very nice theatre, but it is practically surrounded by three drive-ins and it is four miles from downtown. We were licensing day and date there on a bidding basis, and since then we have discontinued that because the exhibitors themselves have discontinued request for the day and date bidding, and they are now bidding theatre against theatre.

The Court: I do not understand what you did about the request. You denied it, you mean?

The Witness: No. We had to accept the request, while we had to offer the pictures for bidding.

The Court: I did not understand you. You offered the request, but at least I did not hear what the result was.

The Witness: The Crest got some pictures and the Miller or Orpheum and the Boulevard got some pictures, then they found out, I guess, that it was unsatisfactory. Then Sullivan, who owned the Crest Theatre, a very fine theatre, located four miles out, asked to bid against an individual theatre downtown, which would be the Miller or the [fol. 1189] Orpheum, and they are now getting pictures, both of them are getting some pictures, the last time I looked at the record.

Q. As a matter of fact, Mr. Sullivan had threatened litigation if you did not give him bidding?

A. That is right.

Q. And he did begin five lawsuits, if you know?

A. Yes, I do.

Q. And he abandoned those, too, didn't he?

A. Yes, sir.

Q. In your first run situation, in your first run in large cities, is the matinee business important to you as a distributor?

A. Yes, in the majority of cities the matinee business is very, very important.

Q. Take a city like Baltimore, is the matinee business important?

A. Yes, I would say——I have not examined the records lately. All I would say it is very important. The records would show.

Q. Mr. Myerberg testified he did not believe had he gotten first run pictures at the Crest, that he would gross more than 5 to 10 per cent of his weekly gross at those matinees Monday through Friday. Is that the kind of business you would like and place a picture first run in a city like Baltimore on your matinees?

[fol. 1190] A. I do not like to guess. I do not like to guess about anything without referring to the record, but I would say in an important downtown theatre or real good downtown theatres or maybe even the general line of downtown theatres, in the shopping area, that the business will be 40, 50 and 60% of the business in the matinee, so the opening time in the morning, say, around noon until 6:00 o'clock at night, I know some specific theatres, and they are not in Baltimore, and I do not know.

Q. But 5 to 10 per cent of a weekly gross, Monday to Friday matinees, is not the kind of business you want on your first run pictures in a city like Baltimore?

A. No, of course not.

Q. By the way, the name Mr. Benson, has come into this trial as being branch manager for Paramount in Washington. Is he still with you?

A. No, he is not. Mr. Benson is now with the company of——I don't know what its name is or what he is doing. He is working in Washington at some other business and he has been succeeded by Phil Isaacs.

Q. Benson left here over a year and a half ago; is that right?

A. Almost two years ago.

Q. By the way, Mr. O'Shea, Mr. Rome has been dwelling at great length about the many turnovers we have in the [fol. 1191] motion picture distribution business in personnel. You were how long with Metro?

A. 26 years.

Q. And then to Liberty and then to Paramount when Liberty and Paramount became the same?

A. That is right.

Q. Now, Mr. Rome has been asking a question of a

number of witnesses to this effect: Is a city of 100,000 people capable of supporting a first run theatre?

A. It certainly is.

Q. Well, now, you have first runs in towns as small as what?

A. 500 people. 350 people, I think, is about the lowest I know of. The word "first run" seems to be kind of a magic expression. You see, a city like Baltimore will take certain clearance which is recognized, over suburban runs or towns immediately adjacent to the large city, but there could be towns 25 miles from here who could play that picture, immediately, first run in that little, tiny community.

We have—I am talking too much—and we have 280 to 400 prints of a picture. A print might play the Music Hall Theatre in New York, complete that engagement and go upstate to Pawling, a town of 250 and play an engagement, and then it might come back and be repaired and [fol. 1192] inspected and then go over to Newark and play first run immediately after the little town in between. There are 6,000 clear first runs with no restrictions on them throughout the country. Really the only restrictions are in large cities, very large cities and surrounding areas, and that could also apply—I would like to put in the record, if there are two towns close to each other, the business goes back and forth, you then might sell one town some product and other companies would sell the other town another company's product, whichever they bought, so they would not be in conflict.

Q. And one town on its product might have clearance over the other town?

A. That is right.

Q. And vice versa?

A. That is right.

Q. But when you said the word "restriction" you meant clearance only?

A. That is right.

Q. Who made the final decision in Paramount that you were willing to license Mr. Myerberg a 21-day first neighborhood run in Baltimore?

A. I did, after talking it over with our division manager and our branch manager.

Q. But the final decision was yours?

A. That is right.

[fol. 1193] Q. In making that decision, did you consult with any representative of any other distributor of any other brand of motion pictures?

A. I did not.

Q. That decision was made wholly and solely independently by you, and you believed it to be in the best interests of your company, Paramount?

A. That is right.

Q. Now, in making the decision not to accept the four offers made by Mr. Myerberg or by Mr. Rome, acting for Mr. Myerberg, did you consult with any other distributor of motion pictures?

A. I did not.

Q. And you believed it was in the best interests of Paramount to make that offer?

Mr. Rome: Mr. Raftery, will you please let Mr. O'Shea make the statement without your saying it for him?

By Mr. Raftery:

Q. Will you please answer the question?

A. No, I did not.

Mr. Raftery: The witness is with you.

Cross-examination.

By Mr. Rome:

Q. Mr. O'Shea, during your 26 years with Metro who was your superior there, the person with whom you worked largely?

[fol. 1194] A. In what capacity, Mr. Rome?

Q. In distribution.

A. You mean my branch manager?

Q. No, your superior was Mr. Rodgers, was it not, sir?

A. Yes, he was always superior.

Q. Actually it would be fair to say, would it not, that you got your training under Mr. Rodgers?

A. No, I started with old Metro Company, and Mr. Rodgers was not with Metro at that time. I was hired by a

man named Henry Kahn. Then I worked for a man named Sam Eckman, who is now in England. Then I was made manager of that company I talked about yesterday, as Booker, postal clerk, and salesman. It was a very small company. I was transferred to Albany as branch manager and there I worked under Mr. Eckman, who was district manager.

Q. And Mr. Eckman's superior was Mr. Rodgers at that time?

A. No.

Q. When did Mr. Rodgers become general sales manager?

A. At the death of Felix Feist.

Q. When was that, if you recall, sir?

A. I do not recall specifically. I imagine it was around 16 or 17 years ago.

Q. And for the remainder of the time——

[fol. 1195] A. Maybe 18.

Q. —that you were with Metro, Mr. Rodgers was head of the sales department?

A. And my superior, yes.

Q. You also know Mr. Lichtman fairly well?

A. Do I know Mr. Lichtman?

Q. Yes.

A. Yes. Not too well, though. I worked for him for a short time when he came to Metro and then he went to Fox. It was a very, very short time. I never worked directly under him.

Q. Do you know Mr. Zimmerman of RKO?

A. The lawyer?

Q. Bill Zimmerman.

A. Yes, I was with RKO for almost a year, handling pictures through RKO.

Q. And do you know Mr. Montague of Columbia?

A. Yes, I know him, to say hello, that is all. I do not know him well.

Q. And Mr. Josephs, who was here for Columbia?

A. Never saw him until day before yesterday.

Q. How about Mr. Bill Scully of Universal?

A. I know him very well. I worked with him as branch manager for Metro.

Q. Mr. Scully was with Metro at one time, too; is that [fol. 1196] correct?

A. Oh, yes.

Q. And how about Mr. Kallenson, who is head of the Warner distribution?

A. Do I know him?

Q. Yes.

A. Yes, I do.

Q. And did you know Mr. Lazarus, who was head of Metro ahead of that time, and who is now with United Artists?

A. I know them both just to say hello to them.

Q. Do you, in your capacity as one of the top distribution executives of Paramount, have to consult or meet with any other gentlemen holding comparable positions in the other companies?

A. Do I have to meet with them?

Q. Yes.

A. No, I do not. I happen to be assistant general sales manager.

Q. But you do not have any meetings at which common problems are discussed?

A. You are talking about me?

Q. Yes.

A. No.

Q. Is there someone in your organization who does?

A. I do not know whether there is or not. You are asking [fol. 1197] me to testify.

Q. Do you know whether or not any of the top executives of your company do attend national meetings, any kind of a conference that might be so described?

A. I think that is a theoretical question. I don't know what you mean by a national meeting, or meeting that could be described.

Q. I am asking you, Mr. O'Shea, whether there have been any meetings.

A. I have never attended them. If there is, I do not know.

Q. I have asked you, sir, whether any of your other executives have attended such meetings.

A. I could not swear to that where I am on oath. I do not know.

Q. At the time that you came to Paramount, Mr. Reagan was head of the sales department?

A. Charles Reagan.

Q. And he is now head of the Metro Sales Department?

A. Yes. He got a very good break.

Q. Now, Mr. O'Shea, you said that when the first request came to your attention concerning the Crest Theatre and it is desired to license pictures, that you had an investigation made to find out what pictures had been playing, and so on. You testified that that was a fairly standard procedure on [fol. 1198] your part, to find out what the policy of the theatre had been and what it was going to be?

A. What it was going to be, and how many changes they made and where the house is located and who the owners were. It is a standard procedure. I mean a questionnaire should run through your mind to find out how this theatre could offer $10,000 against an extended run, because you usually stipulate the run when another offer is made. The word "extended" is over and beyond usual, a stipulated run.

Q. So that actually when the request for a picture on first run comes in from another theatre, you make it your business to find out all about that theatre, what it has been doing?

A. The new ones. We know about the others. We have records on all other theatres.

Q. And you know actually what product has been playing in the various theatres, particularly in the larger, important cities, do you not?

A. First run, yes. We keep a record of it.

Q. Now, Mr. Raftery has used the expression "when this offer came out of the blue from the Crest Theatre." Isn't it the fact, Mr. O'Shea, that the only way your company, Paramount, can find out about a new theatre seeking access to your product is to get some information or some request [fol. 1199] by way of a letter, a personal call from those people operating the theatre?

A. Well, it is by our branch people. We have 32 branches and one sub-station across the United States.

Q. And it is not unusual?

A. We say we received a request from Mr. Myerberg of the Crest Theatre or an offer of $10,000 and 40% for first run, "will you please give me all the details covering it?" That is just about it.

Q. That is routine?

A. No; it is not routine when you see $10,000, no, sir.

Q. It is not at all unusual, however, for your company, either in New York or at its branches to receive a request for its product containing offers for particular pictures; is not that so?

A. Yes, that is right, we receive many offers, and since the consent decree we have had a lot of bidding from places I had never been to before.

Q. And you got such a request "out of the blue" from Mr. Sullivan in Wichita and Mr. Hunt in Kansas City?

A. "Out of the blue", it is an expression. We got offers, bids.

Q. One of the main reasons that you gave yesterday in your testimany for feeling that this $10,000 offer on SOR-
[fol. 1200] ROWFUL JONES should be turned down, as I understand your testimony, sir, was you felt that would be unfair to the owners of the Crest Theatre?

A. I really and truly meant that.

Q. You did not advise the owners of the Crest or Mr. Meyerberg, did you, that you felt the offer was extravagant or it would be unfair, that he could not make money on it?

A. I told our local people that, and I knew, I really knew that from first run downtown SORROWFUL JONES and the resultant area play-off in revenue, would give me much more than the $10,000 that Mr. Meyerberg offered and which they would not repeat the picture downtown after Mr. Meyerberg had played it, and then there might have been a lot of Baltimore exhibitors independent, neighborhood exhibitors, who might have wanted to play it following Mr. Myerberg's run, where I do not believe it would have received the national advertising prestige and publicity that it would receive in an important theatre downtown, recognized fine theatre, and recognized throughout this whole area as having prestige and importance.

Q. You did not tell Mr. Meyerberg anything like that, did you?

A. No, I relayed that information through our branch manager, who was a very competent person.

[fol. 1201] Q. But you, yourself, replied concerning the offer of $10,000, did you not, Mr. O'Shea?

A. I would have replied to it.

Q. Would you actually have told Mr. Myerberg that you preferred to exhibit your picture in a downtown theatre?

A. Yes, sir.

Q. You did not tell him anything about whether you thought he would be hurt by such a large bid, or anything else, did you?

A. No, sir.

Q. Although actually you had this solicitude regarding Mr. Myerberg?

A. It wasn't solicitude, it was decisiveness, knowledge of the town and knowledge of the picture.

Q. Although you had this decisiveness, to use your word, on behalf of the Crest Theatre in Baltimore when offers were made to you on behalf of the Ontario Theatre in Washington, offers which, according to your testimony yesterday, seemed equally extravagant, you went ahead and licensed the Ontario Theatre in Washington, did you not?

A. I will tell you why.

Q. Why, sir?

A. We were having terms difficulties with our two most important accounts in Washington, that is, the Warner and [fol. 1202] Ambassador Theatres, for the one-two theatre, multiple run and the Loew company that has the Capitol, Palace and Columbia Theatres, and as of the release of pictures late in the fiscal year, we were making every effort that we could to straighten out the terms and conditions of the Loew deal in Washington, the Loew picture proposition in Washington, and the Warner deal. It wasn't satisfactory. We wanted it changed.

We had several pictures backed up and I said this might be a very, very good opportunity to experiment with men who have been in the picture business a number of years, Kogod & Burka.

Mr. Boucher, their buyer, came to New York and I told him it was a mistake, they could not afford the money they were talking about, then Mr. Boucher came with their at-

torney to my office. Then Mr. Kogod came up from Florida, he told me, purposely, to discuss it. He wanted those pictures, that he had a great opportunity because of the apartment houses and the thickly populated area and the fact there was the Ambassador Theatre adjacent which was playing first run pictures.

Then when he came up and again brought Mr. Sher, the attorney, with him, I said to my people, "These law suits are driving us crazy. You are getting the same sort of things shot all over. Here is a place we are having difficulty with [fol. 1203] our first run theatres. This man has knowledge of the business. He understands if he buys the pictures that is his complete responsibility, and I suggest we sell him some."

After that Mr. Kogod and Mr. Burka said DARLING, HOW COULD YOU was the sort of picture that could show me what they could do, and he said RHUBARB wasn't a picture that he could show me what he could do. I said, "You bid them before," and he said, "Some of our people." He said, "What I would really like to get is a picture like DETECTIVE STORY." I said, "We have not sold DETECTIVE STORY." The picture was released in November and I have already played it. I hope I have the record on it. It was released in November and it played January 30th at the Ontario Theatre, January 30 to March 4th. I don't know what our future dealings will be.

We sold most of these pictures. For instance, MY FAVORITE SPY was released Christmas in Washington.

I would like to point out how that was backlogged.

Q. Aren't you getting a little far afield from my question?

A. I don't think so.

Q. I don't want to cut you off a bit, Mr. O'Shea.

A. It was released and it played April 9 to 23. That is all.

[fol. 1204] Q. Your statement now is one of the chief reasons, as I understand it, why you granted the picture to the Ontario was because you were having trouble with Loew's and Warner?

A. That is right. We were having terms difficulties.

Q. Isn't it the fact, Mr. O'Shea, that the reason you granted the product to the Ontario Theatre was just be-

cause, as you said, that Warner's Ambassador Theatre, a few blocks away from the Ontario Theatre, had for a number of years been licensing product from your company and playing it day and date in the City of Washington.

A. That is right. You mean was that the reason I sold Ontario?

Q. Yes.

A. No, sir. He told me he had, he thought, the finest theatre in the United States and the finest pictures he got from people all over the city and he thought he had a chance in that location.

Q. You were kept fully advised, were you, by Mr. Isaacs and other people with respect to the situation concerning the defendants?

A. Yes.

Q. Did you consult with your legal department?

A. Yes.

Q. Mr. Gibbons?

[fol. 1205] A. Tom Gibbons, yes.

Q. He kept you informed concerning what correspondence he was having with Washington?

A. I get copies of all correspondence.

Q. Isn't it actually the fact that Mr. Gibbons informed you, informed Mr. Minsky, as well as informed Mr. Isaacs, that the exclusive run for the Ontario Theatre in Washington was absolutely out of the question?

A. Yes, he thought that it was as a steady diet, yes. But we wanted to experiment and I convinced Mr. Gibbons that we should experiment.

Q. You wanted to experiment in Washington but you did not want to experiment in Baltimore?

A. It is not the same set-up at all.

Q. But isn't it the fact that although Mr. Gibbons told you and Mr. Isaacs, as well as Mr. Minsky, that an exclusive run for the Ontario Theatre was absolutely out of the question, that is exactly what the Ontario Theatre got?

A. That was his opinion at that time.

Q. And you say that had nothing to do whatever with the fact Warner Theatre, the Ambassador, a few blocks away, had for years been playing your product?

A. That was Mr. Kogod's talk with me.

Q. Isn't it also the fact that you were informed by Mr. Minsky and Mr. Isaacs that this was a very ticklish situation?

[fol. 1206] A. No.

Q. You were not kept advised of that?

A. No. No. No.

Q. You were not told this would develop into a real whopper?

A. No.

Q. Wasn't your top legal counsel, Mr. Phillips, ever in on the thing?

A. He usually is. He is not the top legal counsel.

Q. Mr. Phillips, one of your lawyers. Wasn't it impressed upon everyone, especially through Mr. Minsky, that this was a very important thing?

A. No, not of that great importance.

Q. You are sure of that, now, Mr. O'Shea?

A. To the very best of my recollection, I am.

Q. I should like to read you some of the exhibits that are in the case here, coming from your own personnel. Mr. Isaacs wrote to Mr. Minsky, with a copy being sent to Mr. Gibbons, who presumably kept you informed, sir, a letter dated July 30, 1951, which is plaintiff's exhibit No. 42, in which he said:

"Dear Howard:

"I have previously written Tom Gibbons, giving the physical facts pertinent to this theatre, that is, location, appointments, etc. While it is not a problem at this particu-[fol. 1207] lar moment, you can well see that if the point is pushed, it can result in a real whopper."

A. I would not know what he was talking about, really. A real whopper?

Q. Did that letter come to your attention in any way?

A. Let me explain my set-up. We have a lawyer which looks after each division manager's territory and they consult with them.

Q. Now, there is another letter, plaintiff's exhibit No. 43, in which Mr. Isaacs writes to Mr. Gibbons in New York and says:

"You have all the physical facts relative to seating capacity and distances between theatres; further than that, this is a rather ticklish situation as you can readily understand. I would appreciate any comment you care to make as soon as convenient."

Q. Why was that situation so ticklish?

A. I will tell you why the situation was ticklish. These people are customers and build theatres where there are a lot of people or apartment houses. To deny them the right to experiment with the picture, and just like we have sold to Trans-Lux, A PLACE IN THE SUN, which did very, very well with it financially; they did as well as we, and would not sell a picture called TRIO to another house, and we had several customers in Washington where I felt we had these pictures backed up, and maybe this would be [fol. 1208] an opportunity to find out if Kogod & Burka, experienced, successful theatre operators, had a theatre that would throw off a lot of money for them and for us.

Q. Was there any superior right in your mind, Mr. O'Shea, for someone who has been a customer of yours for a period of time in the past or with other theatres, to have access to pictures from someone who has not had access?

A. In a neighborhood theatre?

Q. In a neighborhood theatre.

A. Absolutely not. We make the pictures available for sale and the policy of our company, of which I am proud, is we send out instructions and compare one picture to another as to values, as to particular values, and we instruct them that we want—we say, "It is believed to be as good a picture as such and such picture:" We would like the same terms or same playing opportunity in, of course, the finest theatres.

[fol. 1209] Q. It was a fact Kogod & Burka and Boucher had other theatres, and were good customers of your company?

A. They were experienced theatre people. When they sent in a bid, I believe they knew the dollar value of it and the length of run by the specific time,—not crazy dollars.

Q. Are you unwilling to accept the opinion of someone who has not been in the motion picture business?

A. Of course, not. If they build the right theatre in the

right location, whether it would be first run, subsequent run or what, they certainly would have an opportunity to buy our pictures.

Q. But the Crest Theatre was not able to get you to experiment in Baltimore, whereas you were prepared to experiment in Washington?

A. I think the thing is not comparable at all.

Q. Can you explain why it is that, in all the correspondence which has gone into evidence here in this case concerning the licensing of your product to the Ontario Theatre, there is never a word concerning any difficulty between Paramount and Warner and the others with regard to licensing, or anything of the kind.

A. There would not be. We do not exploit that. We don't put that in letters.

Q. This was entirely intra-company correspondence, [fol. 1210] wasn't it,—from your branch manager to your home office?

A. That is right.

Q. And there is not a word in that correspondence concerning any difficulties with Warner's and Loew's. On the contrary, isn't it a fact that Mr. Isaacs informed your home office that at the present time he was splitting Paramount products between Warner and Loew's; and that is all he said?

A. That is right. And then we stopped doing it.

Q. After the Ontario——

A. No. We sold PLACE IN THE SUN to them.

Q. Plaintiff's Exhibit No. 44 is a letter from Mr. Gibbons to Phil Isaacs, and it says:

"I discussed the exhibitor's request with Mr. Phillips, stressed the importance of the matter and conveyed Mr. Minsky's feeling that a conference should be held relative to it."

What was the importance of Washington as contrasted with Baltimore or any other situation?

A. I think the fact we had withheld our pictures from Loew's and Warner Bros., and we were at a stalemate; first run in Washington could have been very important.

Q. You say you were actually withholding pictures from Warner and Loew's at that time?

A. Sir?

[fol. 1211] Q. Your statement was that you were withholding pictures from Warner's and Loew's at that time?

A. We would not sell them because we could not get together on terms.

Q. Then, why is it that, on June 25, 1951, Mr. Isaacs wrote to Mr. Gibbons in a letter, Plaintiff's Exhibit No. 41, and informed him that "At present, we are splitting our product first run Washington between Loew's Palace, Capitol and Columbia Theatres and Warner's Warner, Ambassador or Metropolitan Theatres. Those pictures which play the Loew situation play one theatre exclusively; whereas, Warners day and date their pictures in the Warner and Ambassador, the Metropolitan playing an exclusive first run"?

A. That is right.

Q. Mr. Isaacs did not tell Mr. Gibbons anything at all about your withholding products from Warner and Loew's?

A. You make a big point about the word "withholding".

Q. You used the term.

A. If I did, it is just a word. We were selling picture by picture; and picture by picture they were going to Loew's and Warner's, with some exceptions. Then, the pictures we played in the Ontario Theatre, Mr. Rome, were after that letter.

Q. Of course, they were, because at that time the request [fol. 1212] of the Ontario had not yet been granted.

A. And we had not started to have any terms difficulties, either.

Q. Your statement now is that the terms difficulties with Warner and Loew's came after the request on the part of the Ontario Theatre?

A. It came out in the period after that. It had no bearing whatsoever on the Loew and Warner Bros. account. When we did have pictures backed up, I thought, here was an opportunity to find out just exactly what the theatre could do.

Q. And then you say you would not experiment in Balti-

more. Isn't it a fact that Mr. Benson, your branch manager in Washington, wrote about experimenting there?

A. At the Crest Theatre?

Q. Yes. At the Crest Theatre.

A. I haven't any knowledge of that.

Q. There is in the record a letter from Mr. Benson to Mr. Gibbons, which is Plaintiff's Exhibit No. 47, dated November 14, 1949, in which he said:

"I firmly believe that an experimental plan first run in the Crest Theatre would prove our judgment to be correct."

A. He was probably sure about that.

Q. A copy of that letter is marked as going to Mr. [fol. 1213] Schwalberg.

Mr. Raftery: What is that?

Mr. Rome: (Reading).

"I firmly believe that an experimental plan first run in the Crest Theatre would prove our judgment to be correct", —the judgment of Paramount.

The Witness: Then, why did we want to make the experiment, if that was the opinion of our branch manager?

By Mr. Rome:

Q. You were not able to determine what the outcome in Washington would be, were you?

A. We had a backed-up product. No. 2, we would more or less welcome the experiment at that time.

Q. Was there any reason for that, that you would welcome it?

A. We had several pictures that we had not played in the city of Washington.

Q. Your statement is that the fact that the Warner theatre, the Ambassador, had been playing Paramount products for a number of years and, consequently, the denial of your product to the Ontario would be obviously discriminatory, had nothing whatever to do with your decision?

A. No, sir.

Q. But isn't it a fact that that has had to do with your decision in granting the pictures in other situations, such as in Wichita, Kansas,—the fact that one of these other

[fol. 1214] large companies had a theatre which had been getting the products from your company in an area outside of the downtown area?

A. I told you that Mr. Sullivan wanted us to license for the two theatres. We had been playing the two theatres on pictures at the Fox Miller and Boulevard, and Orpheum and Boulevard. It was one or the other combinations.

Q. There is a letter in the case, sir, which is Plaintiff's Exhibit No. 66, addressed to Harry Hamburg from Mr. Morgan. Mr. Morgan was another one of the lawyers of Paramount, wasn't he?

A. He was in the legal department.

Q. That letter has to do with Wichita, Kansas, and the request of the Tower, which you said was four blocks from the other?

A. Yes.

Q. To get access to Paramount first run in the city of Wichita. In that letter, Mr. Morgan wrote to Mr. Hamburg, who was the branch manager—

A. Yes, and he still is.

Q. "Both Mr. Smith and myself have reached the conclusion that because we have licensed this run in the past from time to time in the Fox Boulevard Theatre, we could be accused of discriminating in favor of Fox if we do not offer a comparable theatre the same opportunity."

[fol. 1215] Do you still say the fact that these other defendants had been licensing your product in a theatre outside of the downtown area has nothing whatever to do with the decision when an independent comes along and seeks access to your product in a similar manner?

A. I say we should not be accused of discrimination.

Q. "We could be accused of discriminating in favor of Fox if we do not offer a comparable theatre the same opportunity".

A. Yes; we might have had a lawsuit in Washington. I think that is why they brought the lawyer on.

Q. So it did have to do with the fact that the Warner Theatre had access to your product?

A. Yes. And that is the only way we can license them,—if we sell Warner, to sell the Metropolitan Theatre.

Q. Actually, it remains a fact that your company has a

national policy which restricts the showing of your pictures first run to theatres in the downtown area, except in these unusual instances?

A. That is not so.

Q. That is not so?

A. No. We have a national policy regarding the showing of pictures downtown. We want to show them downtown, we want to show them to the best advantage, and under the best advertising and the greatest prestige in a large area, re- [fol. 1216] sulting from that film. And we do have a national policy on that basis. We want to play the finest theatres everywhere, we believe the best results can be obtained in playing downtown, populated shopping areas.

Q. That was not my question. Perhaps I did not make it clear. My question was, Mr. O'Shea, that your company does have a national policy which limits the showing of your pictures on first run, particularly in large cities, to theatres located only in the downtown area of the cities?

A. That is the policy generally, yes. That is where we think we can get the best results.

Q. And, no matter how fine a theatre, no matter what it might be willing to offer, if it is outside of the area, it cannot get access to your pictures?

A. No; I did not say that. I did not say that. You heard a man here yesterday say that if they build another Music Hall out there, and put on a $50,000 stage show, he would be very willing to go out there.

Q. If the Crest Theatre had been located downtown, would it have had access first run to Paramount products?

A. Yes. Even with the same theatre located downtown, it would have been easier for the customers to go in there than to go out to the Crest Theatre and seek it.

Q. If Warner Bros., in addition to having the Stanley Theatre in Baltimore, owned the Crest Theatre where it is [fol. 1217] located now, would it have had access to your pictures on a day and date basis?

A. No, sir.

Q. Yet you were willing, and actually did, grant Warner first run day and date in Washington?

A. I have only been with Paramount, as you know, about four years. If you want to sell the picture to the Warner

theatre, a very important downtown theatre,—they play the Metro. We sold four other pictures to Loew's Palace and Columbia.

Q. If Warner, in Baltimore, wanted to play that picture day and date, it would have been permitted to do so?

A. At the time the Crest Theatre opened? It would have been denied them.

Q. Actually, Mr. O'Shea, the national policy that you and I have been talking about was a policy that had existed in the Paramount Company before you ever came there?

A. That I don't know at all. I know these two theatres were playing day and date. If you want to ask a specific question about anything else that I know about, I will honestly answer it.

Q. I am not talking about Washington, but about the national policy on the part of Paramount, which you have described, sir, to limit the showing of your pictures first run to theatres located in the downtown section?

[fol. 1218] A. That is not the national policy at all. I said we would send out a policy that we want to play the finest theatres, the finest grossing theatres on our pictures; and we point out that we believe this picture, STREETS OF LAREDO, is as good as some other picture, they should seek out the early runs, and that this is sort of a test run to find out what the picture is worth, so that we can sell it at the proper terms.

Q. I thought we had agreed——

A. I thought we had, too.

Q. Then—that there is a national policy on the part of Paramount to limit the showing of your pictures on first run, particularly in the larger cities of the country, to theatres located in the downtown area of the cities?

A. We generally like to do that, because that is the best revenue. That is the opportunity for the picture, that is where the most people are, and that is where the best advertising is achieved by us.

Q. That is the policy that you found in the Paramount Company when you joined it? Isn't that right?

A. No, sir.

Q. Paramount had not been doing that before?

A. They had various policies. I don't know what the policy was.

Q. Didn't you make it a principle to inform yourself as [fol. 1219] to what had been done in Paramount?

A. I could see the policy.

Q. And the policy had been the same?

A. No; it was different. A policy is liable to change next week, or next month. You are talking about what I found when I got there.

Q. That is correct.

A. It was as I outlined,—to get the finest theatres downtown, the best located theatre, the best one to play it.

Q. You are not suggesting that you are the gentleman who instituted the policy for Paramount?

A. No.

Q. So it had been there before you joined the company?

A. Parts of it.

Q. Isn't that also the policy that had existed in Metro when you were with Metro?

A. Metro had their applicable policy. I would prefer that Metro discuss their policy.

Q. Speaking of the time when you were with Metro and Loew's, Incorporated, wasn't it also true in that company that it licensed its pictures for first run exhibition, as a national policy, in theatres located in the downtown sections of cities?

A. Yes,—the finest theatres they could get. Is there any law against that?

[fol. 1220] Q. That is what we are trying to find out.

A. Is there anything that says in the decree—And it may shorten this—that I must license a downtown theatre and a neighborhood run day and date?

Q. You are familiar with the Paramount case?

A. I have read it several times; but, legally, I do not understand it.

Q. But you are familiar with some of the things found by the Court to have existed?

A. I heard of it. I did not attend any of the hearings; so I am not familiar with it and can't quote it.

Q. But you do recall, from having read the opinion, that the Court found that "The fixed system of runs and clear-

ances which we found involved a cooperative arrangement among the defendants, was also designed to protect their theatre holdings and safeguard the revenue therefrom"?

Mr. Raftery: I object to the form of the question, Your Honor. He is reading from a law report.

Mr. Rome: I am reading from the opinion of the Court, which this gentleman said he read.

Mr. Raftery: He said he had read a decree. That is what he said.

The Court: He didn't say he had read the opinion.

By Mr. Rome:

Q. I am sorry. What was your statement?

[fol. 1221] A. I read the decree that was entered as to Paramount.

Q. Then you remember, do you not, that in the decree Paramount is enjoined, that is, prohibited, from having any arrangement or having a fixed system of runs and clearances? You remember that, do you not?

A. Yes.

Q. And you remember also that Paramount is prohibited——

A. I don't know what you mean by "fixed system". I don't understand it.

Q. That was the language of the decree, wasn't it?

A. I don't understand the legal part. Will you tell me what it means?

Q. A uniform system of runs and clearances, meaning, as we contend here, Mr. O'Shea, that there is this hierarchy of runs, and no independent has been permitted in the past to enter the field of first run.

Mr. Raftery: I object to that. It is based upon entirely erroneous assumptions of fact. Mr. Rome has proved that the majority of the first run theatres in Baltimore are operated by independents. I think there are only two regular theatres operated by affiliates, the Century and the Stanley. On the other hand, he has shown through his own witness that the New, the Town, the Hippodrome, Keith, and the Mayfair, are all operated by independents. He put in that question an assumption that in Baltimore no one but an

[fol. 1222] affiliate could have first run pictures. That is not the issue in the case at all.

The Court: I don't think you should go that far in the question to this witness. He said he had no agreement and does not know of any agreement that his superiors had.

Mr. Rome: I will not pursue it with the witness. But I will not permit Mr. Raftery's statement to go unchallenged, because my contention is that this is exactly the issue in the case, shown from the fact that these defendants have been shown to have a monopoly on first run pictures throughout the country, particularly in the larger cities of more than 100,000. Of course, Baltimore is one of those cities.

The Court: Have you finished?

Mr. Rome: No, Your Honor, I have just a few more questions.

By Mr. Rome:

Q. Mr. O'Shea, do you know what the weekly operating expense of the Ontario Theatre might be?

A. I was told as early as this morning. I was interested to know. I understand it is $3,500 a week, including advertising.

Q. Including advertising?

A. Yes.

Q. Do you know what the operating expenses of the Crest Theatre, in Baltimore, are?

[fol. 1223] A. No. I understand it is around $2,000 a week. I have not investigated that.

Q. And isn't it a fact that the percentage of the gross revenue that a theatre is capable of paying to Paramount for a particular picture, is something that depends largely upon the operating expenses weekly of that theatre?

A. Oh, no. Sometimes the expenses are not important at all. We have houses that have $2,000 of expenses and do $30,000 a week; we have one with $9,000 expenses, abnormal expenses, who may pay you $25,000.

Q. If a theatre has a large operating expense per week, in order for it to be able to pay the distributor a large film rental, it must get a larger gross than a theatre with a smaller operating expense? Isn't that right?

A. They hope to, yes, of course.

Q. So, if a theatre has operating expenses of, let us say, $5,000, in order to be able to pay a percentage to Paramount, it must gross more ultimately?

A. Let me say that they hope to gross more; and, if they are operating with a $5,000 expense, then they have to take a certain amount of money in to pay the operating expenses, to pay the film, and leave themselves a profit.

Q. And if a theatre has a small amount of operating expenses per week, it can still afford to pay a high film rental, percentagewise, out of the total gross, to a dis-[fol. 1224] tributor?

A. That is right. I made that pretty clear to you this morning, I thought, Mr. Rome, and to the Court, that we had played a great number of weeks A PLACE IN THE SUN, in Washington at the very small theatre, with less than 600 seats, with a gross of $102,000, and we secured $52,000. But that theatre had a reputation of that kind for some time. It is a downtown deluxe theatre, catering to the intelligen-sia.

Q. Do you know anything about the rentals earned in Baltimore from the showing of the pictures that were shown in the Ontario Theatre in Washington?

A. Yes.

Q. Can you tell us what the rental terms were for the exhibition in Baltimore of DARLING, HOW COULD YOU?

A. Yes. It played 6 days. We accepted $751 film rental.

Q. From first run?

A. From the Keith's Theatre in Baltimore.

Q. And you got $8,000 film rental from the Ontario Theatre in Washington?

A. We had a guarantee of $8,000, money dollars.

Q. Can you tell us what film rental you got out of RHUBARB?

A. In Baltimore it played the Stanley Theatre, and we [fol. 1225] got $2,536.

Q. And you got $8,000 out of the showing of that picture in the Ontario?

A. They guaranteed $8,000 film rental.

Q. Which constituted 58 per cent of the gross?

A. A little more than that, I think.

Q. Do you know what film rental you received out of the showing of DETECTIVE STORY, in Baltimore?

A. First run?

Q. Yes.

A. First run, we received $9,405.

Q. And you received from the Ontario in Washington $19,920?

A. Kogod & Burka made the offer of $15,000 guaranty and agreed to the specific splitting terms of that entire contract.

Q. Actually, then, the Ontario Theatre had been a very profitable outlet for the showing of Paramount pictures in the city of Washington, hadn't it?

A. It has been a quick dollar that I am sorry we accepted, because they can't afford it. They could not afford, by any stretch of the imagination, to pay us that money.

Q. Actually, the Ontario is still operating as first run and still seeking the licensing of pictures?

[fol. 1226] A. I sold them several of our pictures.

Q. And they are still doing business as a first run house?

A. Yes. I don't know whether I will sell them any more pictures. These pictures were sold some little time ago. When I got the records, they are all confused,—58 per cent to 105 per cent. I don't think I will sell them, because it is not the most desirable run in Washington, which we are seeking for the company.

Q. Actually, you can't tell what a theatre can do after a short period of time; you have to give it some time to prove itself, don't you?

A. We don't have to. The theatre should prove itself before it gets our pictures. You see we do experiment, and they have been very costly at times. Then we exercise our good business judgment and believe in advance of the experiment, after talking to our branch manager and division manager and after we consult with them, if we feel the experiment would be costly, not only to us but maybe to the man who is making the offer, we decide that maybe he is just making another capital investment to call attention to first run pictures and establish him in the area—there are many reasons why they offer more than they can, other than lawsuits. If we decide against that, then we don't

experiment in the licensing of our pictures, particularly first run.

[fol. 1227] Q. There is no way actually that the exhibitor can tell, until he gets a run of pictures? Isn't that so? He can't tell on one picture, he can't tell from one run, he must have a continuity of products over a period in order to be able to tell, and in order for you to make a reasonable decision?

The Court: We are just going over what we have been over before. That depends upon a lot of factors in different cities, different types of pictures, and so on.

By Mr. Rome:

Q. Mr. O'Shea, you referred to the importance of matinee business, so far as the Ontario, of Washington, is concerned?

A. Yes.

Q. Isn't it a fact that the ultimate test of a theatre is its over-all gross, rather than just the gross received from a matinee performance?

A. You mean the weekly gross? Yes, that is the way we look at it. But we also think enough of the matinee and the morning and the evening to see what kind of a picture we have, and whether the morning business, the afternoon business or the evening business—I like to have that information.

Q. But it is the over-all gross that ultimately governs?

A. Yes. I don't think there is a company in the business [fol. 1228] making motion pictures, abroad or here, that does not try to make the Radio City Music Hall. They like to show it. It is a great showplace, nationally and internationally. I am going to couple up your last question and say that I think about 70 per cent of their business is done in matinees and 40 per cent at night.

Q. Just one other thing, since you have said that. Isn't it a fact also that one great phenomenon of the motion picture industry in the last several years has been the development of drive-in theatres, which operate not at all in the afternoon, but only at night?

A. Yes, sir.

Mr. Roma: No other questions.

The Court: That is all.

(Witness excused.)

The Court: We will take a recess for a few minutes now, gentlemen.

(After a short recess, the following proceedings were had.)

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[fol. 1229] EXCERPTS IN DEPOSITION OF HARRY D. MYERBERG

The Court: Very well, gentlemen, we are ready to proceed.

Mr. Boyd: May it please Your Honor, there are a few points from the depositions that we would like to get into the record. I am reading from page 48 of Mr. Myerberg's deposition.

The Court: Is this a lengthy deposition?

Mr. Boyd: No, sir. There are very brief excerpts, about eight or so. I am reading from page 48 of the deposition. This has to do with the reference to the Paramount Company. (Reading:)

IN RE DEPOSITION OF HARRY D. MYERBERG

"Q. Suppose we take the situation prior to the entry of suit. What, if any clearance did Paramount grant in favor of the Crest over other theatres?

"A. No formal clearance.

"Q. When you say 'no formal clearance'——

"A. They never granted us any formal clearance, but the Pikes Theatre and the Pimlico Theatre, and, in some cases, the Avalon Theatre, are not permitted to play day and date with us.

"Q. Can you say that they are not permitted to or that they don't in fact?

"A. That I would not know. They don't, in fact."

[fol. 1230] Now, that refers to some testimony as to the Parkway. I refer to pages 71 and 72 of the deposition.

"Q. Let me give you this, and see if it strikes a respon-

sive chord: 'Although the defendants, on and after February 26, 1949,—"——

Mr. Rome: Excuse me. I am not sure that this is at all proper procedure. It is my understanding that depositions are for the purpose of impeaching a witness on cross-examination and not in this way.

The Court: I will allow it. You are reading now from Mr. Meyerberg's deposition?

Mr. Boyd: Yes, all I am reading is from Mr. Myerberg's deposition. Under the rules, we are entitled to do so. (Reading:)

"Q. Let me give you this, and see if it strikes a responsive chord: 'Although the defendants, on and after February 26, 1949, did license subsequent run product to the Crest Theatre, they unlawfully discriminated against the plaintiff by exacting from it a film rental greater than that paid to them by comparable or inferior theatres for similar product, by withholding reasonable clearance between theatres actually presently in substantial competition and by imposing unreasonable and discriminatory clearance between theatres not in substantial competition.' Do you know of any instances?

[fol. 1231] "A. Only in so far as Loew's is concerned, I would say that would hold; Loew's Theatre plus the Parkway Theatre, 14 days after downtown, and holds us seven days behind the Loew's Theatre. I consider that to be discriminatory. If Loew's Theatre permits the Parkway Theatre to be played every fourteen days from downtown, I think we should be able to do the same. I think that is discriminatory.

"Q. That is the only one of the defendants you put in this classification?

"A. Yes."

Now, more generally, referring to page 83 of the deposition: (Reading)

"Q. Are the exhibiting companies or the exhibitors in Baltimore a part of this conspiracy?

"A. No. When I say 'no', I mean not to my knowledge.

"Q. That is right. You don't have any knowledge of any exhibitor or exhibitors in Baltimore being a party to this alleged conspiracy to which the distributors are parties?

"A. No."

On page 118: (Reading)

"Paragraph 18 states that the arrangement with respect to what you class as an arbitrary and rigid manner of dis-[fol. 1232] tributing the first run product, had been made possible only by the agreement and connivance of the defendants in pursuance of their own conspiracy to dominate the distribution and exhibition of motion pictures in the City of Baltimore. My question is whether or not the conspiracy to which reference is made involves any person or company other than the defendants you have named in the complaint.

"Mr. Rome: I object to that question, Mr. Watkins, because the complaint named only certain defendants, and the very language you have just read states unequivocally and pretty clearly that the conspiracy alleged involves the defendants named therein.

"Q. But does not say 'only', that is my question.

"A. Yes, it is only the defendants therein.

"Q. So that no other exhibitors in Baltimore are involved in this Complaint?

"A. Not to my knowledge."

Now, on page 129: (Reading)

"Q. When you were requesting day and date exhibitions with the downtown theatres, did you give any consideration to the number of pictures that you would expect to take from each of the defendant companies?

"A. No. We expected the best picture available at all times."

Now, on page 138: (Reading)

[fol. 1233] "Q. Did you ever discuss your proposed method of distribution with any of the downtown exhibitors?

"A. Yes, I think I did.

"Q. Can you recall with whom?

"A. I think it was Mr. Schuleberger, of Keiths.

"Q. Schamberger?

"A. Schamberger.

"Q. Can you recall when?

"A. I would say in the middle of 1949, something like that.

"Q. Who were present?

"A. Just Mr. Schamberger and myself.

"Q. What was the discussion on the occasion?

"A. I discussed with him the possibility of playing Paramount pictures day and date with the exhibitors downtown.

"Q. What was his reaction to that suggestion?

"A. He did not want to do it."

Now, on the same page, 139: (Reading)

"Q. Do you recall discussing it with any other downtown exhibitor?

"A. Not in any formal way. I may have met one or two. I think they asked me about it and I may have had some curbstone discussion; but other than that, no.

"Q. You cannot recall any other?

[fol. 1234] "A. No. I may have had some curbstone discussion with some as to the situation. Other than that, I had no formal discussion.

"Q. To the extent that you had these discussions, do you recall what their given reaction was? Was it the same as Schamberger's?

"A. I would say generally, yes."

The Court: Are you bringing this up now because you omitted, inadvertently, to ask Mr. Myerberg about this, or why?

Mr. Boyd: No; this is evidence-in-chief.

The Court: Why didn't you ask Mr. Myerberg, when he was on the stand?

Mr. Boyd: Your Honor, I do not mean to not try to answer your question directly, but we chose to proceed under the rules, which give us the right, as we understand, to read into evidence depositions from any party to the case.

The Court: Well, it is not our practice—you could not carry that, certainly, to the extreme of reading, say, scores of pages of testimony of a principal witness, primarily a party, who is here in the flesh and available, and has been on the stand. That would be carrying the rule to an absurdity.

Mr. Boyd: Your Honor will recall we were under some limitation with our cross-examination. Your Honor sug-[fol. 1235] gested that we limit it, and we chose this method, rather than have an extended discussion about it.

The Court: I did not deny you the right to ask these questions of Mr. Myerberg.

Mr. Boyd: Would the practical solution be, if I told you I have four more references to make?

The Court: If they are no longer than the ones you have read.

Mr. Boyd: They are just as brief as those.

On page 228: (Reading)

"Q. What clearance would you ask for, assuming a day and date first run was had by the Crest Theatre?

"A. The same clearance as now enjoyed by the downtown theatres, 21 days."

Now, referring back to page 13: (Reading)

"Q. What, in general, was the nature of those discussions?"

The Court: What discussions?

Mr. Boyd: The answer will explain it. It is the first conversation he had with the branch managers.

"A. I told them the type of theatre we were anticipating building, what we were wanting to do, what we wanted to have available to us, that we wanted to have available to us first-run pictures in the City of Baltimore, either with the theatres downtown or exclusive,—"

[fol. 1236] And the answer goes on, describing the type of house, which I won't bother to repeat now.

Mr. Rome: I think that answer should be completed.

Mr. Boyd: I was trying to save time. I will complete the answer: (Reading)

"—for a house with the beauty of appointments, size, type of first-class theatre, with parking area, and so forth. I was told by each one individually that they would not at that time consider any request for film until the theatre was actually built, at which time, if we came in and talked to them, they would be glad to discuss it further with us."

Now, on page 102, these questions I am reading now were by Mr. Watkins on October 22, 1951, before luncheon. (Reading:)

"Q. To what extent did you continue endeavoring to obtain either exclusive Baltimore first run or downtown first run day and date?

"A. Well, I had a very concrete method. We set out to show the film companies it would be more to their advantage dollar wise to play our Theatre than the present distribution method and were willing in each case to set up a guarantee by way of certified check in bidding for specific pictures from these distributors."

Now, luncheon was taken at page 103 and, following the [fol. 1237] luncheon, at page 116: (Reading)

"Q. It is a fact, is it not, you did attempt to secure exclusive Baltimore first-run for the Crest?

"A. No.

"Q. You did not?

"A. No."

And, continuing on page 117: (Reading)

"Q. What did you seek to obtain?

"A. We tried to get pictures exclusively for our area. When we bid for pictures, exclusive first run in Baltimore, we mean exclusive in our particular area. We don't feel that the downtown Baltimore section is in competition with us, nor are we in competition with them. We had no objection. Our bids are for our own area. We have no objection whatsoever to bidding on pictures in our area, and we think that should be instituted. First-run day and date in the City of Baltimore, the same as in Washington, and a great many other cities throughout the United States.

"Q. Didn't you attempt to secure pictures either exclusive Baltimore first run or day and date for the Crest?

"A. I never did, no, never that, no. The wording of some letters in our bids may have been a little confusing at times, but our intention was we had no desire to do anything but get pictures in the City of Baltimore in our area exclusively day and date."

[fol. 1238] That concludes that portion of the deposition that I would like to offer.

Now, I would like to offer for Your Honor and the jury a series of photographs.

The Court: You are speaking for Loew's, now?

Mr. Boyd: These are general exhibits. We have been sharing the work. I particularly represent Loew's, and I will put their witnesses on in a moment, sir.

I offer in evidence, sir, a series of four photographs having to do with the Crest Theatre. One is an aerial

photograph, and three of the more conventional type, which I think will speak for themselves before Your Honor and the jury. I offer them as one exhibit.

The Court: They are not the same photographs that are already in the case?

Mr. Boyd: These are different aspects, I think you will see. The plaintiff put some in.

(Series of four photographs, in re: Crest Theatre, were marked Defendants' Exhibits Nos. 23-A, 23-B, 23-C, and 23-D, respectively.)

Mr. Boyd: Your Honor, I offer in evidence an aerial photograph of the Edmondson Village development, of a comparable nature to the ones that just went in, about the Crest. I understand the plaintiff objects to it, not as to the accuracy of the photograph but as to its relevancy?

[fol. 1239] Mr. Rome: I object to it because this is Edmondson Village, and the theatre there; whereas, we are concerned, as I understand it, with the Crest Theatre. There is no applicability of this theatre, Edmondson Village, as to the Crest. This dispute exists between the Crest and these defendants for access to the first-run pictures on the part of the Crest.

The Court: If you are right, Mr. Boyd, you could put pictures in, of the various neighborhood setups all around town, to no end.

Mr. Boyd: We do not think there would be no end to it, but we think we are entitled to show other developments in contrast to the plaintiff's development.

The Court: Is that in dispute?

Mr. Boyd: There has been a great deal of dispute about the drawing field and the attractiveness of this Hill Top shopping center, and how many stores it has.

The Court: But there is no claim that it reaches over to Edmondson Village; there is no claim about what has been given to Edmondson Village as being preferential with reference to the Crest. I will exclude this. We are getting a little too far afield. The others, I will allow.

Mr. Boyd: We have, sir, pictures of theatres that have come into the discussion as being comparable to the better neighborhood theatres.

[fol. 1240] I offer a series of photographs with respect to the Boulevard Theatre.

The Court: If they are photographs of theatres that have been discussed in the evidence——

Mr. Boyd: They would apply to the Edmondson Village, which has been in the evidence.

The Court: Not in the same way. You have discussed the Parkway and the Ontario in Washington. They have particularly been put in the case; but Edmondson Village Theatre, as far as clearance or other allowances, it is not in this case, as I understand.

Mr. Boyd: I did not offer that with respect to the theatre, but with respect to the shopping center. You remember, Dr. Hawkins described it.

The Court: I think there is a distinction. I will exclude this.

Mr. Boyd: May I offer the Parkway?

Mr. Rome: I object to this; and this falls exactly within what Your Honor has said about the Edmondson Village. This is not the Ontario, in Washington, which has been marked——

The Court: I will exclude photographs of theatres that have not been made the subject of comparison, individual theatres that have not been brought into comparison in the evidence, particularly, such as the Parkway and the Stanley, [fol. 1241] and the others in Baltimore, and like the Ontario in Washington.

Mr. Boyd: I offer for identification a series of photographs, five in number, of the Boulevard Theatre. I think it comes within the category of Your Honor's ruling.

Mr. Rome: Would you please stipulate the Boulevard Theatre in Baltimore, Maryland?

Mr. Boyd: Of course.

The Court: And you still object to this?

Mr. Rome: I do.

The Court: I sustain the objection.

Mr. Boyd: I offer in evidence a series of photographs of the Senator Theatre, which has been put in evidence on several occasions.

Mr. Rome: I object to that.

The Court: It has been mentioned. I do not think there has been a moving picture theatre in the United States

that probably has not been mentioned. I do not recall any treatment of that theatre as being discriminatory or preferential.

(Photographs of Boulevard Theatre were marked Defendants' Exhibit 24.)

[fol. 1242] Mr. Boyd: No, sir, Your Honor, but we think we are entitled to show that there are a number of other theatres of comparable beauty and appointment and size to the Crest Theatre, which has been so lauded in the plaintiff's testimony, and it certainly has, whether or not the Crest Theatre is the only one that should be considered, either in that area or in some other territories.

The Court: I will sustain the objection for the reasons given.

Mr. Boyd: I offer in evidence a series of 7 photographs of the Senator Theatre, sir.

Mr. Rome: I object to those, too.

The Court: They are excluded.

Mr. Boyd: Now, I take it, sir, that the same objection could not be made to a series of photographs with reference to the Uptown Theatre. That certainly has been in evidence by way of figures, runs, clearance and otherwise. That is the theatre which is located on Park Heights Avenue, just south of Belvedere Avenue, in the Pimlico area.

Mr. Rome: I object to this because the Uptown Theatre was entered into the evidence as the theatre with which the Crest is hoping to play day and date, which we claim is in unquestionable competition with the Crest. Mr. Myerberg recognized in his testimony that the Uptown was a nice theatre, a fine theatre, he said.

[fol. 1243] The Court: I think the Uptown can go in for the reasons Mr. Boyd has given.

The Clerk: The photographs as to the Senator Theatre are marked defendants' exhibit 25 for identification only, as to each.

(Photographs of Senator Theatre, marked Defendants' Exhibit No. 25 for Identification.)

Mr. Boyd: As to the Edmondson Village photographs, I offer that for identification.

The Clerk: That will be defendants' exhibit No. 26 for identification only.

(Photographs of Edmondson Village Theatre, marked Defendants' Exhibit No. 26 for Identification.)

Mr. Boyd: Now, if Your Honor please, I offer a series of photographs of the Uptown Theatre, 12 in number, and I understand they are admitted.

The Court: They are admitted.

The Clerk: Photographs as to the Uptown marked defendants' exhibit 27.

(Photographs of Uptown Theatre were marked Defendants' Exhibit No. 27.)

Mr. Raftery: I am advised, Your Honor, that the Marshal has subpoenaed the person in charge of the records of the Hippodrome and Town Theatres.

The Court: Very well.

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[fol. 1244] Thereupon HELEN LEONARD MARSHALL was called as a witness for and on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name for the record.

The Witness: Helen Leonard Marshall.

Direct examination.

By Mr. Raftery:

Q. Miss Marshall, by whom are you employed?

A. By Mr. Rappaport.

Q. Will you speak up so the jury can hear you?

A. Mr. Rappaport.

Q. In what capacity?

A. I am his secretary.

Q. Did you get a subpoena served on you?

A. Yes, sir, I did.

Q. Did you bring with you the records?

A. I have them here.

Q. Have you the records of the gross receipts of the Hippodrome Theatre for the calendar year of 1948?

A. Yes, sir, I have.

Q. Have you totalled them?

A. Yes, sir.

Q. How did you total them?

[fol. 1245] A. I have an adding machine tape; for 1948.

Q. Will you tell His honor and the jury the gross receipts of the Hippodrome Theatre for the calendar year 1948?

A. $631,686.88.

Q. And for the calendar year 1949?

A. $576,545.22.

Q. How about the Town Theatre; did you do the same thing?

A. Yes, sir.

Q. Have you got a number on it?

A. Yes, sir.

Q. How about 1948?

A. $394,774.14.

Q. And for the next year?

A. $336,193.77.

Q. And those were the box office receipts of those theatres for each of those periods?

A. Yes, sir.

Q. Now, did you yesterday get up a gross for the period from February 17, 1949 to February 15, 1950?

A. Yes, sir, I did.

Q. And what was that gross?

A. I don't have those here.

Q. Have you the figures?

A. Yes, sir, I have.

[fol. 1246] By the way, who called your office and asked you to get up that gross, if possible?

A. Mr. Galanty.

Q. And did you give the figures to Mr. Galanty over the telephone or did he get them at your office?

A. Over the telephone.

Q. Over the telephone?

A. Yes.

Q. And was the figure you gave him for that period for the Hippodrome Theatre $577,500.? Does that refresh your memory?

A. Yes, I think so, yes, sir.

Q. And for the same period for the Town Theatre, $293,146.?

A. Yes, sir.

Mr. Raftery: That is all.

Cross-examination.

By Mr. Rosse:

Q. Miss Marshall, do you have records showing the report of your gross admissions at the Hippodrome Theatre for the season 1948-1949 from the playing of Columbia Pictures?

A. Yes, sir, I have the whole year.

Q. Can you tell me what the gross admissions as reported to Columbia Pictures was for the theatre season 1948-1949?

[fol. 1247] A. You mean picture by picture?

Q. No. The total gross admissions.

A. For the whole year?

Q. For the season 1948-1949. It was run from September 1948 to September 1949.

A. I have it by weeks and I have to pick out Columbia pictures.

Q. Can you tell me whether or not the information which has been furnished in this case by Columbia Pictures, based upon reports made on behalf of the Hippodrome Theatre, is correct if it shows that the Hippodrome grossed from the playing of Columbia Pictures on percentage basis $103,328?

A. I don't know. I would have to break it down.

Q. You do not have that information?

A. No.

Q. Can you tell me whether or not your figures would show the total gross admissions received at the Hippodrome Theatre during that same period of time from the showing of RKO pictures?

A. Yes, they are all in this book.

Q. Can you?

A. Yes.

Q. Can you tell me whether or not the figure furnished by RKO in this case, in its answer to interrogatories, for the season 1948-49 from the showing of RKO pictures in the [fol. 1248] Hippodrome Theatre, is correct, if that figure is given as $23,371.73?

Mr. Raftery: Will you include on percentage pictures?

By Mr. Rome:

Q. On percentage pictures?

A. These are only the receipts.

Q. Is there anything in your records which shows how many flat rental pictures which you played during that period of time?

A. No.

Q. Is there any way that can be broken down so you could get that figure?

A. It would have to be gotten—not from this record. I have no records like that. These are receipts.

Q. Do you know how many pictures played in the Hippodrome Theatre during the season 1948-1949, the total number of pictures?

A. For 1948-49?

Q. The season 1948-49, from September of 1948 to September of 1949.

A. I would have to count them.

Q. Can you tell me at the present time, Miss Marshall, how many pictures played from either one of the companies, Columbia and RKO, in the Hippodrome Theatre during that period?

[fol. 1249] A. No, sir, I cannot tell you that.

Q. Did the Hippodrome exhibit vaudeville as well as motion pictures during that period of time?

A. Yes, sir.

Q. Can you tell me how many weeks during that period that it showed vaudeville attractions?

A. Every week.

Q. Every week?

A. Yes, sir.

Q. Do you know whether or not you showed percentage pictures in your theatre every week?

A. No, sir, we did not.

Q. Does your book there show the total amount of the expense for the vaudeville attractions?

Mr. Raftery: Oh, I am objecting to this, now.

The Court: As I understand it, these over-all figures support what Mr. Raftery stated this morning.

Mr. Rome: Sir, I still maintain, and in view of the way this has developed, I would request Your Honor, despite

the lateness of the hour and despite the fact we are trying to bring this thing to a conclusion, if we cannot secure from this witness, to be submitted at some appropriate time, the breakdown to show that either the plaintiff in this case has been misinformed by Columbia and RKO or else the figures that I stated to Mr. Galanty are 100 per cent correct, [fol. 1250] sir, with regard to the gross admissions at the Hippodrome Theatre during the season 1948-1949, derived from the showing of first run pictures on a percentage basis. That is the question that I asked Mr. Galanty. That is the question which drew remarks from Mr. Raftery.

The Court: We are going around in a circle now. Where is the question that you have been asking so much about, the interrogatory question. Read that.

Mr. Rome: Yes, sir. This is the separate answer of Columbia Pictures. I believe it will show——

The Court: Do not read the answer first, read the question first.

Mr. Rome: Very well, sir. This is interrogatory No. 4, sir:

"State year by year the total amount of admissions paid to each of the theatres named in your answer to interrogatory 1."

That is, the theatres to which they licensed first run pictures.

"——while the film distributed by you or an affiliated or predecessor company was being exhibited during the period from 1940 to 1950 inclusive."

The Court: That is not the subject in dispute. It was the intake, the gross income.

Mr. Rome: The total amount of admissions which would [fol. 1251] be the gross revenue of the theatre, sir. I want to draw Your Honor's attention——

The Court: I thought you were talking about the amounts paid.

Mr. Rome: It is a problem of terminology, sir. The total amount of admissions paid, which would be the gross of the theatre.

The Court: I misunderstood you. I thought you meant the license fees.

Mr. Rome: No, sir.

I wish to add, however, sir, that the defendants objected to the manner in which this question was asked by reason of the time period involved, 1940 to 1950. Your Honor sustained their objections with regard to that.

At the argument on the objections, which Your Honor will recall, they also raised the issue that they could not tell me what the gross was because they had no report from the Hippodrome Theatre or any theatre other than on pictures licensed on a percentage basis, and Your Honor, therefore, ordered them to answer this question as to the period from 1948 on as to those pictures which they had licensed to these theatres on a percentage basis. That is the information they gave me in the interrogatories. It was on the basis of that information that I framed my question to Mr. Galanty, and it remains the fact, sir, accord-
[fol. 1252] ing to the information they have given me, the gross at the Hippodrome Theatre——

The Court: It is not according to the information, except according to the answer to the question, is it not? Read the answer to the question on the interrogatory. That is what you put in issue.

Mr. Rome: That is right, sir.

The Court: What does it say?

Mr. Rome: Answer No. 4. This is Columbia:

"The gross admission receipts, exclusive of admission taxes reported to have been received by theatres from the exhibition in Baltimore on first run of those feature motion pictures as to which film rentals were computed in whole or in part as a percentage on gross receipts, were as follows: Theatre: Hippodrome, 1948-1949, $109,328."

As to RKO, sir——

The Court: State that figure again.

Mr. Rome: $109,328 from the showing of Columbia pictures on a percentage of the gross, sir, $109,328. And to be added to that is $23,371 gross admissions at the Hippodrome Theatre from the showing of RKO pictures. Adding those together, sir, it comes to $132,699 of gross from the showing of first run pictures on a percentage.

The Court: Now, would your records show any such breakdown, Miss Marshall?

[fol. 1253] The Witness: No, sir, those are gross admission receipts.

The Court: Not by pictures?

The Witness: Weekly gross admission receipts.

The Court: You would have them but you haven't them here; is that it?

The Witness: No, sir, I haven't them with me.

Mr. Raftery: Your Honor, I can stipulate that Miss Marshall and her employer, Mr. Rappaport, reported the grosses on percentage pictures to RKO and Columbia accurately, and on those we gave them the grosses on those few pictures that played on percentage. Now, what I objected to was Mr. Rome asking the questions of Mr. Zimmerman and Mr. Galanty and suggesting to the witness that the gross of the theatre for the whole year was $132,000 and not $600-odd, as shown by the record.

I have no quarrel with the figures that are in there, and Mr. Rome must concede the answer was 100 per cent right.

Mr. Watkins told me just a minute ago that on the day of the argument before Your Honor the point was raised that we had no control over these theatres and could not get the figures, and you limited Mr. Rome to the percentage of pictures and you told him on the argument: "If you want the rest of the figures, subpoena the Hippodrome [fol. 1254] Theatre or the other theatres."

The Court: It seems we have both, Mr. Rome. You ought to be satisfied.

Mr. Rome: I am satisfied, sir, in view of Mr. Raftery's statement.

The Court: You do not want to keep Miss Marshall any more?

Mr. Rome: No, sir.

The Court: That is all. You may step down.

(Witness excused.)

Mr. Boyd: Mr. Murphy, please.

Thereupon JOHN F. MURPHY was called as a witness for and on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name for the record, please.

The Witness: John F. Murphy.

Direct examination.

By Mr. Boyd:

Q. Mr. Murphy, by whom are you employed?

A. I am employed by Loew's Theatres.

Q. Are you related to anybody else in the movie industry?

A. No, sir.

[fol. 1255] Q. How did you happen to be employed in the movie industry?

A. Well, I have been in business in and out for 35 years. I was a caddy at a golf course where William Fox, David Loew and David Bernstein and other people played, and I think they liked me.

I got a job ushering in some theatres while I was going to school, and about 25 years ago I went to work for Loew's in the office and also worked in theatres on week-ends. Since that time as the men I worked for improved in position, I improved, too, and at the present time I am general manager of Loew's out-of-town theatres.

Q. When you say "out-of-town theatres" you mean theatres outside New York City?

A. Yes, sir.

Q. And that is all over the United States?

A. Yes, sir.

Q. Mr. Murphy, the Century Theatre, therefore, comes under your direction?

A. It does.

Q. And its policies are determined by you?

A. Yes, sir.

Q. And you play at the Century Theatre Loew's pictures, do you not?

A. We do.

[fol. 1256] Q. Do you play all their feature pictures at Loew's?

A. Yes, I would say all of them.

Q. And then sometimes your——

Mr. Boyd: Your Honor, I am leading the witness a little. If there is an objection, it is only from the point of view of time I am doing it.

By Mr. Boyd:

Q. You may sometimes move your pictures over to the Valencia, have in the past?

A. That is correct.

Q. And the Parkway Theatre is owned by Loew's?

A. That is right.

Q. And after that time you moved your pictures up to the Parkway?

A. That is right.

Q. Some of them?

A. Some of them, that is correct.

Q. Beyond that point you have nothing to do with the pictures—when I say you move them over" I mean Loew's licenses the pictures to your theatres?

A. That is correct.

Q. Mr. Murphy, did you, about the end of 1951, cause to be made a survey of the patronage at the Century Theatre?

A. Yes, I did.

Q. What were your reasons for doing so?

A. Well, I had several reasons. Baltimore was one of [fol. 1257] the cities that we picked for a television installation. We picked eight cities in this country in different areas. We found that the few events we had were quite costly to advertise and we wanted to make an analysis of where our patronage came from, so, perhaps, we could advertise a little more scientifically, particularly on mailing cost.

A television program is a one-event program and it is pretty hard to spend a lot of money for one event, so I suggested to the manager that he should put up a sign in the lobby, to employ a couple of nice young ladies and every day ask people coming in the theatre whether they were interested in being apprised of our programs and our television activities, and if they were to sign their name and address in a book.

I also told our manager at the time to make sure that he kept the record, that the young ladies sign the record each day, and that a photograph was made of the method in which we pursued the matter. All of that was done, and we have such survey.

Q. When was the survey made?

A. It was made the week starting December 24 on a Universal picture FLAME OF ARABY.

Q. And went until what time?

A. Up until the 30th. It was surveyed for 7 days.

Q. How many persons signed their name to the book?

[fol. 1258] A. I think around 8900, as I remember.

Q. Aren't you talking about attendance?

A. Oh, no. 2915. There were 8900 admissions. That's the figure I was remembering.

Q. And of the 2915 there were a certain number of transient communicants?

A. 242.

Q. So, am I correct in saying that you then had 2673 local addresses?

A. That is right.

Q. Of that 2673, were there certain names and addresses that you were not able to locate on a postal zone map?

A. There were a few. There was not streets in that new area, and so forth.

Q. But to the extent that you could locate those addresses, what did you do? Did you make an exhibit?

A. I suggested to our manager—in fact I told him to get from the post office a postal zone map of the city which would locate the various postal areas and represent by dots in each of those postal zone areas each of those addresses that you have, so that the final survey shows how many addresses were signed in the book in each postal zone, and they are located in each postal zone, of which I think there are 22 or 23.

[fol. 1259] Q. I point out to you this map designated "Greater Baltimore Street Map" and ask you if that is the map on which those dots were placed, if it is the result of the week's survey you just described?

A. That is right.

Q. This map does not have designated on it the postal zones. That is available through an overlay which I can show you in a moment.

A. That is the map and the result of the survey.

Q. If possible the dots were put on this map at the actual addresses rather than the postal zone?

A. The dots were put on this map just as well as we could do it.

Q. And in many instances there were overlays, one dot over another?

A. Yes, that is right.

Q. Have you made use of that information for a mailing list?

A. Yes, we have, and we are using it right now. As a matter of fact, our manager told me the other day on some picture in the last week or so he had used a lot of special mailing, using that survey.

Q. Are there indications people are interested in the mailing list?

A. Oh, yes.

[fol. 1260] Q. In what way?

A. If they change their address they call the theatre, or sometimes stop in and mention to the manager that "I heard this or that was coming. I heard it through this mailing list."

Q. You continued the survey in subsequent weeks, I believe?

A. Yes.

Q. By taking down the names?

A. Yes.

Q. You did not transcribe those over to an exhibit such as these?

A. No.

Q. During what showing were those subsequent surveys taken?

A. We made a survey during the QUO VADIS engagement, I think.

Q. And you are using the result of that in your mailing list, aren't you?

A. Yes.

Mr. Boyd: Then I offer that map as defendants' exhibit 28, sir.

The Clerk: Defendants' Exhibit No. 28.

(Large postal zone map of Baltimore was marked Defendants' Exhibit No. 28.)

[fol. 1261] By Mr. Boyd:

Q. Mr. Murphy, the books in which those names were written are in court, I believe, on the stand over there?

A. That looks like the books.

Q. Will you take my word for it?

A. Yes.

Q. Mr. Murphy, based on your experience as a theatre operator, what would you have to say as to whether or not neighborhood theatres in Baltimore City are or are not in substantial competition with the downtown theatres?

A. They are in substantial competition with the downtown theatres. Every theatre in the City of Baltimore is.

Q. Ultimately?

A. Yes.

Q. Are you familiar with the Crest Theatre?

A. Yes.

Q. You have been out there and seen it?

A. Yes, I have.

Q. Now, without reference to any question of the policy of distributing pictures, with which you are not concerned, I understand——

A. No, I am not.

Q. ——would you or not, as a theatre operator, play the Crest first run?

A. I would not play the Crest first run if you gave me [fol. 1262] the theatre for nothing.

The Court: I can't hear you, sir.

The Witness: I would not play the Crest Theatre first run if the man said to me tomorrow, "You can have the theatre rent free," because I think it would be absolutely impossible.

The Court: Well, now, what do you mean by "impossible"

The Witness: Your Honor——

The Court: Talk to the jury, please.

The Witness: You asked me the question, so——

The Court: I am asking you the questions so the jury can hear what your answers are.

The Witness: Excuse me, sir.

The theatre is located in an area that is not a shopping area by the widest stretch of the imagination. What is

there? A couple of meat markets, a diner, a used-car lot. Where is the opportunity given to the patrons who go downtown and shop around and see what picture he wants to see at the time he wants to go? The downtown areas of any cities are the first run areas, are the main shopping centers where people go and say: "I am going to go to the movie." They are not sure what they want to see, so what is here? What is there? They look around and they pick one out. Where is that opportunity given to them out at the Crest [fol. 1263] Theatre? In the second place, how are they going to get there? It is tucked away in a remote corner of the City of Baltimore, and I would think that your patrons would resent having to go out there. Why should they be forced to travel way out to the Crest Theatre to see a first run picture when they could go downtown conveniently? They can go downtown to shop and the restaurants and have a choice which is denied them at the Crest Theatre.

I honestly do not think the Crest Theatre, with first run pictures, would do as well as they would with second run.

The Court: How about the question of exhibitors who wished to play day and date with the Crest Theatre?

Mr. Boyd: That was my next question, sir.

By Mr. Boyd:

Q. Mr. Murphy, as the operator of the Century Theatre, would you license pictures for exhibition in the Century if those same pictures were licensed by the distributor playing day and date with the Crest Theatre?

A. I would not, never.

Q. I assume your reasons are the same you have just given?

A. I would go out of business.

Mr. Rome: Please do not lead him even on the reasons, Mr. Boyd.

Mr. Boyd: Your Honor, I am not trying to do any wrong- [fol. 1264] ful leading. We are pressed for time. That is all.

By Mr. Boyd:

Q. What reasons would you have for not playing day and date, Mr. Murphy?

A. If the Crest Theatre, in its location, non-shopping area in the country, has the right to buy first run pictures, then there are a dozen other theatres in the City of Baltimore just as good in every way, even better, physically and better located. The Crest is nothing unusual as a theatre. It is just a theatre. There are thousands of theatres over the United States, all over the United States as good or better, second run theatres, than the Crest, I think some of mine.

The Court: Now, gentlemen, the time for lunch has arrived and it is obvious that the case cannot be finished today. I have a motion calendar this afternoon, and I have devoted part of the day to this case, against our ordinary rule, and I thought that today we would finish the case, but it is quite obvious it cannot be finished, so we will obviously have to go over until Monday.

May we have an understanding whether there is going to be any extension from Monday? Are there any more figures you want, Mr. Rome?

Mr. Rome: No, sir.

The Court: How many more witnesses have you, Mr. Boyd? Are you the last counsel to present witnesses?

[fol. 1265] Mr. Boyd: Yes, sir, I believe I am. I have two other witnesses. One will be reasonably short, sir. The other, the length of which I cannot predict, because it may reflect in the end to the extent of the cross-examination.

Mr. Rome: I undertake to say to you, sir, my cross-examination will be very brief.

The Court: We will suspend here, members of the jury, until 10:00 o'clock Monday morning.

(Whereupon, at 1:05 o'clock, p.m., an adjournment was taken until Monday, May 26, 1952, at 10:00 o'clock a.m.)

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[fols. 1266-1268] Reporters' Certificate to foregoing transcript omitted in printing.

[fol. 1269] TRANSCRIPT OF PROCEEDINGS OF MAY 26, 1952, 10:00 A.M.

The Court: I understand from our last session that everyone feels the evidence can be finished in this case this morning.

Mr. Rome: We have nothing more, Your Honor.

The Court: Mr. Boyd, Mr. Watkins, and Mr. Raftery?

Mr. Raftery: Yes, Your Honor, I believe that is correct.

The Court: Members of the Jury and counsel, we are ready to proceed.

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Thereupon JOHN F. MURPHY resumed the witness-stand and, having been previously sworn, testified further on behalf of the defendants, as follows:

Direct examination (resumed).

By Mr. Boyd:

Q. Mr. Murphy, at the close of your testimony on Friday, you had just answered why you would not be willing to play the Century Theatre day and date with the Crest Theatre.

Now, leaving that subject, I would like to ask you what, in your opinion, is the effect of the matinee business, as between downtown and neighborhood theatres?

A. In the downtown area you have a shopping crowd, and the matinee business in downtown theatres is many, many times that of a neighborhood theatre. As a matter [fol. 1270] of fact, those neighborhood theatres, in most big cities, are closed from Monday to Friday. They close only because they cannot take in enough business to make a profit. If they could make a profit, they would stay open.

Q. Do you have your own experience upon which to draw in that regard?

A. Yes.

Q. Do you have neighborhood theatres under your direction?

A. Yes, I have.

Q. Where?

A. Well, in Buffalo we have four neighborhood theatres. As to those theatres, we found by experience, it was not

profitable to operate Monday to Friday matinees; so we keep them closed. I would say that one of them, particularly the Kensington Theatre, is a far superior theatre in every way to the Crest Theatre in Baltimore.

Q. Speaking of Buffalo, Mr. Murphy, do the Loew Theatres play Warner pictures in any of the theatres under your supervision?

A. We play Warner pictures in one town only. That is Buffalo.

Q. In your downtown or suburban theatres?

A. In the suburban theatres. I operate in about 36 towns or 36 cities.

[fol. 1271] Q. Mr. Murphy, can you tell the Court and jury the approximate highest attendance you have had at the Century Theatre in recent years, in a week's time, let us say?

A. The highest I remember is BATTLE GROUND. In one week, the first week, we played to over 37,000 admissions.

Q. And that stayed on for a subsequent play?

A. Yes. I think on BATTLE GROUND our total admissions on the downtown run were over 63,000 admissions in Baltimore.

Q. Getting back to the neighborhood situation for just a moment, are you in a position to tell us anything about the effect television had on the attendance at neighborhood theatres and downtown theatres?

A. Well, the television programs, the big shows, are on at night, and our night business in neighborhood sections is much more affected than the matinee. The matinee business downtown holds up much better, because you do not have the television competition on the matinee pull downtown. While television programs are on, they are not important shows. The important television programs are on at night.

Q. Mr. Murphy, are you in a position to comment upon the effect of public transportation or its absence on theatre attendance?

A. Well, it is peculiar. We had an outstanding instance of this situation on QUO VADIS. I think the day after we [fol. 1272] opened, or the day before we opened QUO

VADIS at the Century Theatre, there was a transportation strike here.

Q. And am I correct in my understanding that QUO VADIS is the most expensive motion picture ever produced?

A. I understand that is so. It cost $8,000,000. At the end of the first week on QUO VADIS we did many thousands of dollars less than we did with GONE WITH THE WIND. In all of our other cities throughout the country, the first week of QUO VADIS was a lot better than the first week of GONE WITH THE WIND. In Washington, for instance, QUO VADIS just knocked the tar out of GONE WITH THE WIND the first week. And it was the same right down the line. But Baltimore was an entirely different situation. We were materially affected by the transportation strike.

Q. And you would believe from that that public transportation is a major factor in the motion picture theatre attendance?

A. Yes.

Q. What operating costs do you have at the Century Theatre, Mr. Murphy?

A. Well, it fluctuates. Without the film rental, you mean?

Q. Yes.

A. It fluctuates principally with the cost of the advertis- [fol. 1273] ing campaign. I would say, including our overhead, our rent, it is from $5,400 to $6,000 a week. Our payroll alone is over $2,200 a week.

Q. How many people do you employ?

A. About 50 people. Downtown theatres are big business.

Q. Mr. Murphy, when we were discussing the exhibit which was the result of the survey, the other day, I mentioned to you that there was available to you in the courtroom an overlay showing the postal zones. I would like to have you identify that.

A. Yes, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. So that you can look at the situation over-all and have that "blue measles" effect, and then go out into the Postal Zones by dropping down the overlay?

A. Yes, sir.

Q. And the red triangles are here (indicating)?

A. Yes.

The Court: I can't hear you.

The Witness: The blue marks are the addresses, and the red marks are the various theatres.

Mr. Boyd: The witness is with you.

[fol. 1274] Cross-examination.

By Mr. Rome:

Q. Mr. Murphy, your duties cause you to have to do with all Loew Theatres that are known as out of town theatres, meaning out of the city of New York theatres?

A. That is correct.

Q. That is, throughout the country?

A. That is correct.

Q. How many theatres are there included in that category?

A. About 65.

Q. Can you tell me how many theatres Loew's has in New York City?

A. I am not sure, but I think they have about 60. I am not sure.

Q. Are the 65 theatres that come within your jurisdiction located in any particular section of the country?

A. No, sir.

Q. How many of those 65 theatres are first run theatres?

A. Most of them are. I would say all but six.

Q. And how many of those theatres that are first run are located in the downtown sections of cities?

A. I would say all of them that are first run are located in the downtown section.

[fol. 1275] Q. Do you buy or book pictures that play in those houses? What products do you play?

A. I play whatever I can buy.

Q. Do you buy pictures from all the other companies?

A. I would say that we do generally,—except, for instance, we may play Paramount pictures possibly in 6 towns of the number I operate.

Q. It is true, isn't it, that you actually buy or license pictures in some of your situations from every one of the companies involved here? I do not mean to say by that,

Mr. Murphy, that you play the products of all 8 companies in any one house; but, in the 65 theatres, the products of all companies are played?

A. I might buy some product from all companies.

Q. But, actually, in the 65 theatres they return very substantial revenue to the distributors, do they not?

A. Yes.

Q. What products are played in the Century Theatre?

A. Century Theatres?

Q. The Century Theatre in Baltimore.

A. Well, principally Metro. I would say about 80 per cent, or 75 or 80 per cent of our playing times are Metro pictures, our own pictures; and there are a few Universal, and we played a few United Artists.

Q. Any other pictures?

[fol. 1276] A. Yes; we played a Lippert picture; we played a Selznick picture. They are independent.

Q. One picture in each instance?

A. We played several Selznick pictures, and I think we played one Lippert.

Q. Generally speaking, it is true, is it not, that the playing of products by Loew's, principally Universal and United Artists, has been true over the period of years that you have been acquainted with the situation?

A. No.

Q. What changes have there been in that period of time?

A. Several years ago we were able to buy from Universal Pictures. Prior to that time I don't think we had been able to buy them.

Q. How far back does that go?

A. I believe six years, or something like that.

Q. Is all of Loew's product presently being licensed to the Century Theatre?

A. Well, unless they sell the pictures somewhere else, I think they have sold pictures to other runs, occasionally.

Q. That has happened recently?

A. Possibly. They might have sold pictures to someone else.

Mr. Boyd: Keep your voice up, please.

By Mr. Rome:

Q. Do you also have to do with the move-over of pictures [fol. 1277] from the Century into the Valencia?

A. Yes.

Q. And you are the gentleman who is responsible for the booking of pictures in the Parkway?

A. Yes.

Q. Did Universal Pictures play FLAME OF ARABY, to your knowledge, in the Parkway Theatre?

A. No; it did not.

Q. You mentioned, in connection with the survey that you conducted, that there was a sign in the lobby of your theatre. Is that correct?

A. Yes.

Q. What did that sign say?

A. I think there is a picture of it here. I don't know exactly what it says; but I believe it said something about, "if you are interested in our forthcoming program".

Q. Were the young ladies who were employed by you in connection with the making of the survey, Mr. Murphy, instructed to say anything at all to the patrons?

A. No. They just asked them to sign their names, if they were interested in being on our mailing list.

[fol. 1278] Q. Did each patron sign individually?

A. I don't understand your question.

Q. You have signatures in these books, as I understand it.

A. Yes.

Q. And did each person who signed his name sign himself?

A. Yes.

Q. And the young ladies in no instance signed for the person?

A. That is correct.

Q. Have you ever made any other survey other than the one you have described in the survey made during the showing of QUO VADIS?

A. In Baltimore?

Q. Yes.

A. Yes. Well, during the showing of QUO VADIS?

Q. You referred yesterday, or Friday, you made a continuation of the survey.

A. Yes.

Q. During the showing of QUO VADIS?

A. Yes, that is right.

Q. Now, at any time prior to these two instances, have you ever made a survey in the City of Baltimore?

A. Probably we have. We made surveys from time to time, lots of times.

[fol. 1279] Q. You say probably, Mr. Murphy. Can you tell me definitely whether you have or have not?

A. I do not remember whether we have. We might.

Q. Can you tell me how many times per year your theatre is patronized by any person whose name appears on your mailing list?

A. No, I cannot tell you that.

Q. Did you use the mailing list that was compiled from the names that you got in these books for the program of the Century Theatre only?

A. I don't understand your question.

Q. Did you send to this mailing list information concer-ing the pictures that were being shown in the Valencia and in the Parkway Theatres, as well as in the Century Theatre?

A. I doubt it.

Q. Can you say definitely?

A. No.

Q. Then there is a possibiilty that actually this mailing list is for all three theatres?

A. Anything is a possibility.

Q. Well, you were the gentleman in charge, Mr. Murphy. Can you tell me whether or not——

A. The purpose of this survey was to find out where our patronage came from and to create a mailing list for the Century Theatre.

[fol. 1280] Q. You have so testified, Mr. Murphy. My question is whether or not you can tell us if this mailing list has, in fact, been used for all three theatres.

A. And my answer was I doubt it.

Q. But you cannot say definitely?

A. No, sir.

Q. Now, as I understand your testimony, Mr. Murphy, you feel that you would not take the Crest Theatre as a first

run theatre if the plaintiff in this case were to offer it to you rent free?

A. That is right.

Q. And I assume that is because of the fact that in your opinion the downtown first run theatres are infinitely superior by way of producing revenue?

A. No.

Q. What are the reasons for it?

A. The reason is that I think the Crest Theatre would lose a lot of money, and would be a financial flop, so why should I take it?

Q. Were you also linked with the thought the Crest Theatre could not produce revenue?

A. That is right. If they do not take it in, they cannot pay it.

Q. And then it follows that the downtown theatres are better producing theatres?

[fol. 1281] A. No question about it.

Q. In that category of downtown first run theatres, do you not include the Valencia Theatre?

A. Well, I would say the Valencia Theatre is a downtown first run theatre. It is a continuous run. It is a theatre on the roof.

Q. It is a downtown theatre, is it not?

A. Yes.

Q. And actually, although you say it played a continuous run——

A. Yes.

Q. —it played first run pictures in the City of Baltimore that were moved over from the Century Theatre without any intervening period of time?

A. That is right.

Q. And those are pictures that could conceivably have continued playing in the Century Theatre; is that so?

A. Well, anything is conceivable. I mean I could play a picture 20 weeks and take in nothing. You can do anything you want. It is a question of what is good business to do.

Q. Isn't it a fact it is generally recognized in the business, the motion picture business, that a move-over house, so-called, which is what the Valencia is, is a first run house?

A. Yes.

[fol. 1282] Q. And, therefore, it would come within our category of downtown first run houses that are superior producers of revenue to the Crest Theatre?

A. I guess it would.

Q. Now, can you tell the Court and jury, Mr. Murphy, what gross revenue was actually produced by the Valencia Theater during the period 1949?

A. No, sir, I do not know the figure.

Q. That theatre was, however, under your direct supervision?

A. That is right.

Q. Mr. Murphy, may I direct to your attention, sir, the fact that Loew's Incorporated has answered interrogatories in this case in which it is stated as follows:

"State year by year the total income"—the total income—"received by the Loew's Valencia Theatre during the years 1948, 1949 and 1950, excluding admission taxes.

"Answer. For the year 1948, $136,836.77; for the year 1949, $125,457.00; for the year 1950, $118,505.84."

Would those figures tie in with your own knowledge of the gross of the Valencia Theatre?

A. Gross receipts?

Q. Gross receipts.

A. That is right.

Q. And that is the kind of gross revenue you have in [fol. 1283] mind when you say the Valencia Theatre is a superior producer of revenue to the Crest Theatre; is that correct, sir?

A. I don't say that, and I don't see your point at all, because you are comparing two entirely different things. The Crest Theatre is a suburban theatre operating with maybe two or three changes a week, second run pictures. The Valencia Theatre is a theatre sometimes plays a picture six or seven weeks, the same picture.

Q. It plays that picture six or seven weeks because it is producing revenue; is not that a fact?

A. That is right.

Q. Yet despite the fact it may play a picture for six or seven weeks, its total revenue, for instance, for the year 1949, was $125,457?

A. That is right. Naturally as you play the picture the gross goes down.

Q. The Valencia played its pictures at regular admission prices?

A. That is right.

Q. Have you any knowledge of the gross revenue earned by the Crest Theatre from the playing of pictures on first subsequent run at first subsequent run admission prices?

A. With two or three changes a week.

Q. With as many changes a week as it used?

A. Yes, you said -122,000?

[fol. 1284] Q. That is correct, Mr. Murphy.

And you would still be of the opinion that despite the gross earned by the Crest Theatre on its subsequent run, as contrasted with the gross earned by the Valencia on its first run at first run admission prices, that you would not be willing to take the Crest Theatre and play it first run even if it were to be given to you rent free?

A. Absolutely, I would not.

Q. You have also testified, Mr. Murphy, that in your opinion every theatre in Baltimore is in substantial competition with the Century; is that correct, sir?

A. That is right.

Q. And, consequently, I take it that one reason you were opposed to the possibility of the Crest having access to first run pictures is that in your opinion that would constitute a competitor for the Century Theatres; is that correct?

A. If every theatre in Baltimore is a competitor and the competitor plays the same run as I have, naturally they take something away from you.

Q. I am drawing your attention now directly to the Crest Theatre. The reason why you oppose first run for the Crest Theatre is that in your opinion it would be in competition with the Century Theatre and would possibly hurt the gross of the Century Theatre?

[fol. 1285] A. The reason that I feel the Crest Theatre should not be sold first run is that I buy at the Century Theatre an exclusive right. I pay a lot of money for it with clearance. That is what I buy. That is the only thing a picture is worth; the only value a motion picture has is how new it is, and anything that affects that makes my run less desirable, anything that affects that.

Q. And, consequently, if I follow you, Mr. Murphy, your

view is that you do not want anyone else having that new picture?

A. That is right.

Q. I see.

A. Because I pay for an exclusive run. That is the only thing I have to sell.

Q. Are there within your supervision, Mr. Murphy, any drive-in theatres that are owned by Loew's?

A. No.

Q. Isn't it the fact, however, Mr. Murphy, that there have been a large number of drive-in theatres erected around in different sections of the country which had done excellent business despite the fact that they have no matinee patronage whatever?

A. There are a lot of drive-in theatres that do excellent business, that is right.

Q. And they have no matinee patronage whatever; is not [fol. 1286] that also the fact?

A. Yes. They play to an entirely different clientele. Your drive-in people, they are not even normal picture-goers, they are a lot of people not going to pictures at all. They are people who may be cripples or maybe the mother did not like to put her shoes on when she went out, or they couldn't find a baby-sitter. Those are the type of people you generally get at drive-in theatres. You generally get some nice people, too, but generally it is a new type of audience.

Q. Your testimony is that only cripples and old ladies who don't like to take their shoes——.

A. I did not say that. Whole families sometimes go who normally do not go, because of their peculiar family conditions.

Q. Isn't it a fact the drive-in theatres do not usually have the same kind of transportation facilities which downtown theatres have?

A. That is right. Drive-in theatres are specialized audience. They have their own peculiar audience.

Mr. Rome: I have no further questions.

Redirect examination.

By Mr. Boyd:

Q. In connection with the figures read to you out of the answers of Loew's to certain interrogatories, I would like to ask you this: Is it not true that most of the pictures played at the Valencia Theatre, if in fact not all of them, [fol. 1287] has previously played at the Century?

A. That is correct.

Q. And would these figures accord with your general recollection? They are part of the answers of Loew's to certain interrogatories, particularly interrogatory No. 5, which was: "State by year the total income received by Loew's Century Theatre during years 1948, 1949 and 1950, excluding the admissions taxes." And the answer was: "In 1948, $572,014; 1949, $497,317; and in 1950, $452,036.

A. The figures sound correct to me.

Q. To which you were able to add as part of your original first run in Baltimore the $136,000, the $145,000, and the 118,000 that you acquired from the run at the Valencia.

A. That is correct.

Q. The Valencia is in the same building as the Century?

A. The Valencia is in the same building as the Century, the same entrance, the same box office.

Q. Does its overhead figure in the figure you gave us before or does it have an additional overhead?

A. An additional overhead.

Q. But it is lower than the Century, considerably?

A. Yes, considerably lower.

Mr. Boyd: That is all.

Recross-examination.

By Mr. Rome:

[fol. 1288] Q. Mr. Murphy, can you tell us what the operating expenses for the Valencia are per week?

A. I would say around $1,500 or so, depending upon the advertising. Our advertising bills in one week fluctuate from $1,200 to $2,000 on a picture.

Q. And sometimes it runs less than $1,200, does it not?

A. Not very often.

Q. One other question, Mr. Murphy. You said there were 60,000 total admissions at the Century Theatre for BATTLEGROUND.

A. As I remember.

Q. Can you tell me about how many weeks BATTLEGROUND played at the Century?

A. I think it played two or three weeks. I am not sure.

Q. Two or three weeks?

A. Yes.

Mr. Rome: No other questions.

The Court: That is all, sir.

(Witness excused.)

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COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Raftery: Your Honor, I would like to offer a couple of exhibits which I think would clear up a lot of indefinite numbers. First, I want to offer an exhibit which I had prepared in black and white, but it has now been turned [fol. 1289] to colors, which shows exactly the number of pictures played first run in each downtown theatre by years. We have had a lot of vague testimony, splits, and so forth. Every answer in here is in the answers to the interrogatories which were served on Mr. Rome, so there is no surprise of any kind in this particular exhibit.

The Court: Have you copies of that?

Mr. Raftery: No, I have not, Your Honor, but I can give a short summary for the record which I think will help both Your Honor and the jury.

[fol. 1290] The Court: Very well.

(Chart showing number pictures played in downtown theatres for 3-year period, was marked Defendants' Exhibit No. 29.)

Mr. Raftery: Your Honor and members of the jury, this exhibit is confined to the 3-year period that were answered in the interrogatories. It shows that the Hippodrome Theatre during that time played 88 pictures.

The Court: Would you wait just a minute?

Mr. Raftery: Sure.

The Court: I want to make this observation: it would be additionally helpful, I think, if this chart, or one like it, also contained information under the individual theatres, as to who owned or operated them.

Mr. Raftery: I will read that right into the record now and then will have, in addition——

Mr. Boyd: It can be put on in a half-hour.

The Court: Unfortunately, the record that you gentlemen keep speaking of is not the record in the minds of the jury or Court. It is the typewritten record or shorthand record, and what is said in the record is not as indelibly engraved in the minds of the jury or the Court and, therefore, it does not always help if it is just in the record, as you say, as if it is in some tangible exhibit that the jury, when they are deliberating on the case, can have in their [fol. 1291] hands to look at. I think that is more helpful than just to recite it orally.

Mr. Raftery: I agree with you, Your Honor, and we will have that typed on a piece of paper and appended to this exhibit. It will show the ownership and operation of each of the theatres, right across the top.

The Court: Couldn't it be written on the exhibit, over or under the name of each theatre?

Mr. Raftery: Yes.

Mr. Boyd: After the jury has had a chance to look at it, primarily, we can take it, and in twenty minutes have it back here, sir.

The Court: Very well. You might put that up over there, Mr. Clerk, and, Mr. Raftery, I think, if you will refer to it while you are talking——

Mr. Raftery: On Exhibit 29, down here, is the name of each of the distributors distributing pictures, and named a defendant in this case. Across the top are the names of the theatres.

The first one is the Hippodrome, operated by Mr. Rappaport, who is not a defendant in this case.

The second one is Keith's Theatre, operated by Mr. Schanberger, who is not a defendant.

Then we have the Town Theatre, operated by Mr. Rappaport, who is not a defendant.

[fol. 1292] Then we have the New Theatre, operated by Mr. Mechanic, who is not a defendant.

Then we have the Stanley Theatre, operated by Warner Bros. Circuit Management, which is a defendant.

Then we have the Century, operated by the Defendant Loew's; and the Valencia, a theatre Mr. Murphy just talked to us about, a move-over house.

Then we have the Little Theatre, operated by Mr. Rappaport, who is not a defendant.

Then we have the Parkway, which is operated by Loew's.

Then you have the Times and Roslyn, which are two houses up away from the downtown section, operated by an independent, Zeller.

And, at last, we have the Mayfair, which is operated by Mr. Hicks, who is not a defendant.

The Court: To make it perfectly clear, I think, when you get that information on there, over or under the names of the individual theatres, it will make it clear, if you use some such key word as "independent", or if it is a theatre owned or affiliated with one of the defendant companies, the appropriate name of the defendant, say, Columbia Defendant, "Def", or something like that, and then one in advance can see how many independent (so-called) theatres are on that list, and how many are involved in this case [fol. 1293] and who owns or operates them, who is a defendant in this case.

Mr. Raftery: We will do that, Your Honor.

Summarizing, the Hippodrome played these pictures that are listed down this column here, which indicates they played pictures released by Universal, Columbia, Warner, Paramount, RKO, United Artists, Fox, and Loew's, the total number of pictures listed during the three years.

In the second column is Keith's, playing 101 pictures released by United Artists, Paramount, Universal, Fox, and Loew's.

In the third column shows the Town Theatre, which is a Rappaport Theatre, and they played 83 pictures during this period, released by Universal, Columbia, RKO, United Artists, and Loew's.

In the New Theatre, operated by Mr. Mechanic, he only played pictures released by Fox, or a total of 74 pictures for that entire period.

Now, the Stanley played a picture released by Universal, 83 by Warner's, 18 by Paramount, 2 by United Artists, and

one by Loew's, or a total in the Stanley of 105 pictures for the whole period.

The Century played 21 released by Universal, 16 by United Artists, and 80 released by Loew's, or a total of 117 pictures.

[fol. 1294] The Valencia played 14 Universals, 12 United Artists, one Fox, and 7 Loew's, or a total for the whole period of 24 first run pictures.

In the Little Theatre, they played one Columbia, one from Paramount, one from United Artists, two from Fox, a total of five pictures; and that is a Rappaport Theatre.

The Parkway played one first-run picture during the entire period, and that was a Loew picture.

The Times and Roslyn played 5 pictures, and they were all United Artists.

The Mayfair played 6 pictures from Universal, 6 Columbia, 2 Warner, 17 Paramount, 20 United Artists, 6 Fox, and 3 Loew's, or a total for the period of 60 pictures.

And, now, adding the total pictures played in the area, 416 were played in the so-called independent houses, and 247 were played in the Stanley, Century, Valencia and Parkway, which are the houses owned by the defendant-exhibitors in this case. In other words, 63 per cent of the first-run pictures shown downtown Baltimore were shown in independent houses, as against 37 per cent shown in the Stanley, Century, Valencia and Parkway.

The Court: I think that emphasizes the great desirability of having on there the particular thing that you haven't got on there.

Mr. Raftery: That is right.

[fol. 1295] The Court: And, unless the jury are as good moviegoers as you are, they cannot carry that in their minds, as you have been in the last few days.

Mr. Raftery: May I take it down, and turn it over to the Art Department?

The Court: Which theatre has the art department?

Mr. Raftery: I thought it was so pretty——

Mr. Boyd: We will send it up to the Century, and it will be right back.

Mr. Raftery: In line with the stipulation made with Mr. Rome, I am going to offer a chart which shows the play-off of every picture at the Crest Theatre, from the date it

opened until the end of the period for which this suit is brought.

It shows the name of the picture, the name of the distributor, the number of people that attended afternoon and evening, the total admissions, total receipts, any refunds made at the box-office to people who walked out, or who got sick, or something; net receipts for the day, total receipts for each engagement of each picture; the balance; the terms of the contract, and the actual film rental paid for each picture. This tells the whole story of the Crest Theatre, and this was prepared under our order of inspection and under my supervision.

The Court: Is there a summary under the headings that [fol. 1296] you have just enumerated?

Mr. Raftery: That is right.

The Court: What I mean is, does one looking at that, would he have to look down through all the columns in order to get the information? Have you got a summary of the figures, the sum-total figures under the various items that you are concerned with?

Mr. Raftery: Your Honor, during the course of the trial there has been reference to what this picture grosses, and what that picture grosses, and what business it did, and what film rental it paid, and the terms, et cetera. This will make it possible for either Mr. Rome or for our side to refer to any engagement and have the exact record. All of this was taken from the books of Theatre Enterprises.

The Court: Well, now, when you say what that refers to, I am trying to see of what material help or value that is to the jury. Our engagement here is nearly over, the jury's engagement, and I just don't want the record to be cluttered-up with a lot of statistics that cannot be quickly understood.

Mr. Raftery: This will be quickly understood. For instance, in argument or in discussion regarding the STRATTON STORY, you have a bulk figure put in here. We have THE STRATTON STORY, showing the business on the [fol. 1297] first day, second day, third day, and fourth day, and if there is any discussion of the receipts, or how the receipts went down, all they have to do is look here, under THE STRATTON STORY, and there is the whole story for them. This was taken right from the books of the

Crest Theatre, and I believe it will be of help to the Court and to the Jury; and I have an extra copy here for the Court.

The Court: Very well.

(Chart showing pictures played at Crest Theatre, was marked Defendants' Exhibit No. 30.)

Mr. Raftery: I am going to follow Your Honor's suggestion, and have prepared a summary of one very important feature that can be taken out of this; to wit: this shows the number of pictures actually played at the Crest, from each of the defendants. For instance, during the period of the lawsuit, the Crest played 26 Warner's, 30 Loew's, 2 Republic's, and 24 Fox; 20 Columbia, 14 Paramount, 4 RKO, 8 Universal, 2 Selznick, 2 Eagle Lion, 4 United Artists, with one added, that was part of a double-bill, where they played a two-in-one bill. I think it was DENVER KID played with HOME OF THE BRAVE; two Film Classics, one Screen Guild, and a reissue called THE HAMILTON WOMAN; and I haven't been able to find out who sold the reissue. That is the play-off, company by company.

That is all I have, Your Honor.

[fol. 1298] The Court: Is there any more testimony?

Mr. Boyd: Yes; I have my two witnesses here.

Mr. Watkins: Your Honor, there is one question and answer in Mr. Myerberg's deposition which was not read, and I would like at this time to read from Mr. Myerberg's deposition, taken on October 22, 1951, page 8, at line 13:

"Q. Was any consideration given to the construction of a motion picture theatre in approximately the Crest location, aside from being part of a general business development?

"A. No."

Mr. Boyd: Mr. Adams, take the stand, please.

Thereupon JEROME ADAMS was called as a witness for and on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Boyd:

Q. Will you please state your full name?

A. Jerome Adams.

Q. By whom are you employed, Mr. Adams?

A. Loew's Incorporated, distributors of M-G-M pictures.

Q. In what capacity?

[fol. 1299] A. I am branch manager, Washington exchange area.

Q. How long have you held that position?

A. Since March 24, 1946.

Q. Were you employed by Loew's prior to that time?

A. Yes, I was. I was originally employed in November, 1934.

Q. In Washington?

A. Yes, sir; as a student, and, in turn, in the intervening years, I progressed from student to booker, from booker to second or first booker, then to student salesman, then to salesman in the Washington office. I was then transferred to various other exchanges throughout the United States, until 1941, at which time I was drafted into the army for a 5-year period. Upon my return, I was then sent out into various exchange areas throughout the United States; and in March, 1946, I was appointed branch manager of the Washington office.

Q. Mr. Adams, I promised to be as brief as possible. I would now like to direct your attention to the period—Well, you have been in court here the last several days?

A. Yes.

Q. You have heard references to Mr. Myerberg's visits to Washington?

A. Yes.

Q. Do you recall a visit from him in or about November, [fol. 1300] 1948?

A. I do.

Q. At that time did he discuss with you the Crest Theatre?

A. He discussed the Hill Top Theatre at that time; his original meeting with me was regarding the newly, about to be constructed Hill Top Theatre.

Q. We are all agreed that was changed over to the Crest. So he did discuss the Crest with you?

A. Yes, sir.

Q. Did he see you more than once on this matter?

A. I believe he made one visit prior to the opening of the theatre.

Q. And that was around October?

A. Yes.

Q. Now, Mr. Adams, from his visit at that time, what did you understand he was seeking?

A. On Mr. Myerberg's original visit, I was of the opinion that he was seeking a first subsequent run. I will tell you why. Mr. Myerberg told me of his previous experience in the picture business, and he was aware, being a Baltimorian, that we had Loew's Theatre, and we utilized our products first run in the city; and, consequently, it was inconceivable to me at that time that he meant first run City of Baltimore.

[fol. 1301] Q. When did you gain the other impression?

A. When we received a letter asking for the World Premier of a motion picture in the Crest Theatre.

Q. That was about October 12 or 15, 1948?

A. About that time.

Q. It has been stipulated that a similar letter was received by Loew's in the same form as the others; so I will not bother to introduce it now.

Did you respond to that letter?

A. Yes, sir. I responded to the effect that the matter was being taken under advisement, and he would hear from us shortly. I then corresponded, as is our routine, with the legal department. And I believe you have a letter stating that it was our recommendation, in view of the fact we obviously had our own Loew's theatres, that the request should be denied. It was a routine statement on my part. I also recommended, however, I believe, in that letter, that the account be given a first subsequent run availability.

Q. I believe you are referring to Plaintiff's Exhibit No. 5, a letter from Mr. Adams to Mr. Myerberg, dated October 19, 1948.

Mr. Rome: I do not follow you. I do not think he has been referring to any.

Mr. Boyd: I was speaking to the witness and was calling [fol. 1302] to your attention the exhibit to which he was referring.

Mr. Rome: Thank you.

Mr. Boyd: I will not bother to introduce it.

By Mr. Boyd:

Q. But, eventually, you replied directly to Mr. Myerberg, did you not?

A. Yes, sir, I did.

Q. Is this (indicating) a copy of your letter?

A. Yes, sir, it is.

Mr. Boyd: I offer in evidence as Defendants' Exhibit No. 31 a letter, under date of November 9, 1948, addressed to Mr. Harry Myerberg, Theatre Enterprises, Baltimore, from J. A. Adams, Resident Manager of Loew's Incorporated.

"Dear Mr. Myerberg:

"This is with further reference to your letter of October 12, 1948 concerning 1st run exhibition of our product at your Crest Theatre in Baltimore, Md.

"As you are undoubtedly aware, Loew's Incorporated operates its own theatres in Baltimore at which its product is exhibited 1st run. We are, therefore, unable to grant your request that we license our pictures for 1st run exhibition in Baltimore at your Crest Theatre.

"Very truly yours, ——— ———."

The Clerk: That will be marked Defendants' Exhibit [fol. 1303] No. 31.

(Letter, November 8, 1948, J. A. Adams, Resident Manager, Loew's Inc., to Harry Myerberg, was marked Defendants' Exhibit No. 31.)

By Mr. Boyd:

Q. Thereafter, Mr. Adams, you had further discussions with Mr. Myerberg on the subject of availability, or what kind of arrangements he wanted for your product?

A. Yes, I did.

Q. Briefly summarize that, please?

A. I acquainted Mr. Myerberg with the three possibilities of playing MGM-product in that zone or in that area. There could be an equal division, or split of product, because, in my original opinion, the area was substantially competitive, and the Crest Theatre would therefore be competitive with the Uptown Theatre; there was a possibility of bidding, and finally, equal availability for both theatres.

Q. Did Mr. Myerberg——

The Court: He has not finished, Mr. Boyd.

The Witness: And the third possibility of a split bid and equal availability.

By Mr. Boyd:

Q. On the 21-day run?

A. Yes, on the 21-day run.

Q. Did Mr. Myerberg indicate to you any preference of [fol. 1304] his own as among that group?

A. Yes, he did. His original preference was for playing on the 21-day run, the first subsequent run availability, because, in his opinion, the Crest Theatre was the best theatre in the City of Baltimore and capable of producing substantial grosses and, consequently, he felt it could play on equal availability.

Q. With what?

A. With the Uptown Theatre,—despite the fact there were other theatres in the City of Baltimore that were as close or closer than the Crest and Uptown Theatres, that were playing on equal availability.

Q. As a result of that position on his part, what did you do?

A. We went along with his reasoning.

Q. And that continued for some period of time?

A. I imagine, about a year, almost.

Q. When did it change, if you recall, and as a result of what?

A. It changed as a result of the performance of the Crest Theatre on our pictures, which did not prove satisfactory.

Q. And did Mr. Myerberg, himself, make any proposal looking for a change in the matter of handling your product?

A. Yes, he did.

[fol. 1305] Q. When was that, if you recall?

A. I believe it was in the spring of 1950. I am not certain of that.

Q. Do you recall—I am referring to Plaintiff's Exhibit No. 70—writing to Mr. Myerberg with reference to a request for competitive bidding from Mr. Myerberg on or about June 1, 1950?

A. Yes, sir, I do.

Q. Accompanying that letter, Mr. Adams, did you not send certain forms that Loew's uses, known as Form 1279-E?

A. Yes.

Q. What is that?

A. Performance of our pictures in the theatre.

Q. Were they directed at particular times or periods?

A. That is the play-off for all the pictures the theatre has played.

Q. Were they directed before the Crest opening and after the Crest opening?

A. Yes. If I remember, there were three run-downs, one showing our results at the Uptown Theatre, in that area, prior to the opening of the Crest, a run-down to show the results of the Uptown Theatre with the Crest opening, playing with Crest on the same availability, and I believe——

Q. The Pimlico?

[fol. 1306] A. There was a run-down by the Pimlico, yes.

Q. What was the result on your grosses after the Crest opening? I mean your receipts?

A. Our receipts, while showing a slight increase—our returns, our rentals, showed a decrease. We were earning less money playing both theatres than we previously received playing the one Uptown Theatre.

Q. The gross returns were more, but your net returns were less?

A. Our net returns were less.

Q. As a result of your recommendation on that subject, what took place?

A. Later, we recommended the institution of competitive bidding, as it was then proved beyond question of a doubt that the theatres were in substantial competition. We recommended that the Uptown, Pimlico and Crest Theatres be given the opportunity of bidding for our product first subsequent run in that zone.

Q. With the winner of the bid——?

A. To be given clearance over the losing theatres.

Q. Was the Avalon included in the bidding area at that time?

A. It was not my recommendation that the Avalon be included; but the records show, of course, that the Avalon was included, for this reason; since the Crest Theatre [fol. 1307] opened, Mr. Garman, who previously played the Avalon after his Uptown Theatre, then asked for a 21-day first subsequent run in his Avalon Theatre, thus making it equal with his Uptown Theatre and the Crest Theatre.

Q. You were not in entire agreement with that?

A. No, indeed. I saw no reason to give the Avalon the improvement in availability.

Q. For what reason?

A. Basically, it was unfair to the Crest. That gave Mr. Garman two opportunities of playing the picture. If he lost it in bidding, to his Uptown, he had the Avalon free and clear and could offer us a proposition in the Avalon Theatre.

Q. And that subject-matter was the source of discussion between your offices?

A. Yes.

Q. How did it eventually resolve itself?

A. Mr. Garman insisted upon this improvement in availability for the Avalon to the point where he asked for an appointment with our Mr. W. F. Rodgers, who was then general sales manager of the company; and we went to New York and visited with Mr. Rodgers,—Mr. Garman

and his associates, and myself, and Mr. Rudolph Berger, my division manager.

[fol. 1308] Q. Was Mr. Garman accompanied by anyone else?

A. Yes, sir, he had with him his associates, Mr. Chauncey Wolfe, and Mr. Ben Beck.

Q. Anyone else?

A. No, sir.

Q. I was under the impression that they had brought counsel with them.

A. No, sir, they did not.

Q. I am sorry. There was such a conference in New York?

A. Yes, sir, there was.

Q. And I think the record shows here that Mr. Garman had in fact threatened suit?

A. Yes, he had.

Q. If that increase in availability was not given him.

A. That is correct.

Q. In any event, what was the result?

A. Rodgers then told Mr. Garman that he would again take it under advisement and discuss it with us, and when he did it was then decided that a way of settling the problem to the mutual satisfaction of both Mr. Garman and ourselves would be to move the Avalon up to the last half of the first subsequent run availability, last half of the first week of availability, not the same availability as the Crest, but the last half of the week, so that under ordinary cir-

[fol. 1309] cumstances on play-off, the Crest would have finished with the picture one or two days prior to the opening, if Mr. Garman chose to play it in his Avalon Theatre.

Q. So there was a compromise?

A. Yes, sir, there was.

Q. Did in fact the Avalon ever play a picture on the same availability as the Crest after the decision to go into competitive bidding was reached?

A. You mean day and date?

Q. Day and date.

A. Oh, no, sir.

Q. They did not?

A. No, sir.

Q. Mr. Adams, there has been introduced into evidence here a series of correspondence between you and Mr. Myerberg which, briefly summarizing, was to this effect: You sent out a request for bids for a picture called GO FOR BROKE, and Mr. Myerberg wrote back and called attention to the fact the Avalon was not included in the bidding. Do you remember that?

A. I remember it distinctly. May I elaborate on that a minute?

Q. Will you explain it to the Court and jury without my asking any more questions about it?

A. Ordinarily when any changes made in clearance it is common courtesy to notify the exhibitors involved. Some- [fol. 1310] how I still can't tell why I failed to notify Mr. Myerberg. I just failed to do it, and when we sent out the bid letters our letters were in conformity with our decision in New York, and I say, I failed to tell Mr. Myerberg and it was not the Avalon was, therefore, removed from the clearance letter. Mr. Myerberg called our attention to it by saying, if my memory serves me correctly, "Would we please send a corrected bid letter as we had failed to include the Avalon Theatre." It was then that I wrote and called Mr. Myerberg telling him it was an inadvertency, we just failed to tell him, and we were extremely sorry.

Q. Now, the Avalon did not play day and date with the Crest?

A. That is right.

Q. You refused to grant Mr. Garman's request because it would be unfair to the Crest?

A. That is right.

Q. Mr. Adams, you granted to the Crest Theatre, did you not, Saturday opening?

A. The first time he asked for it, I granted Saturday opening.

Q. And continued to do so?

A. Yes, sir.

Q. Why did you do that?

A. We were doing it with other theatres in the city and [fol. 1311] saw no reason not to give it to the Crest.

Q. You granted Mr. Myerberg a sliding scale, did you not?

A. Yes, sir, we did.

Q. After you had been——

A. After we had had experience.

Q. Sufficient on which to base your judgment?

A. Yes, sir.

Q. And that was the normal way of doing it?

A. Yes, sir, it was, and it is.

Q. Mr. Adams, have you prepared from your records a list of the pictures played at the Crest Theatre distributed by Loew's Incorporated and on which there were contract terms containing a guarantee?

A. Yes, sir.

Q. Do you have it there?

A. I do.

Q. Will you refer to it, please?

A. All right, sir. I have it.

Q. Do you have with you, Mr. Adams, a bid letter received from Mr. Myerberg on the picture DUCHESS OF IDAHO?

A. No, I do not have it with me, but I do have it over at the hotel, the actual bid letter.

Q. I am sorry.

A. No, I believe it is here.

[fol. 1312] Q. Would it take you long to check?

A. Well, I do not have it on my person, no, I do not.

The Clerk: That will be defendants' exhibit No. 32.

(List of Loew's pictures played at Crest Theatre under guaranties was marked Defendants' Exhibit No. 32.)

By Mr. Boyd:

Q. Mr. Adams, I show you a letter on the letterhead of Theatre Enterprises and ask you what it is.

A. This is a bid offer on one of our pictures called DUCHESS OF IDAHO for the Crest Theatre, signed by Harry Myerberg.

Q. And this letter came to you simply as the result of a request from you to Theatre Enterprises for a bid on this picture?

A. Yes, sir.

Q. And was that same request sent to other theatres in that area?

A. Yes, sir.

Q. And in the request for bids did you prescribe any terms?

A. No, sir. We invited bids on the picture.

Mr. Boyd: Your Honor, I offer in evidence a letter dated August 5, 1950, addressed to Loew's Incorporated, at its Washington office, attention Mr. Adams, signed by Theatre [fol. 1313] Enterprises, Inc., Harry D. Myerberg, as follows:

"Dear Mr. Adams"——

The Court: Have you given the jury a copy?

Mr. Boyd: No. I would like to do it together, if I may, sir.

The Court: Very well.

Mr. Boyd: "Pursuant to your request of August 8, 1950, the following are the terms upon which we are willing to exhibit DUCHESS OF IDAHO at our Crest Theatre: (1) Film rental $2,000 guarantee plus 50% of gross over $4,000.

"(2) Number of days picture will be exhibited, 7;

"(3) Play dates, Saturday, Sunday, Monday, Tuesday, Wednesday, Thursday and Friday;

"(4) DUCHESS OF IDAHO will play our Crest Theatre immediately upon availability.

"Very truly yours."

Now, you received that from Mr. Myerberg?

A. Yes, sir, I did.

Q. Signed by Harry D. Myerberg?

A. That is right.

The Clerk: Defendants' exhibit No. 33.

(Letter, Aug. 5, 1950, Harry D. Myerberg to Mr. Adams, Loew's Incorporated, was marked Defendants' Exhibit No. 33.)

By Mr. Boyd:

Q. Mr. Adams, will you refer to the figures that are con- [fol. 1314] tained in defendants' exhibit No. 32 and tell His Honor and the jury what the gross receipts were re-

ported to you on the picture DUCHESS OF IDAHO, as shown at the Crest Theatre?

A. The gross receipts reported were $2,513.

Q. And the guaranteed license, if that was paid?

A. $2,000.

Q. As a result of the bid made by Mr. Meyerberg?

A. Right, sir.

Q. There were about six of these, as Your Honor can see, and I would like to ask the witness about them.

Mr. Adams, the picture THREE LITTLE WORDS, that was a Red Skelton picture, I believe.

A. Yes, sir.

Q. Played in the Crest Theatre from the 30th of September to the 5th of October, 1950?

A. Correct.

Q. And it played 6 days beginning on Saturday?

A. Right, sir.

Q. And again as a result of terms offered by Mr. Myerberg voluntarily, he offered $1,600 with a 50% share of any gross receipts over $3,750?

A. That is right, sir.

Q. And what did the picture gross at the Crest Theatre?

[fol. 1315] A. The picture grossed $1,967.

Q. In other words, it grossed $367 more than the guarantee?

A. Right.

Q. And SUMMER STOCK, which played October 21 to October 25, for five days beginning on Saturday, what were the bid terms there?

A. $1,500 guarantee and 50% over $4,000.

Q. You shared everything over $4,000?

A. Right.

Q. What did the picture gross?

A. The picture grossed $1,794.

Q. And the license fee bid?

A. $1,500, with 50% over $4,000.

Q. LIFE OF HER OWN, with a playing date of November 5 to November 7, what were the terms?

A. A guarantee of $500, with 50% over $1,800.

Q. What did it gross?

A. It grossed $836.

Q. And paid you $500?

A. Right, sir.

Q. And TOAST OF NEW ORLEANS, that was a Mario Lanza picture?

A. Yes, sir, it was.

Q. That played November 25 to November 27, for three [fol. 1316] days, Saturday, Sunday and Monday?

A. Right, sir.

Q. On what terms?

A. $500 guarantee and 50% over $1,600.

Q. What did it gross?

A. $1,138.

Q. And, so, it paid you the $500 guarantee?

A. Right.

Q. What about RIGHT CROSS. Was that a boxing picture?

A. Yes, it did have as a theme boxing.

Q. And played December 3 to 6, for four days, 1950?

A. Right.

Q. And on what terms?

A. $500 guarantee and with 50% over $1,600.

Q. And the gross receipts?

A. $879.

Q. And paid you?

A. $500.

Q. And the picture TO PLEASE A LADY, playing December 10 to 13, beginning on Sunday, four days. What were the terms?

A. The guarantee was $500, sharing 50-50 over $1,600.

Q. And the gross?

A. The gross was $630.

[fol. 1317] Q. And, therefore, paid only the guarantee?

A. Right, sir.

Q. And the last on the list KING SOLOMON'S MINES. That was one of the greater M-G-M pictures, was it not?

A. Yes, sir, it was.

Q. And it played January 21 to 27, 1951, for a full week?

A. Yes.

Q. And the guarantee?

A. The guarantee was $1,200, with a split over $3,200.

Q. And the gross?

A. The gross was $2,582, and we received the guarantee of $1,200.

Q. Now, how many playing units, based on ten units a week does this list of pictures cover?

A. There were a total of 60 playing units.

Q. Or six full weeks of playing time?

A. That is right, sir.

Q. Have you made a calculation which bears on this exhibit?

A. Yes, I have.

Q. As to the cost of operation of the Crest Theatre for those six weeks, including the guarantee rentals; you have made such a calculation?

[fol. 1318] A. Yes, we have.

Q. And what does it show?

A. It shows that Mr. Myerberg paid us in excess of 67% for film rental.

Q. How much were the total guarantees?

A. $8,300.

Q. You have shown a figure here of the total overhead exclusive of film rental?

A. Yes, sir.

Q. Based on the testimony previously given in this case that the overhead is $1,900 a week?

A. Right, sir.

Q. You have multiplied that by six to get a total figure?

A. Of $11,400.

Q. Which, added to the film rental, gives a total cost of operation?

A. $19,700.

Q. Against which there were gross receipts reported to you of how much?

A. $12,331.

Q. Which leaves a deficit for operation in that period of how much?

A. $7,369.

Q. And the percentage of the film rental as applied to [fol. 1319] the gross receipts for that period was how much?

A. 67% plus.

Q. Now, Mr. Adams, you had a bid letter from Mr. Myerberg for each one of these pictures following DUCHESS OF IDAHO, similar in form to that which we have

introduced as regarding DUCHESS OF IDAHO, did you not?

A. Yes, sir, we do have such letters.

[fol. 1320] Q. And in each one of these letters were the terms fixed entirely independent of anything on your part?

A. Absolutely.

Q. In other words, they came to you as a voluntary offer?

A. Of Mr. Myerberg.

Q. Mr. Adams, in arriving at any of the decisions which you have made with respect to the Crest Theatre—and I include therein not only the availability of pictures but the Saturday openings and the granting of the sliding-scale,—were you motivated in any way other than by your best independent business judgment as respecting the business interests of Loew's Incorporated?

A. I was not motivated in any other way; no, sir.

Q. Did you obtain any information or receive any information from any other distributor or employee of any other distributor as to what they were going to do at the Crest?

A. Absolutely not, sir.

Q. In arriving at your decision with regard to the Crest, did you conspire or agree to act in concert with any other person or corporation?

A. No, sir.

Mr. Boyd: Witness with you.

[fol. 1321] Cross-examination.

By Mr. Rome:

Q. Mr. Adams, with regard to those pictures on which guaranteed bids were submitted to Metro, did Mr. Myerberg ever ask you for any refund as to those?

A. No, sir; he did not.

Q. And, of course, no refunds were ever made or suggested?

A. No.

Q. Those were guaranteed amounts and they were paid to Metro in each instance?

A. That's right.

Q. Mr. Adams, is it your testimony that from the begin-

ning, it was your view that the Crest was in substantial competition with the Uptown, Pimlico and Avalon Theatres?

A. No; that was not my testimony.

Q. What was your view of that situation?

A. I made an observation to Mr. Myerberg, when he first visited my office, that I was of the opinion that the Crest and Uptown Theatres were in substantial competition, and also the Pimlico, since the Pimlico was closer to the Crest than the Uptown Theatre.

Q. Actually, the Pimlico Theatre is a lesser house?

A. A lesser house?

Q. You, yourself, considered it to be an action house, playing on an inconsistent policy?

[fol. 1322] A. Yes.

Q. And you so advised your home office with regard to that, didn't you?

A. I did.

Q. That being so, in your opinion, the Pimlico was not a comparable theatre to the Crest?

A. That's right.

Q. With regard to the Avalon Theatre, the Avalon Theatre was playing on a lesser availability than was the Uptown Theatre at the time the Crest opened; isn't that so?

A. I don't know what you mean by "lesser availability".

Q. It was playing later in point of time?

A. That's right.

Q. The Uptown Theatre actually had clearance over the Avalon Theatre?

A. It did.

Q. And that was true when the Crest opened, just before the Crest opened; isn't that so?

A. Yes.

Q. When was the change actually instituted with regard to the Avalon Theatre?

A. The change was instituted, if I remember correctly, when we went into competitive bidding in that zone, the change being—may I elaborate?

Q. Surely.

[fol. 1323] A. The inclusion of the Avalon Theatre in the bidding.

Q. And that would have been in June of 1950?

A. 1950; that is right.

Q. But it is your testimony now, Mr. Adams, that from the beginning you felt that the Crest Theatre was actually in substantial competition with the Uptown, and consequently, from that time, you were willing to institute bidding?

A. No; I felt, it was my opinion that the Crest Theatre was in substantial competition, but having no proof or experience or a play-off of our pictures, I was not as certain as I was after we actually played the Crest Theatre with the Uptown Theatre, because there is no question in either of our minds, Mr. Myerberg's, or in mine——

Q. But your testimony now is that, although you felt that the Crest was in substantial competition, it was your thought that there had to be an experience in order to confirm that thought?

A. Yes; based on Mr. Myerberg's discussion to me in the office, that there were several other features, several other theatres comparably located, and even closer together than the Crest and the Uptown, that were playing on the same availability.

Q. Was it Mr. Myerberg who persuaded you that they were not in substantial competition?

A. Well, let's say that I kept an open mind after dis- [fol. 1324] cussing this with Mr. Myerberg. We tried it on his method, first.

Q. Isn't it a fact, Mr. Adams, that from the beginning, Mr. Myerberg was agreeable to enter into a competitive bidding situation, so that the Crest Theatre would have clearance?

A. That is not a fact; no, sir. I am sorry for interrupting you.

Q. Didn't you advise your home office, in June, 1950, that, contrary to your original opinion, you had now come to the conclusion that the Crest Theatre was in substantial competition with the Uptown?

A. I so advised them, that my original opinion was predicated, again, on the fact that I was amenable to Mr. Myerberg's thinking; that possibly the two theatres could play equal availability.

Q. Mr. Adams, there has been offered in evidence here a letter from you to Mr. Eisenberg, in New York, which has been marked in evidence as Plaintiff's Exhibit 70, which

is dated June 1, 1950, in which you informed Mr. Eisenberg, among other things, as follows:

"Data concerning this situation was forwarded to your office under date of October 19, 1948, when the original availability was set for this theatre. Since the opening of the Crest Theatre our grosses in the Uptown Theatre have deteriorated steadily, leading us to believe that, contrary [fol. 1325] to our original opinion, these two theatres are in substantial competition and, therefore, we now recommend the institution of competitive bidding."

Do you recall writing that letter?

A. Yes, I do.

Q. In that letter, you never advised Mr. Eisenberg that Mr. Myerberg had been of the opinion that he could play on equal availability with the Uptown Theatre, did you?

A. In order to have played the Crest Theatre on equal availability, it was necessary for me to have secured, after discussion with the legal department, permission to play the Crest Theatre on equal availability; and, consequently, I must have advised them to that effect, that we would try it on equal availability.

Q. Did you ever advise your home office at any time that Mr. Myerberg was agreeable to playing day and date with the Uptown Theatre? You never did, did you, Mr. Adams?

A. Are you telling me?

Q. I am asking you whether you ever did.

A. I must have, in order to have played the Crest Theatre with equal availability.

Q. Do you have any letter that so states?

A. I don't have one in my possession; no.

Q. Do you recall any such letter?

A. I do recall having a discussion with Mr. Eisenberg, [fol. 1326] yes, sir; I do.

Q. In a phone conversation?

A. Both in a phone conversation and, if my memory serves me, in writing.

Q. Can you produce that letter in which you so advised Mr. Eisenberg?

A. I would like the time to do it.

The Court: If it was done, I wonder why you make so much over this.

Mr. Rome: Simply because of the question of fact, that the home office was advised by Mr. Adams that Mr. Myerberg had ever agreed to an equal availability with the Uptown Theatre.

The Court: I thought the witness said it was accomplished and was done.

Mr. Rome: It was done.

The Court: If it was done, he must have given authority to do it. Why dwell on this?

Mr. Rome: The theatres actually did play day and date, but I am raising the question as to the statement made by Mr. Adams that it was done because Mr. Myerberg had requested it or agreed to it in any way. That is all, sir.

The Court: He operated under it, didn't he?

Mr. Rome: Yes; he did.

The Court: I think we are wasting time.

[fol. 1327] By Mr. Rome:

Q. Actually, it is a fact, is it not, Mr. Adams, that you refer all these matters to the home office?

A. Yes; I do.

Q. And you simply carry out instructions furnished you by the home office?

A. The instructions were based on my observations and my recommendations.

Q. But you had nothing to do with the making of the policy with regard to the licensing of pictures to the Crest Theatre, as contrasted with the other theatres, did you?

A. There was no policy. We are granted a great deal of latitude in our office, and our Legal Department bases their decisions after due conference with the Manager in the Exchange.

Q. Isn't it a fact, Mr. Adams, that although you recommended and struggled to bring about the fact that the Avalon Theatre should play after the Uptown, the legal department overruled you?

A. Yes.

Q. So that you were under the supervision and jurisdiction of the home office with regard to runs, clearances and availability?

A. No; I can't accept that, Mr. Rome. That is not so.

You cite one instance. I can show you dozens in our office [fol. 1328] where we had a difference of opinion, and the legal department acquiesced.

Q. I am talking of the Crest Theatre.

A. In that instance, they saw differently.

Q. The taking away of the clearance over the Avalon Theatre came about just recently, did it not, in the relatively recent past?

A. That is true.

Q. And, for a long period of time, the Crest Theatre had actually had a clearance over the Avalon?

A. In the bidding, the winning theatre was granted clearance, which included the Avalon; yes, sir.

Q. Isn't it a fact, with regard to the playing of Metro pictures first-run in the City of Baltimore, Mr. Adams, that at least recently Loew's product has not gone exclusively to the Century Theatre in the City of Baltimore downtown?

A. With rare exception, until recently, Loew's pictures went exclusively to the Century Theatre.

Q. But now, in the recent months, there has been a change in that?

A. Yes, sir; there has been.

Q. And, consequently, despite the fact that Loew's Incorporated has its own theatre, the Century Theatre, playing first-run in Baltimore, theatres other than Loew's owned by Loew's, now have access to Loew's product?

[fol. 1329] A. That is true.

Q. Downtown first-run?

A. Downtown first-run; that is right.

Q. What was the reason for that change?

A. It was brought about by a request made by Mr. Rappaport for his Town and Hippodrome Theatres, for an opportunity of bidding for first-run Baltimore. The request was granted.

Q. Had there ever been a similar request from any other exhibitor in the past?

A. From a downtown exhibitor, not to my knowledge; no.

Q. No one playing first-run downtown had ever sought to license a Loew picture?

A. Not to my knowledge; no, sir

Mr. Rome: I have no other questions.
The Court: That is all.

(Witness excused.)

The Court: You have one more witness?
Mr. Boyd: Yes.
The Court: We will take a recess for ten minutes.

(At the conclusion of the short recess, the following proceedings were had:)

The Court: Very well, Gentlemen of the Jury, and counsel, we are ready to proceed.

[fol. 1330] Thereupon William F. Rodgers was called as a witness for and on behalf of the defendants and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name for the record?
The Witness: William F. Rodgers.

Direct examination.

By Mr. Raftery:

Q. Where do you reside, Mr. Rodgers?
A. Rye, New York.
Q. How long have you been in the motion picture business?
A. Forty-two years.
Q. Where did you start?
A. With the General Film Company, in 1910, as a clerk.
Q. In what office?
A. I started at Eighth Street and Fifth Avenue, at the home office.
Q. You have been associated with Loew's Incorporated, or its predecessor companies, for how many years?
A. For 28 years.
Q. What was the last steady position you held with Loew's?
A. I was the general sales manager for 16 years, until [fol. 1331] the first of the current year.
Q. What happened on the first of the current year?
A. I relinquished my assignment and the responsibilities

I had, and I was reemployed by Loew's in a consulting or advisory capacity.

Q. On a semi-retired basis?

A. Well, I like to call it that.

Q. When you first came into the motion picture business and the licensing of pictures, were there any theatres owned by any of the distributors; and how were pictures generally licensed in those days first run, in a town like Baltimore, let us say?

A. They were always licensed first in the theatre who was in position to pay; and those theatres were always downtown theatres. In those days, even prior to the feature pictures, we did the same thing with short subjects; we sold them at so much per day, as a rule according to the age. There was never any theatre that could pay the price for first run pictures except downtown houses.

Q. So, the showing of single-reels, or two-reels, or features, from 1910 on, when you first came into the business, generally was in the downtown first run theatres?

A. That is right. I don't think we originated that. I think that was the situation in all types of show business. [fol. 1332] I mean our vaudeville houses. We had so many of them that we always played our stellar acts first in what we called our flagship or State Theatre. In the case of Keith's, they always played the Palace before they went around to the other threat-es in the vicinity.

I think the same thing is true of the legitimate shows, especially in cities which have legitimate houses, such as New York, where you would never think of opening a legitimate show in the Windsor Theatre, in Flatbush; you would certainly play it downtown first run.

Q. And that was true as the shows went on the road, and you played Baltimore?

A. Ever since I have been in the business.

Q. So this run and clearance thing is not something that originated in the motion picture business, but it is a part of the show business, and has been as long as you know?

A. Yes.

Q. As to prints, what are the two types of prints generally used in distributing a picture?

A. The type of prints?

Q. Yes.

A. Do you mean color and black-and-white?

Q. Yes.

A. They are the only two that I think of.

[fol. 1333] Q. On a black-and-white good feature subject, how many prints do you normally use in distributing to the 18,000 theatre possibilities that there are in this country?

A. That depends upon the quality of the picture. The average, I would say, is between 250 and 450; and they run as high, I guess, as 500.

Q. Five hundred would be the exception?

A. Yes; 500 would be the exception. However, 450 is not an exception. That is very often true of the larger pictures.

Q. How much did these prints cost, and what have they cost the past three or four years?

A. That also depends upon the length of the subject. It is sold by the foot of raw stock; so it depends upon its length. I should say the black-and-white will average $150 to $200 a print, whereas the color picture will average anywhere between $600 and $1,100 per print.

Q. You are the gentleman who handled and directed the distribution of GONE WITH THE WIND in the United States of America, are you not?

A. Yes, sir.

Q. What did the prints of that picture cost, for example?

A. Well, as I recall, about $1,200 each.

Q. In the past three years has there been a tendency [fol. 1334] generally in the distribution——

Mr. Rome: Mr. Raftery, please do not lead the witness. I object to this line of questioning, where Mr. Raftery leads the witness.

By Mr. Raftery:

Q. Mr. Rodgers, what has happened in the past three or four years in the motion picture business with regard to the ratio of the number of Technicolor pictures formerly produced as against black-and-white?

A. Well, we are distributing today, or we are producing and distributing, I suppose I might say, five or six or

seven times as many color pictures as black-and-white. I think our schedule this coming season is very heavy in that direction.

Q. Has there been generally in the industry an increase in the number of Technicolor pictures as compared with black-and-white?

A. Yes sir; definitely.

Q. Is Technicolor printing an important thing in considering the licensing of your pictures on runs?

A. It has to be, because the Technicolor is so expensive, not only as to printing, but the subjects which lend themselves to the production of Technicolor form are usually the most expensive pictures to produce.

Q. In licensing pictures on staggered runs, as distinguished from the legitimate theatre which has only one [fol. 1335] theatre downtown, and the vaudeville theatres, which generally have but one theatre in a city, when is the motion picture made available to the public in the nature of staggered runs?

A. Well, we supply the largest theatre operating today, I suppose, the Music Hall, in New York, and we seek the business of the smallest theatre in the country. Therefore, while the film rental from one may be in the hundreds of thousands of dollars, I believe there are a few—and, I might say, a very few—who pay as low as $7.50; and there are others who pay $12.50 and $15. In other words, by the present method of distribution, all types of people have our pictures available to them, in whatever theatre they seek to play them.

Q. What about admission prices in a theatre like the Music Hall in relation to the theatres that pay you $7.50 or $12.50 for the same identical picture that plays in the Music Hall?

A. Well, of course, we have nothing whatever to do with fixing the admission prices. I know only by observation that the Music Hall,—I believe their top price is in the neighborhood of $2.40, whereas some very small theatres sell their entertainment for as low as 25 cents or 20 cents.

Q. Thus making it possible for every segment of the [fol. 1336] public to see every picture, on some admission price?

A. Yes, sir.

[fol. 1337] Q. Mr. Rodgers, in the years that you were the head of sales of Loew's, you were the top man on making decisions in that company were you not, in regard to sales, and so forth?

A. Yes, sir.

Q. In making any decision in regard to sales or sales policy, runs and clearance, or availabilities, did you consult with the representatives of any other distributor in arriving at any judgment?

A. No, sir, never.

Q. Did you in connection with the Crest or the Avalon, in making any decision that affected either of those theatres, consult with or confer with any representative of any other distributor?

A. No, sir.

Q. Now, where did you generally exhibit your pictures in downtown Baltimore first run?

A. The Century Theatre.

Q. And that was considered your own theatre?

A. Yes, sir.

Q. And you showed your own pictures in your own theatre?

A. As we did in all other cities.

Q. Where you had theatres?

A. Yes, sir.

[fol. 1338] Q. You have seen the Crest Theatre, have you not?

A. Yes, sir.

Q. Were you in it?

A. Yes, sir.

Q. And that was last week?

A. Yes, sir.

Q. Did you make any inspection of the neighborhood around there at all?

A. Yes, sir.

Q. In your opinion is that theatre suited for showing your pictures, Metro pictures, first run exclusive in the City of Baltimore?

A. No, sir.

Q. Will you tell His Honor and the jury why?

A. Well, in the first place, it does not have what we would consider an adequate drawing power, nor would I believe that we would be treating the population in Baltimore fairly if we set our pictures in a theatre for exclusive first run in the neighborhood that would be equally impracticable for people in another section to Baltimore to attend, and there are people who like to see pictures when they are very new and are willing to pay for it. But if they do not have the facilities to get there, they are not going to attend, and last, but not least, they could not possibly pay the amount of film rental that would be [fol. 1339] necessary for us to get for our first run pictures in a city of this population.

Q. What is your opinion as to the day and date run at the Crest Theatre, of your Metro pictures playing day and date with the Century Theatre?

A. Well, in the first place that would be suicide for the Century.

Q. Will you elaborate on that?

A. Well, in the first place, I do not know who so testified, but I could not help but agree with him that there are other theatres in the City of Baltimore that in my opinion have better facilities, better located, to play on such a run, and if you did it for the Crest Theatre, I don't see how you could deny doing it for other theatres.

The consequence is you would probably have and no doubt likely would have the same unsatisfactory condition as it related to first run as you now have in so many theatres playing the first second run in a city.

Q. Too many in your opinion?

A. Well, it affects the business, but then with the result that a majority of the theatres in Baltimore have complained very bitterly about the fact that they have not made enough money, or they are losing money over these last few years, which is largely due, in my opinion, to the number of theatres that are playing simultaneously on a second run basis, so that if a family is disposed to go to [fol. 1340] their favorite theatres or one of their favorite theatres over the weekend, there is only one picture playing there in so many theatres, with the result that they do not go but once which I have always contended is one of

the most contributing reasons for the falling off of any motion picture attendance. You witnessed here what was testified to by our manager this morning, that you play in two theatres simultaneously but the gross receipts were a little bit more but our returns were less.

Q. One of the witnesses—I do not believe you were here—used the term "overseating," that a neighborhood was overseated or a city was overseated. You are familiar with that term?

A. I have often heard it.

Q. Is it one of the problems in the business?

A. A very difficult problem.

Q. You haven't formed any judgment, have you, whether Baltimore is overseated or not, or have you?

A. I would answer that I am not fully enough familiar with the City of Baltimore to say that. I only know there are too many theatres playing day and date on their first neighborhood break.

Q. What, generally, is the result in any situation where you have overseating?

A. Business is distributed so there is no money in it for [fol. 1341] anyone, distributors, exhibitors or theatre owners.

Q. And many of the theatres have closed as a result?

A. More theatres have closed over the past few years than there have at any other period in the entire industry, so far as I know.

Q. You are familiar with the term "art pictures," are you not? That is generally used in the industry?

A. Yes, sir.

Q. Can you give us an example of an art picture? Give us two or three.

A. We do not make art pictures.

Q. You know the term in the industry generally?

A. Well, I refer to a picture, which I think is a very good picture, such as HAMLET, I would consider an art picture.

Q. Or KING HENRY V?

A. KING HENRY V, RED SHOES, which I consider an art picture, all very good pictures, incidentally.

Q. And the first two you named, HENRY V and HAMLET were both Shakesperean pictures?

A. Yes.

Q. And starring Sir Laurence Olivier?

A. Yes.

Q. Where does that type of picture usually play first run in a big city like Baltimore?

A. To the best of my knowledge always downtown in some art theatre.

[fol. 1342] Q. Now, what is an art theatre as distinguished from a theatre like the Century or the Stanley?

A. Well, an art theatre, generally speaking, is one of limited capacity, who plays for weeks and weeks and weeks, and, generally speaking, its capacity is very small, and they cater to that type of audience and not too much to the general public.

Q. Well, they cater to the college students, intelligentsia, as one witness put it; is that the type of audience you refer to?

A. I would say so, yes, and too many students.

Q. You mean they do not like Shakespeare either in College or in the theatre; is that what you are trying to say?

A. (No response.)

Q. By the way, Mr. Rodgers, there has been some testimony here that you sell Metro or somebody has licensed multiple run in other cities other than Baltimore. Are you familiar with those cities, such as Los Angeles?

A. Yes.

Q. Well, briefly tell us about Los Angeles.

A. In Los Angeles we have usually licensed our pictures, but only in two localities, both what I should say would be separate cities. We release only downtown to Loew's State Theatre and the other one we lease our pictures in Holly-[fol. 1343] wood. They are separate and distinct localities, all with their individual shopping areas, which I have heard spoken of here, as separate communities entirely. People from Hollywood rarely, if ever, go to downtown Los Angeles and I think there might have been an exception once or twice where we might have leased pictures in Culver City, which is quite removed, away from downtown,

and is not a part of the City of Los Angeles, but we discontinued that, too, so we are confined to two.

Then in our own case we have owned two theatres in Boston, one in the downtown section and another, again, in a different community entirely, called the Back Bay section of Boston, where we own both theatres, and we have played them day and date, but it is not uncommon for the theatre in Boston in the Back Bay section to outgross the theatre downtown, but those are the only two with the possible exceptions of small communities around the country. We may have a few of those where it is just as convenient for the people to go to the outskirts as to downtown. It does not apply in a large city.

Q. Are there any situations you have talked about in any way comparable with the condition you have talked about in the Crest Theatre and the Century?

A. None.

[fol. 1344] Q. All things being equal what is your preference, to show a picture first run in a city the type of Baltimore?

A. My personal experience has been, I seek the place that can give us the greater return, and I have generally found over a long experience there is only one place you can get it dependably, and that is downtown.

Q. And that is particularly true of matinees, is it not?

A. Yes, right at this time particularly.

Q. By the way, I think Mr. Murphy said that a number of theatres around the country have closed up and are not having matinees Monday through Friday. Are you familiar with that?

A. Many large cities in the country are not having matinees.

Q. Just give us a few.

A. Well, we do not have matinees in Cleveland, and a lot of them in Detroit, Chicago, Los Angeles, Buffalo, and Mr. Murphy testified to that. We own several neighborhood theatres in Buffalo where we can't even pay expenses by keeping them open in the afternoon, whereas in the downtown it is a much different thing, shops, and so forth.

Mr. Raftery: The witness is with you.

Cross-examination.

By Mr. Rome:

Q. Mr. Rodgers can you tell us, sir, how many theatres Loew's Incorporated has owned or owns presently in vari-
[fol. 1345] ous sections of the country?

A. How many theatres we own?

Q. Yes, sir.

A. Well, I can't tell you offhand how many we own, but I believe we operate somewhere in the neighborhood of 125 or 130 in the United States.

Q. And the greater part of that 125 or 130 are your own theatres, are they not?

A. We lease them if we do not own them, yes.

Q. And in those theatres it is the fact, is it not, to your knowledge, sir, that the other distributors' pictures appear?

A. Oh, I imagine so. I have nothing to do with the Theatre Department, but they could not survive on our pictures alone I don't believe.

Q. And you know, also, sir, do you not, that Fox owns theatres in various sections of the country?

A. I don't know just what the corporate set-up is of Fox, but they have an organization called The National Theatres that is in some way identified with Fox, but to what extent, I do not know.

Q. And they own theatres in many sections of the country?

A. Yes. They operate many.

Q. And that is true, is it not, of Paramount and RKO?
[fol. 1346] A. I don't think Paramount own any theatres any more. I think they are operated entirely separately from the Paramount Producing and Distributing Company, so I have been told.

Q. But until that recent change, Paramount owned a number of theatres?

A. Yes.

Q. And that was also true of RKO?

A. Yes, sir.

Q. And also true of Warner's, was it not?

A. Yes, sir.

Q. And you know, do you not, sir, that Loew's pictures have played in all of those theatres, not in each instance, not in every theatre?

A. To a varied extent, yes.

Q. And Loew's has received very substantial revenues by way of film rental by the exhibition of its pictures in those theatres?

A. Not always. I would not say substantial, no.

Q. But in dollars amount it has been a very large sum?

A. No, I would not say so.

Q. Could you give us some idea of the amount, Mr. Rodgers, from your experience?

A. I only know I do not sell RKO theatres in very many places, so I would not consider their returns to us sub-
[fol. 1347] stantial as compared to some smaller independent circuits.

Q. Can you give us some idea of the amount of the film rental that you have received over any particular period from RKO, sir?

A. I have been out of touch with the business that is, directly, within the last six months. I have been away most of the time and I am not familiar with what they are now doing, but I do not think our revenue with RKO over a period of time is very much more, as a general thing, than $100,000 or $150,000 in the course of a season.

Q. Isn't it a fact the theatres owned by Loew's are in many instances first run theatres?

A. In many instances, yes.

Q. And those first run theatres are all located, are they, sir, in the downtown sections of cities with the exception of this theatre in Back Bay Boston you mentioned?

A. I don't know of any exceptions.

Q. And is it also the fact, to the extent of your knowledge, sir, that the theatres owned by the other companies that have just been mentioned, are also first run theatres in many, many instances located in the downtown sections of cities?

A. Well, these other companies that you have mentioned have many, many more theatres than we operate and they also have many more smaller operated theatres, I believe,
[fol. 1348] than they do large operated theatres. They

may be first run, but in very small towns, but they have very many small theatres, which we do not have.

Q. But those theatres to which Loew's has licensed its pictures for first run exhibition, in most instances to your knowledge, have been in the downtown sections of cities, have they not?

A. Where we license them first run in an area, yes.

[fol. 1349] Q. In your opinion, following what you have said concerning the effect on the Century Theatre, I take it your view would be, Mr. Rodgers, that if theatres out of the downtown areas would get first-run picture access, that the revenues derived by Loew's from exhibition of those pictures in the theatres of Fox and Warner's, and so on, would be considerably curtailed?

A. I think, definitely, it would, for many reasons one that I explained to you a little while ago, and then another reason. These theatres here, that are now playing, for instance, second-run pictures, if they moved up to first-run, we would lose that second-run revenue. Never mind the fact that they would not be able to pay as much, I don't think, as the first-run, in our present system; but we would lose a run in the transaction, which would be very important.

Q. With the exception of the situation in Boston and the city of Los Angeles, has Loew's Incorporated ever experimented so as to confirm your view that theatres outside of the downtown areas are incapable of paying large rentals that Loew's requires?

A. I never had any occasion to experiment because we usually knew, by playing a number of pictures, what are the percentage of grossing possibilities of theatres, and what the grossing possibilities of the theatres in their present position are, and what are the possibilities of the [fol. 1350] theatres that are playing first-run. I did not believe that a company like ours could afford to experiment, considering the cost of productions that are made on our lot.

Q. And then, if I follow you, Mr. Rodgers, when you speak about your experience over many years leading you to this conclusion, what you had in mind, sir, was the fact that the experience of subsequent-run theatres, first-sub-

sequent-run theatres, led you to conclude that they could not pay the kind of rentals you need on first-run?

A. That is true because I have seen them move up for a period of time, where a fellow feels he ought to play day and date with another theatre, and you move him up 7 or 14 days, and his gross receipts don't always go up, but others go down.

Q. But you have no experience with regard to theatres outside of the downtown area not having access to first-run?

A. Do you mean have I ever experimented, instead of playing first-run, that I would play with a number of neighborhood theatres first-run.

Q. One or more neighborhood theatres; yes, sir.

A. I haven't had that. I have never experimented, to my knowledge, on that.

Q. You have referred to the fact that if the Crest were to have access to first-run pictures with other theatres as good or even better than the Crest, in the City of Balti- [fol. 1351] more, they would also seek access to first-run pictures, and that the ultimate result would be suicide for the Century Theatre downtown?

A. Or any other downtown theatre.

Q. Has your company ever received any request from the operator of any other theatres in the City of Baltimore, other than the Crest, for access to your pictures on first-run?

A. Not to my knowledge, with the exception of, I believe, the Hippodrome Theatre asked for our first-run pictures, sometime ago.

Q. But you have had no request from any other theatre outside of the downtown area?

A. No, sir; not that I know of.

Q. And, in your view, that anticipated demand by such other theatres would lead to the same unsatisfactory condition that you found to exist with regard to a large number of first-subsequent-run houses. In your view, is there any possibility, in the City of Baltimore today, for any new exhibitor coming along and entering the field of exhibition on a first-subsequent-run in the City of Baltimore, without further aggravating this condition that you refer to?

A. Oh, yes; I should think he could come in, if he has a logical spot to come in, and he builds a theatre, he may competitively bid with the man that was there, or he might [fol. 1352] be substantially removed from existing theatres that would merit day and date, but more likely it would be, from my limited knowledge of the city, it would be more likely that he would enter into active competitive bidding with the theatre in that area.

Q. And, in your opinion, that access to pictures largely turns upon the ability to pay on the part of the exhibitor; is that right?

A. That is, generally speaking true; yes.

Q. Did your company ever attempt to find out what the ability to pay of the plaintiff in this case was, with regard to getting access to Metro pictures on first-run, either exclusively or day and date in the City of Baltimore?

A. You are referring to the Crest Theatre?

Q. Yes.

A. No. We would not have made any effort to experiment in that case, because, as I say, it has been a custom of our company to play our own product first-run in our own theatres. That is the reason we have the first-run theatres and, generally speaking, we built the first-run theatres many years ago for the reason that, in some cases, we could not get an outlet in every case, so we built our own theatres to play our own pictures first-run.

Q. Is that situation changed now by reason of the fact that Metro, as Mr. Adams and yourself have testified, is [fol. 1353] now permitting theatres other than the Century Theatre in downtown Baltimore to get access to first-run?

A. I have been told that the Hippodrome, I believe, or the Tower, has competitively bid with Loew's for one, two, or three pictures; but it all has been since I gave up my particular position as general sales manager, and I am not fully acquainted with it, so I couldn't even testify on it.

Q. You said the Tower. I believe you meant the Town?

A. Yes; the Town.

Q. So, you are not prepared to voice any opinion with regard to the change in policy on the part of Loew's to grant access to theatres other than the Century, downtown,

and what effect that would have upon the opportunity accorded the Crest; is that correct?

A. I would not testify to it; no, sir, because it all has been since I have given up my responsibilities.

Q. You recognize, though, Mr. Rogers, that the obligation of Loew's Incorporated is to license its product theatre-by-theatre?

A. Oh, my, yes; and we do.

Q. And, consequently, the fact that some other theatre other than the Crest, located outside of the downtown area, might come along and equally seek access to its product, has no real bearing or ultimate bearing on the right to be [fol. 1354] accorded the Crest as such, to the right to have access to your pictures?

A. None whatsoever, except, morally, I would feel obligated, if I was in the chair of general sales manager, and had granted such a request to the Crest, and someone else asked me, from another section of Baltimore, I would have to think a little fast to be able to deny it.

Q. But each theatre must stand on its own merits?

A. Definitely.

Q. The practice of Loew's Incorporated with regard to the licensing of its pictures, which you have referred to, the preference for the downtown outlet, is a practice that has existed for many, many years; is that right?

A. As far back as I can recall; yes.

Q. Are you familiar with the fact that Loew's Incorporated, in answering interrogatories addressed to it by the plaintiff in this case, stated as follows:

"It is the policy of Loew's Incorporated not to license its feature motion pictures for first run exhibition in any city on a day and date basis in a downtown theatre and in a suburban theatre. It is also the policy of Loew's Incorporated to have the first run exhibitions of its feature motion pictures in a city of the size and importance of Baltimore take place in a downtown first run theatre."

[fol. 1355] A. That is the intent and the object of our company; yes, sir.

Q. And that represents a long-standing policy of Loew's Incorporated?

A. I would say so, with minor exceptions, in small towns,

but nothing like Baltimore, except on the two exceptions I made.

Q. Within your own experience, Mr. Rodgers, would you say that policy is also the policy that has been followed and practiced by the other distributors?

A. That, I could not answer, because I could not attempt—it is all I can do to follow my own business, and I don't know exactly what other companies do. I do know our own case. There were times when we might have played day and date a picture here and there in two downtown theatres, but we abandoned that many years ago.

Q. And, from your own statement addressed to Mr. Raftery, and to the Court here, with regard to the way in which this plan has grown up over the years in the entertainment industry, you know, do you not, that the product of all these companies is habitually licensed for first run exhibition in theatres in the downtown areas?

A. That would be the general objective; yes, I should think so.

Q. You also referred, Mr. Rodgers, to the fact that more [fol. 1356] theatres have closed recently than at any other time in the history of the industry. Do you in any way attribute it to the increase in the number of theatres playing first-subsequent-run at the same time?

A. I would say it has had a bearing on it; yes.

Q. Isn't it a fact, generally recognized in the industry, that the advent of television has had an enormous amount to do with the closing of theatres in the various sections of the country?

A. I am one of the few who does not believe that; no, sir.

Q. But you are one of the few who have that opinion?

A. A good many other people think so, but I think there are a good many other contributing reasons to poor business.

Mr. Rome: I have no other questions, thank you, sir.

Mr. Raftery: That is all, thank you.

(Witness excused.)

Colloquy Between Court and Counsel.

Mr. Raftery: We now have back the Exhibit 29, with the suggestions made by Your Honor, put under each theatre, right across the top of the exhibit.

Mr. Rome: Is it not also a fact that a number of pictures appearing upon that chart include flat rental pictures [fol. 1357] as well as those pictures licensed at a percentage of the gross receipts?

Mr. Raftery: I told you that this morning.

Mr. Rome: I would like to have that stated for the record.

Mr. Raftery: I stated it for the record this morning, and will state it again.

Mr. Rome: Thank you, sir.

The Court: Does that include the testimony?

Mr. Boyd: Your Honor, that concludes Loew's witnesses, and also concludes the testimony of all the defendants.

The Court: Have you any other testimony?

Mr. Rome: We have nothing else to offer, except the problem of these decrees.

The Court: The Court will grant opportunity for further argument on that.

Mr. Rome: Thank you.

The Court: We will wait a few minutes, until the jury has had an opportunity to look over that chart.

It is the Court's understanding that counsel will want considerable time for discussion on the various requested instructions, and on the question of the admissibility of the decrees in the Paramount case. Taking all that into consideration, I think it would be appropriate to excuse the jury until half-past-eleven tomorrow morning, at [fol. 1358] which time, I assume, we should be ready to start the argument of the case. Unless counsel has some suggestions to make to the contrary, that will be the arrangement.

Mr. Rome: No, sir.

The Court: Very well, then, members of the jury, you are excused now until half-past-eleven—not 10 o'clock but half-past-eleven tomorrow morning.

(After the jury had retired from the courtroom, the following occurred:)

The Court: If counsel will wait a minute, I will make a further explanation:

As I understand it, gentlemen, we may divide what remains to be considered, before arguments begin before

the jury, into three parts. As I understand, counsel for plaintiff will wish to be heard on the question as to the admissibility of the Paramount decrees. If they are to be admitted, I understand that is all that will be admitted. I mean, there is no further testimony to be taken in connection therewith?

Mr. Rome: That is correct, sir.

The Court: Then, next in order, as I understand it, will be the question which counsel for the defendants want to reargue; namely, an instructed verdict on the ground that the case should be taken from the jury; and then, lastly, if that is not done, arguments on the various prayers, re- [fols. 1359-1360] quested instructions. I might say now, as to the latter, gentlemen, that while I have not completed my thorough examination of all of the law,—it was given more in the nature of a book or books than instructions, or what might be essays on the law, and contain a great deal that I am unwilling to embody in my instructions,—I think, if for no other reason than it would weary the jury and probably lead to mixing their minds up, rather than clarifying them, I am not disposed to give any such lengthy instructions.

However, you will have the right, under our procedure, to be heard on objections, if any, to the requested instructions; so I will grant you that opportunity.

Now, assuming that you would want some considerable time, taking all these three matters into account, I am suggesting now that we take a recess until quarter-of-three, and I assume we ought to be able to complete the argument on the law this afternoon. If not, you will have a little more time tomorrow.

Is that satisfactory to all counsel?

Mr. Rome: Entirely satisfactory.

Mr. Watkins: Yes, indeed.

The Court: Very well, we will take a recess now until 2:45.

(Thereupon, at 1:05 o'clock p.m., a recess was taken until 2:45 o'clock p.m.)

[fol. 1361] AFTERNOON SESSION

(Met, pursuant to the taking of the recess, at 3:00 o'clock p.m.)

ARGUMENT OF COUNSEL IN RE ADMISSIBILITY OF DECREES IN PARAMOUNT CASE AND MOTION TO TAKE CASE FROM THE JURY AND RULINGS THEREON

The Court: Gentlemen, I suppose it is appropriate to take these matters up in their proper sequence, and I would assume that, therefore, the question of reopening or the question of the admissibility of the decrees in the Paramount case would come up first, because until that is decided we cannot say that the testimony or the evidence is entirely concluded. And then I suppose counsel will want to be heard on the motion to take the case from the jury.

Mr. Watkins: Yes, Your Honor.

The Court: I would think that would be the proper way.

Mr. Watkins: I think so, sir.

The Court: There is one thing, I think I should hear you first, Mr. Rome, because I have initially decided against you, and it was without prejudice to renew the motion, and I understand you are now renewing it.

Mr. Rome: Yes, sir, I am.

The Court: You gave me typewritten copies that I might have before me parts of the decrees that you said you wanted to put into evidence. Maybe I didn't get everything you intended to send me, but it would appear that the typewritten extracts you gave me only represent por-[fol. 1362] tions of the consent decree of November 8, 1948, and it does not cover the sections of the final decree of February 8, 1950, that you also wanted admitted.

Mr. Rome: Sir, the typewritten portion which Your Honor has reference to is applicable only as to the defendant Paramount and, Your Honor, that was a question which came up. I did not have a certified copy from the Court in New York of the decree as to Paramount, and Your Honor was kind enough to permit me to furnish you with a typewritten summary of those portions of the decree as to Paramount on which we rely. Those provisions, sir, are

identical, word for word, the same with the applicable portions of the decree as to the other defendants in which they are enjoined from doing certain acts. Those are the four things which we claim fit the present case directly within the issues that were raised and found in the Paramount case as to which these defendants have been enjoined.

The Court: Now, to be sure that I do understand you, let me hand you back at least four pages. One of them is that typewritten copy and on the other you have marked in red, as I asked you when you wanted it introduced. Will you check and see if that is what you have been referring to?

Mr. Rome: Yes, sir, these are the things that I have been referring to. The only additional statement I would make with regard to it, sir, is a matter which I put in the letter [fol. 1363] to you, sir, a copy of which went to my friends on the other side, which brings out the fact that these decrees here provided for divestiture and divorcement——

The Court: Now, if you use these big words before the jury—I don't mind them, but they will think they are in a divorce court.

Mr. Rome: I assure you Your Honor, that I am not intending to use them before the jury, and I do not want to burden Your Honor with them except to make an explanation with regard to the different dates of the decrees.

The decrees that were handed Your Honor called upon the defendants to work out plans as a result of which they would have to get rid of their theatre holdings to some extent, and also they would be compelled to separate their exhibition phases of the business from the production and distribution phases. Subsequently plans were worked out and they were embodied in decrees of a later date, but the applicable portions of all decrees, sir, as to which I rely say word for word the same throughout. And they are the fact that the defendants are enjoined from agreeing with each other or with any exhibitors or distributors to maintain a system of clearance, clearance being defined.

The Court: As I understand it, leaving out the exact words of the decree, you want to be able to argue to the jury as to putting in these decrees, that these parties were

[fol. 1364] enjoined from doing the four things which you gave me on this special memorandum brief?

Mr. Rome: That is correct, sir, as a result of there having been a finding they were violative of the Anti-trust laws, in the Paramount case they were enjoined from doing those things, and we would ask leave to say that to the jury.

The Court: It is very doubtful to me whether even a jury of lawyers could restate the four principles such as those after reading the decrees.

I suppose, though, you are entitled—and I have not ruled you are—but assuming you are entitled to have these decrees form part of the record, then I suppose they would go into the record, whether the jury can understand them clearly or not or understand them at all without having them summarized to them. What you want to do, I suppose, is to have them in the record so you can summarize.

Mr. Rome: Exactly, sir. That is exactly the point.

The Court: You do not propose to read to the jury this language of these decrees, do you?

Mr. Rome: No, sir, if Your Honor will permit me to summarize as you have indicated, I will gladly forego reading to the jury this language which Your Honor has pointed out is highly technical.

[fol. 1365] The Court: I am afraid it would be likely to put the jury to sleep.

Mr. Rome: I certainly have no wish, sir, to do that. But Your Honor has caught my point exactly of what I have asked leave to do, and what I think we are permitted to do within Section 5 of the Clayton Act, sir, is to make a summary reference to the Paramount case and point out what we consider to be its impact upon the present situation.

The Court: On the assumption, for the moment, that you may be entitled to do this, and reviewing again the Finich case, which I understand you rely upon primarily——

Mr. Rome: I do, sir.

The Court: ——the Court summarizes what the trial judge must do or should do.

The Supreme Court says this, on page 572 of 340 U. S. Reports:

"In summary the trial judge should (1) examine the record of the antecedent case to determine the issues decided by the judges."

Well, I am not disposed to examine the record anymore than I have done from the papers that have been given me and the copies of the decree. If I did, we would have to adjourn this case until the Fall term.

"Second, in his instructions to the jury to reconstruct the case in the manner and to the extent he deems neces-
[fol. 1366] sary acquaint the jury fully with the issues to — determined therein."

If you have correctly stated the issues in this brief you have given me, then assuming you have the right to have these decrees in and the Emich case, previously stated, and that is what one is entitled to have, if anything goes in, I would think that second requirement would be met by stating what you have stated.

"Third, to explain the scope and effect of the former judgment on the case at trial. The Court may in the interest of clarity so inform the jury at the time the judgment in the prior action is offered in evidence; or he may so instruct at a later time if in his discretion the ends of justice will be served." I suppose it is appropriate, if it is allowed in, to do it in both occasions very briefly. I think I understand your position, and before hearing you further I would like to address one or two questions to counsel on the other side.

Mr. Rome: Thank you, sir.

The Court: Mr. Watkins, I have examined in more detail your brief and also the cases upon which you rely, or at least a number of them, if not all of them, and there are one or two things which are not clear in my mind, if you will turn to page 6 of your brief on this point. You say there the second paragraph, that the trial of Brookside Theatre Corporation versus Twentieth Century-Fox Film
[fol. 1367] Corporation et al, Judge Duncan—that is, the trial judge—specifically held that the RKO consent decree was not admissible because it did not meet the test established by Section 5 of the Clayton Act. That decision is in accordance with the action taken by the judge at the trial of Cinema Amusement, Inc. v. Loews, Inc.

Is that clear? I could not find that that was clear from the opinion of the Court of Appeals in the Brookside case.

Mr. Watkins: No, sir, but I do not think there is any dispute that that is a correct statement of what the trial court did. The trial court excluded the consent decrees as to RKO and Paramount. It admitted the decrees as to the other defendants, but no objection was made as to the admissibility as to the other six defendants.

The Court: So, you mean that question did not have to be discussed in the appellate opinion; is that what you mean?

Mr. Watkins: Yes, sir. There was no objection as to the six, and no appeal as to the two. The plaintiff took no appeal from the exclusion of the RKO and Paramount decrees.

The Court: Then, you mean that as far as RKO is involved in this suit, whatever might be done by way of admission of the Paramount decrees, it should not be effective against RKO?

Mr. Watkins: And also against Paramount Pictures. Those two companies were the decrees——

[fol. 1368] The Court: I haven't gotten to that. What is your reason—that is on page 7, is it not?

Mr. Watkins: If I might amplify in just two sentences, Your Honor. In the Brookside case the matters complained of related back to 1937, so there was no question presented there such as we have here as to the time element. There was no doubt there that they antedated the 1945 decision in the Paramount case. For those reasons those six defendants interposed no objection as to the decree against them, and it involved the very types of facts out of which the Paramount case arose. Both RKO and Paramount in that case interposed objections which were sustained.

The Court: Now, a little bit more specifically, what was the Paramount objection? That it did not antedate——

Mr. Watkins: No, sir. The objections which were sustained there were that the decrees were entered before——

The Court: One was entered before the taking of the testimony, you mean?

Mr. Watkins: Yes, sir, there had been some taken, but no decree had been entered as to RKO, and no testimony

had been taken as to RKO. Some testimony was taken and before entry of the decree, and in that case the point was when the Supreme Court sent the Paramount case back, it sent it back for the statutory court to reconsider everything if it wanted to. Therefore, it was perfectly a de novo [fol. 1369] situation so far as the statutory court was concerned. In the RKO case no new evidence had been introduced after remand. In the Paramount case some additional evidence had been, but it had not reached the point where any decision had been made.

The Court: Before a consent decree was entered?

Mr. Watkins: That is correct, yes, sir.

The Court: And then the broad ground on which you based inadmissibility with respect to all of the defendants is primarily from the point of time, as I understand it?

Mr. Watkins: Time and place and circumstances, which, admittedly, was not applicable in the Brookside case.

The Court: You mean because as to all of them it was clear that the offenses complained of happened before the decree?

Mr. Watkins: Yes, sir, and involved some of the very subject matters of the Paramount case, price-fixing.

The Court: That summarizes, as I understand it, what you said the other day in argument.

Mr. Watkins: That is right as to those separate things.

The Court: I think I asked you before, and I would like to repeat it: Is there any one case that you rely on which stresses this time element?

Mr. Watkins: Well, the case, Your Honor, that I think most distinctly raises it is the——

[fol. 1370] The Court: Fanchon case?

Mr. Watkins: Well, that certainly does raise it, Your Honor. The quotations point out that the mere fact that there may have been no particular change in methods which were being used in 1945 and 1948 or 1950 did not of itself indicate that there was any need for changing, and the express language you are dealing with in this particular point is at page 103 of 105 Fed. Supp.

The Court: What is that?

Mr. Watkins: Fanchon & Marco.

The Court: That is the one I mentioned.

Mr. Watkins: "Here, again, even if we find no substantial change, we cannot attribute the absence of change to design unless we also find that conditions which have arisen since the Court's interdictions *called for a change*——" The words "called for a change" are italicised. "One of the difficulties with the plaintiff's position in this case is the fact that it assumes that the Court decree called *automatically* for changes. From this it postulates that if there be no change, that, of itself, is proof that illegal practices have continued to date. We cannot agree."

The point which perhaps raises it most emphatically was the short opinion by Judge Briggle which was handed up to Your Honor in the Springfield Drive-In case in this short memorandum of May 5, 1952 to counsel on both sides, in [fol. 1371] which the Court said:

"The question for consideration on the motion of defendant to strike paragraphs 34 to 37, inclusive, of the amended complaint concerns the application of Section 5 of the Clayton Act. I have very carefully considered the briefs filed herein with particular attention to both the Court of Appeals' opinion and the Supreme Court opinion in the Emich case and have concluded that it was never the intention of Congress to make Section 5 applicable to the situation present in our case. To hold Section 5 applicable to our facts would cast grave doubt on its constitutionality."

In that case it was a new theatre which had come into existence after 1945 and was seeking this run and was setting up the Paramount case as an estoppel against the defendants in that case. And the court there flatly had the question as to whether this was the type of case in which estoppel could be invoked, and it held that to say a course of conduct in 1945 can be said to affect something coming into existence in 1947, would raise a very grave constitutional question, as I have said.

The Court: And you mean, if for no other reason, that would not meet what you have as the fourth condition in your brief on page 2? Reading the language of Section 5 it is, "As to all matters respecting which such judgment or decree would be an estoppel as between the parties

[fol. 1372] thereof." You mean it could not be considered as an estoppel?

Mr. Watkins: Definitely, Your Honor, that those acts could not constitute an estoppel with respect to a person or a corporation not in existence at the time, coming in to being only at a later period.

The Court: And that question was not involved at all in the Emich or the Brookside cases?

Mr. Watkins: No, sir, in the Emich case the point was strongly made by the Supreme Court, which says—the exact purpose and reason for this section was that Emich had been a witness in the criminal case in which General Motors had been convicted, that that case involved the question of cancelling licenses of dealers who would not use the GMAC credit plan. He was such a dealer, his license was cancelled, that their practice with respect to the locality in which he lived, because he testified as to the practice as to himself, was involved in the Emich case, and the Court said there, in effect, that when we have already gone into this very situation, and here with the same person, there is no need to put him to the expense of building up a completely new record again, but I admit that is a far cry from the situation we have here where you have, as Your Honor pointed out, the differences in time, but I submit there is nothing to show that the situations which were adjudicated in the Paramount case are similar to the situation existing in Baltimore.

[fol. 1373] Now, I say that simply because I do not want Your Honor to feel that my absence-of-estoppel proposition rests solely upon time. It rests upon time and the absence of similarity of situations in Baltimore.

The Court: You say that the change in time has changed any similarity which might have been shown to exist in other cases?

Mr. Watkins: Your Honor, I would not put it quite that way. I would say, forgetting the time element for the moment, the things that were found bad in the Paramount case were not found or have not been testified to as existing in this case; that what I did, as Your Honor suggested the last time, was to take the categories or the italicized headings with which the Supreme Court dealt in deciding

the Paramount case and, for my own satisfaction—it is not so long—I set it up exactly the way they did, and I call attention to this now——

The Court: Have you a typewritten copy?

Mr. Watkins: No, sir; I haven't. I could have it typed. I did not think it was that significant. I should have; I am sorry. The Court starts out by saying that it is dealing with restraint and monoply by specific practices. Those are the Court's words—not in generalities, but specific practices; and it goes into the three types of practices with which it is dealing.

[fol. 1374] No. 6 is Discrimination, here used in the sense of discrimination against small theatres and exhibitors and in favor of large, by virtue of practices such as giving them a special selection of pictures, which would take out the elimination of films or overages. That was the first group; and not one of those is involved in Baltimore, was involved in 1945, or in 1948, or in 1952.

Second, Competitive Bidding. An interesting thing there was that the Statutory Court had prescribed competitive bidding, and the Supreme Court knocked it out. That becomes of significance to our case here, where the complaint is that the plaintiff did not go into competitive bidding.

All I want to say now is that competitive bidding was not prescribed by the Supreme Court. In fact, it knocked it out, and was one of the main bases for remanding the case; but the Statutory Court had required compulsory competitive bidding, so that is not in this case.

The third, Monopoly, Expansion of Theatre Holdings, Divestiture—there, the emphasis was, just as Judge Chesnut pointed out in his analysis of the Windsor case, and the effect of the Paramount case, that price, clearance and run were interdependent, and that where you had price-fixing associated with clearance and runs, that there would be the opportunity of monopoly and the opportunity of favoritism; but there is no testimony of that here, because

[fol. 1375] First, Restraint of Trade; and, No. 1, under Restraint of Trade, is Price Fixing, which is discussed as the fixing of minimum admission prices. There is noth-

ing of that sort in Baltimore. There is no claim of that kind.

No. 2 is Clearances and Runs. Now, the District Court, the Statutory Court, had held that runs and clearances, if reasonable, were proper. The Government did not appeal from the finding and, accordingly, it was not before the Supreme Court; but Mr. Justice Douglas, nevertheless, took a couple pages to discuss what the Statutory Court had done, and pointed out the several tests used by the Statutory Court as to the existence of transit facilities and the existence of competition.

The third practice that the Court discussed was Pooling Agreements and Joint Ownerships. There is no testimony about pooling arrangements in Baltimore from 1945 on, nor of any joint ownership of theatres in Baltimore, then or now.

The fourth was Formula Deals, Master Agreements, and Franchises. I understand they relate to agreements under which the rental was based upon a percentage of the national gross. There is no testimony of that kind; master agreements covering several theatres; the franchises in running agreements for more than one season.

There is nothing of that in Baltimore.

No. 5 is Block-Booking. None of that was in Baltimore. [fol. 1376] there is not one word with respect to price-fixing in Baltimore City; so that I go back to Judge Chesnut's analysis, that the things with which the Supreme Court was primarily concerned—and now I am talking directly from his analysis at page 390, in 94 Fed. Supp., in the Windsor case, price-fixing, block-booking, and unreasonable clearance. And the Court said, Judge Chesnut said, by way of summary:

"The Paramount case dealt with a factual situation very different from the much simpler and customary business situation involved in the instant case."

That customary and usual situation on first-run films by the neighborhood houses having been covered here in great detail by Judge Chesnut in 1940, and reconsidered by him in light of the Paramount case in 1950, again stating the usual and customary way; and both cases were affirmed by our Court of Appeals for the 4th Circuit.

So, my point is, Your Honor, that, forgetting everything else, in the time element, you cannot estop, you could not have an estoppel with regard to a baby born in 1948, by something which had happened back in 1945; and, secondly, the subject-matter in the Paramount decree does not relate to practices testified to in Baltimore City as involved in this particular case.

The Court: Well, now, admitting that your analysis [fol. 1377] of what was decided in the Paramount case may be entirely correct, have you a copy of Mr. Rome's summary of U. S. v. Paramount Pictures, et al? You gave the other side a copy of it?

Mr. Rome: I did, sir.

The Court: Have you a copy?

Mr. Watkins: I have, I am quite sure.

The Court: I want to read part of it to you, if you have a copy.

Mr. Watkins: I know he gave me a copy, Your Honor.

The Court: If you turn to page 4, right in the middle, it would seem to me that those paragraphs beginning, "The pertinent parts," down through the first paragraph on page 5, are a correct abbreviated statement of what was dealt with and decided in the Paramount case, the same points that are involved in this case.

The reason I am asking you to read that, I want to see whether you do not agree that, leaving out all matters which may have been decided in the Paramount case, has not Mr. Rome stated the area of that decision in the Paramount case which is covered here by the issues raised?

Mr. Watkins: Your Honor, I would agree that those are correct statements of matters which are contained in the decrees. I could not say that they are matters which are in issue or are involved in this case. Take the shortest [fol. 1378] one first.

The Court: Take one of them. They are not very long. I have read it. Tell me why you don't think so.

Mr. Watkins: No. 1, "from agreeing with each other or with any exhibitors or distributors to maintain a system of clearance; the term 'clearances' as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres."

Well, I say that is not applicable here, first, because there is no finding here that these conditions existed in Baltimore in 1945.

The Court: Oh, well, I am not talking about time element now; I am just asking you whether these questions are not involved. One of the arguments of the plaintiff is that, the basic argument, is that the jury should infer, and the plaintiff wants me to instruct the jury that they should consider whether, even though there is not only no admission of any getting together, nevertheless, the uniformity of their conduct may amount to a getting together, and the clearances are involved. I am just trying to see whether—in a minute, I will make my point a little clearer, but I just wanted to see whether you are not forced to agree that, broadly speaking, those four statements are statements of questions that are involved in both cases.

[fol. 1379] Mr. Watkins: I would certainly say, Your Honor, that, No. 1, which I have just read, was involved in the Paramount case, and that Mr. Rome is raising that question in this case.

The Court: Exactly. Then, No. 2, he is also raising No. 2, isn't he?

Mr. Watkins: Yes.

The Court: And that was involved there?

Mr. Watkins: Yes, sir.

The Court: Now, if you will read No. 3——

Mr. Watkins: No, Your Honor; I would say that No. 3 is definitely not involved in this case, because the testimony on the part of the plaintiff is that if he got the run that he wanted, he would expect clearance to be granted in his favor, the same 21-day clearance as was experienced; so that this point is not involved here by a definition on the part of, or, rather, by the express statement on the part of the plaintiff, that he is not quarreling with the setup with reference to that, as such, but he is quarreling because he is not in the proper rank; and, if he were in the proper rank, he would expect exactly the same clearance over other theatres that the present first-run theatres now hold over neighborhoods. So, I say, that question is not involved in this case.

The Court: No. 3 reads: "from granting or enforcing

[fol. 1380] any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted."

Mr. Watkins: Your Honor, I think this is a fair, succinct statement of Mr. Myerberg's testimony. In his day and date claim, he denies that he is in competition with the downtown theatres and, therefore, says that no clearance is proper with respect to them over him; but if he got the downtown run, himself, he would expect exactly the same 21-day clearance over all other houses that the first-run downtown theatres now enjoy. So he does not attack clearance as such, and he does not attack the subsequent clearance in existence in Baltimore. He questions their applicability to him, because he says he is the one in whose favor that clearance should be imposed, as against being the one against whom clearances are imposed.

The Court: You take the last sentence in No. 3:

"Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof."

And he is saying that the clearance that he has is wrong; that he should be given day and date, instead of what he gets, which he is attacking, the clearance provisions. [fol. 1381] I think that is undoubtedly true, that that is what you are doing, isn't it?

Mr. Rome: Yes, indeed. I would also think that Mr. Watkins—although I don't want to inject myself into the argument—but his claims that we are not within the first sentence of that section—we claim that we are exactly within that, the issue in this case is exactly the same as that raised in the Paramount case on that point. If Your Honor would care to hear me on that——

The Court: Just restate that.

Mr. Rome: What Mr. Watkins said, that the plaintiff is not attacking the question of clearance here, and that if the Crest Theatre were to become a first-run, the plaintiff would want 21-day clearance over subsequent-run—that is perfectly true; but what he fails to make clear is the fact that clearance and run are interdependent. The Supreme

Court has specifically so said, on page 170 of its opinion. Clearance and run are interdependent.

What they have done here is make use of a system of clearance to exclude the plaintiff from access to run; that is, first-run; and that is what we are attacking, their exclusion of the plaintiff from that run. Moreover, there is also a point in the second cause of action. We claim that since they contend that we are in substantial competition with the Uptown, that they deal unfairly and [fol. 1382] improperly and illegally with regard to the clearance between those two theatres, making them play day and date. As to the first phase, they claim we are in substantial competition with the Uptown; but instead of giving us an opportunity to get the run that downtown has, they use this system of clearance to exclude us from it.

The Court: I think, without being too technical—and I don't think I am required now, for the analysis I am making, to be too technical—I think that paragraph 3 is a substantially correct statement of what the plaintiff claims.

Now, as to the fourth paragraph:

". . . from licensing any feature for exhibition upon any run in any theatre in any other manner than that each licensee shall be offered and taken theatre by theatre, solely upon the merits, and without discrimination in favor of affiliated theatres, circuit theatres, or others."

I am not talking now about whether that is what the defendants do. I know what the defendants do. I know they claim that they haven't done that, but as a blanket, broad statement of that point, do I understand that as one of the issues here, is it not?

Mr. Watkins: I would say its principles are abstract principles of law; yes, sir.

The Court: I just wanted to see if there was any dis- [fol. 1383] agreement in those four points. Now, I understand you to say, even if we grant that this does not meet the requirements of Section 5, the testimony in this case, because we are dealing here with situations which entirely postdate by two years, anyway, the date of the decree and, therefore, more than that, the situation at the time when the situation occurred in the Paramount case, you say

that you just cannot make any estoppel out of that, because there are factors and elements that were not before the Court in the Paramount case?

Mr. Watkins: Yes; both propositions. May I make this minor correction: Your Honor said the date of the decrees. The decrees speak as of 1945. They deal with conditions as of that time.

The Court: Yes.

Mr. Watkins: Yes; it is my contention incident to this cannot be an estoppel as to a corporation coming into existence in 1947 and going into business in 1949; and, further, I want to say that there is no admission that these principles of law were applicable to conditions existing in Baltimore in 1945; so it is double-barrelled.

The Court: I understand. Whatever you say, I won't consider as an admission of anything in this argument. I am just trying to analyze both sides. Now, what was the page in the Fanchon case you asked me to read?

[fol. 1384] Mr. Watkins: Page 103, the first full paragraph in the right-hand column.

The Court: In other words, to put it in a little different and more abbreviated form, as I understand it, Mr. Watkins, you say that if any other position were taken than the one you now take, whenever these defendants, or any of them, were involved in a similar litigation, no matter who might be attacking their practices, and just as long as that attacker shows that there were involved some of the same basic questions, the Paramount decree would forever stand in the defendants' way and preclude them from showing that the situation was different.

Mr. Watkins: Yes; it would be a bill of attainder. It would not fall within the requirement of the Emich case, but an estoppel on facts must have been distinctly put in issue and determined in the prior case, in such a way as to bind these particular defendants against this particular plaintiff, yes.

The Court: And you mean to say that here, while the plaintiff is contending the facts are different, and no matter how that contention is made, that does not affect the defendants' right to have this decree excluded, because the time element is vital, and if they are not allowed to

prove that, then that annihilates and makes automatic the definition requirement of time?

[fol. 1385] Mr. Watkins: That is right; and I put it on a further ground: that there has been nothing to show that the four points referred to here were found to exist in Baltimore in 1945, or prior thereto, so that you have the two things: that even if you could say that these facts existed, that they have no significance on what the condition is in 1947 or 1948. Secondly, before you can have any kind of estoppel, you would have to show that these four things they claim existed in Baltimore in 1945.

The Court: And they could not possibly do that, because the Crest was not in existence?

Mr. Watkins: Exactly. And, even with respect to anything else, the facts were not in existence in 1945.

The Court: I think you gave your answer to that the other day; but how do you answer that now, concretely—why isn't that a more controlling argument today, just as it was last week?

Mr. Rome: They refer to the problem of time. May I draw Your Honor's attention, first, to the fact that the operative facts applicable to the Crest Theatre actually got started and were in operation before any decree had been entered against any one of the defendants here, which I have offered in evidence, because in January, 1948, according to Mr. Myerberg's testimony, and again in October, 1948, he approached these defendants and asked for [fol. 1386] product, and was told at that time that he could not get it. That was before any decree was entered in this case. But with regard to the problem of time, even assuming that we need to show, for the purposes of our discussion here, the very case that Mr. Watkins draws to Your Honor's attention, the Fanchon & Marco case, the operative facts there were that the theatre was created subsequent in point of time to the Paramount case; and Judge Yankwich in that case received and considered the decrees as to all of the defendants, not only the decrees as to the six defendants who were adversary parties, but as to Paramount and as to RKO; and if you will look at page 90 of that opinion, Judge Yankwich said that there was received in evidence the decrees as to all the defend-

ants, so that this problem of time has nothing to do with it. There was another case squarely on that point, which raises the question of time, and dismisses it.

The Court: What is the language in the Fanchon case?

Mr. Rome: On page 90, the second full paragraph:

"All recent actions of this type stem from the decree secured by the Government in its equity action against Paramount. The plaintiff relied on this decree and on two consent decrees against certain defendants not affected by the main decree."

[fol. 1387] Those two defendants would be RKO and Paramount, as to whom there were the so-called consent decrees; and these decrees were received by Judge Yankwich, and considered by him. It is perfectly true that at page 103 of the opinion, he went on to say that the plaintiff in the Fanchon & Marco case had not made clear his case as to any duty that these defendants were to follow, or that they had been following up to that time; and Judge Yankwich said there was no conspiracy; but the introduction of the Paramount decrees is only prima facie evidence at best. It has no conclusive evidentiary value, and these defendants are not precluded from——

The Court: How do you interpret this so-called fourth condition as to matters respecting which such judgment or decree would be an estoppel?

Mr. Rome: That, I construe in this fashion: The plaintiff here is to have every benefit of the effect of the Paramount decrees, just as though the Government, itself, were coming in here and were a party; and I don't suppose that if the United States Government were here as plaintiff suing these defendants in Baltimore, that Mr. Watkins would attempt to raise the argument that there was not an estoppel as to these defendants as to the operative facts up to the point of time. It is perfectly true the plaintiff must go beyond, and show the conspiracy, which we think we have [fol. 1388] done by virtue of the testimony adduced here; and that brings me to one crucial element of this case. Mr. Watkins said the Crest Theatre did not come into being until 1948 or 1949. The curious fact is that every company whose representatives testified from the stand, except

United Artists, who had only an ex-branch manager on the stand, admitted that his company had a policy that had been in effect for many years, and it is the policy which we say made the impact on this plaintiff, and would have had great impact on any exhibitor having a theatre outside of the downtown area, no matter when he came along; and that is exactly what happened in the case of Milgram.

There, a drive-in theatre was created subsequent in time to the operative facts in the Paramount case. In Volume 192 Fed. (2d) 584, the Court of Appeals, in affirming the Court below, which had considered the decrees in the Paramount case as to these defendants, had this to say:—

The Court: What are you reading from?

Mr. Rome: The Milgram case, 584, 192 Fed. (2d). There, the Court of Appeals said:

"It is true that the facts of the instant case arose subsequent to the time period involved in the Paramount case. They arose soon after the Paramount decision, and before any decree had been entered there against most of the distributor-defendants. We think that the past proclivity [fol. 1389] of these defendants to unlawful conduct may be of some significance here, where the conspiracy alleged by plaintiff is identical in scope and nature to one of the conspiracies found in the Paramount case—concerted action to fix a uniform system of runs and clearances."

Now, there the evidence was that none of the distributors would give access to first-run product to any drive-in theatre, no matter where it was, no matter how fine it might be. That is exactly our case, although we have the conventional type theatre. And the Court went on to say:

"Further, there is no evidence that this policy was conceived subsequent to the time period involved in the Paramount case."

The Court: Where are you reading from?

Mr. Rome: Still on page 584 of 192 Fed. (2d), the left-hand column; the first full paragraph starts it out.

The Court: I have it.

Mr. Rome: (Reading)

"Viewing the facts of this case in the light of the specific finding in the Paramount case, the inference of conspiracy here is strengthened."

So that there, again, sir, there was a factual situation which arose subsequent to the time of the Paramount case, [fol. 1390] and because these same defendants had a policy which infringed the Paramount case, the Court said that, obviously, it should be considered what happened in the Paramount case, and the decrees were properly admitted.

In that case, the Milgram case, these defendants raised the issue about the Court's consideration of those decrees. It was affirmed on appeal, and they raised it on certiorari; and, once again, the Supreme Court denied certiorari. So, as I see it, particularly here, in the case before Your Honor, every one of the defendants, most recently, just this morning, Mr. Rodgers testified that for years it has been the policy of his company and, to his knowledge, the policy of the other distributors, to exclude from access to first-run product, theatres out of the downtown area.

We contend that when the Crest Theatre was built, in 1948-49, that preexisting conspiracy of these defendants had impact on the plaintiff, and we looked to the Paramount decrees pertaining to this question of runs and clearance that had applicability to us.

There is one further point: the decrees in the Paramount case, obviously speak in terms of future action, that these defendants are enjoined from doing these kinds of things in the future, and fixes the runs and clearances.

The Court: It is not clear to me—my dilemma flows somewhat from the language of the statute, more so than [fol. 1391] from what you have said. If you read this sentence: " . . . respecting which said judgment or decree shall be an estoppel as between the parties thereto," they are talking about or applying it to our case—it is the Paramount decree we are talking about—it would be an estoppel as to all matters respecting which the Paramount decree would be an estoppel.

Now, under your argument, as I understand you, you say it assuredly must be an estoppel, because they were talking of the Paramount decree, and you say, for that reason, if for no other, this time-element argument is vitiated. If this is not true, why must they use that word "estoppel"? "Estoppel" means,—suppose A sues B, and B says that matter is exactly the same issue that was decided against

you in a former case, and you are estopped, your rights have been precluded; and it seems the use of the word "estoppel" here means what it says. But what, under your argument, Mr. Rome, would be left to decide here?

Mr. Rome: I think Your Honor must bear in mind that the statutory provision says that it shall be prima facie evidence only.

The Court: You mean, then, it is a contradiction of the statute?

Mr. Rome: It becomes prima facie evidence as to those issues which were raised and adjudicated in the Paramount [fol. 1392] case, so that if the Government were coming in, it would be conclusive, and an estoppel; but here we come along, as an outsider. This changes the ordinary rule of law, which says there is nothing can be used when the parties have changed.

The Court: If the Government were involved——

Mr. Rome: If the Government were here, it would be res adjudicata, because the parties would be identical; but, in a sense, they are not the same. Congress granted an exception to the ordinary rule. They said, "We will grant you an exception as to prima facie evidence," and that is the distinction between this case and the Fifth and Walnut case. The plaintiff there claimed an actual violation of the Paramount case, and the Court properly held so, and the Court of Appeals affirmed that.

The Court: Let me see if I fully understand you. You mean, as it stands now, for violating the decree in the Paramount case, all that one would have to do would be, rest on the Paramount case in any prosecution or any suit they might bring, and that would work an estoppel; and you say that is what this language means. But, read in the light of the prior statement about prima facie evidence, that the defendants have the right to say that the latter occurrence should, if they can show that this latter occurrence——

[fol. 1393] Mr. Rome: No, sir.

The Court: You say they are not, and they say they are.

Mr. Rome: They would claim, and are not precluded from arguing to the jury, that they have not done this as the result of any conspiracy; and, if they are a party, this would be conclusive evidence.

The Court: Even if that be true, will you repeat again what you have to say about the defendants' claim that in any event RKO should be excluded, and Paramount?

Mr. Rome: Yes; I will be happy to do so. Their claim with regard to that, sir, is that because of the language of the proviso of Section 5, that they are excluded. That language reads:

"Provided this section shall not only apply to consent judgments or decrees entered before any testimony has been taken."

Now, Mr. Watkins has attempted to suggest to Your Honor that RKO decree was entered before any testimony was taken on remand. That is true. The RKO decree was entered before any testimony was taken on the remand, but before the case ever got up to the Supreme Court, an enormous volume of testimony was taken, applicable to RKO, and applicable equally to Paramount; and as to those things which the plaintiff in the present case complained, subse- [fol. 1394] quent-run and clearance, the Supreme Court affirmed those findings and, consequently, that, we contend as the result of the earlier proceeding in which the findings of the Statutory Court were affirmed, the decree is not a consent decree; and that was specifically so held, sir, in the case which was cited in my original brief to Your Honor, DeLuxe v. Balaban & Katz Corporation, 95 Fed. (2d) 983.

The Court: At what page is that in your brief? I have it—page 3.

Mr. Rome: That is exactly the language there. It appears that the defendants are not entitled to rely upon the protection of Section 5 of the Clayton Act. Excuse me, I want the exact language; if Your Honor will excuse me. I referred you previously to the language on page 13, which is not exactly the language I want to read at the moment.

The Court said there:

"It appears the defendants are not complying with Section 5 of the Clayton Act, which provides that the final decree rendered in a proceeding brought by the United States shall be prima facie evidence in a suit subsequently brought by any other party, except where a consent decree is entered before any testimony is taken."

In the New York case, a trial was held and an appeal was taken; and the Supreme Court affirmed it in part, and [fol. 1395] reversed it in part, and remanded the case.

It should be noted it was remanded for further proceedings, not a new trial; and, therefore, there was not a trial de novo. Mr. Watkins just attempted to tell you it was a trail de novo. This Court said it was not a trial de novo, but a continuation of the previous trial, where certainly considerable testimony had been taken.

In other words, as to the issues that were relied upon previously, a fixed and uniform system of runs and clearances, the Supreme Court affirmed that; and in the lower court, following the remand of the case, Judge Hand wrote the opinion, indicating the things that were found to be unlawful; and it was only to enlarge the decree that the case was remanded to the Lower Court. And that was when the question of divorcement and divestiture came up. But, because of that fact, we deny that RKO and Paramount submitted to consent decrees within the actual meaning of Section 5. These are actually adversary decrees resulting from the taking of an abundance of testimony, and we are entitled to rely on that case as prima facie evidence as to the other defendants.

Referring to the case which was tried by Chief Judge Knight, of the Western District of New York, there he specifically permitted the decree as to RKO and as to Paramount, and they were admitted over these very same [fol. 1396] objections.

The Court: Mr. Watkins, how do you answer that?

Mr. Watkins: I would like to answer that. Reference is made to the Bordonaro case. In that case, they were dealing with a situation which began in 1931, and clearly antedated the Paramount case, in which there was nothing to show any change in the particular practices that had been condemned. So it is in no respect similar to the case we have here.

Secondly, as to the Balaban & Katz case, the same Judge reached exactly the opposite conclusion in the case cited, and at the moment, Balaban & Katz, 88 Fed. Supp., at 314, the same Judge who previously decided—these were both on motions to strike—had decided that the decree was not available against Paramount.

The Court: How do you meet the argument in the Milgram case?

Mr. Watkins: Your Honor, in the Milgram case, despite what Mr. Rome said, it is my understanding that, first, the decrees were not offered in evidence in the Lower Court. That was a nonjury case, and, therefore, that Judge, and the Court on appeal, had available to it all the printed records that one might see in the books and reports.

The Court: Should I treat the situation here differently [fol. 1397] from what I should treat it if I were sitting without a jury, and a question arose as to whether I should allow the decrees to be introduced? It seems to me to be the same question.

Mr. Watkins: Yes; it is, except a Judge can wipe his mind clear.

The Court: Isn't it fundamentally the same question? I assume Mr. Rome would be asking the same privilege, if we did not have a jury. In the case that Judge Chesnut handled, you didn't have a similar situation.

Mr. Watkins: Your Honor, that was an action where the situation in Baltimore was reviewed.

The Court: And he did, in effect, just what we are doing now,—analyze the Paramount decree. He had to.

Mr. Watkins: Yes; and he said he found nothing in there relating to the simple business practices that had existed in Baltimore for many years, first-run followed by neighborhood-run; and you can have an estoppel only on facts. There could not be estoppel on questions of law, but estoppel is with regard to the question of facts; and I submit that nowhere in the Paramount case do you find any condemnation of any exclusive first downtown run. Nowhere do you find that condemnation. Nowhere in Paramount do you find the requirement that there must be a day and date run between a downtown theatre and a neighborhood theatre, [fol. 1398] which is the second claim here; and I say we have to deal with facts, and not abstract propositions of law.

Paramount did not find anything wrong with those conditions and, therefore, the Paramount decree, for that reason alone, cannot be an estoppel in this case. The very thing involved, downtown first-run, is not condemned anywhere; exclusive first-run is not condemned; day and date

first-run is not prescribed. Therefore, there is no ruling in Paramount——

The Court: They proscribed, broadly, any such clearances or day and date or exclusive first-run, where there was an agreement in restraint of trade to bring that about.

Mr. Watkins: No, Your Honor; that results from the antitrust laws, not from the Paramount decree. If Mr. Rome wants to prove a combination, let him prove a combination by evidence. That is our whole point. He is trying here to avoid the necessity of introducing evidence as to a conspiracy as of the present time. That is the sole purpose of this. I think he knows it, and that is the reason he——

The Court: It is a reasonable inference, from the uniformity of performance on the part of all the defendants in the way they act as to the downtown theatres versus neighborhood theatres, and with respect to first-run pic- [fol. 1399] tures, day and date pictures. From that conduct may be inferred an agreement in restraint of trade. Now, I am not saying whether that is right or not, or whether the jury will be impressed with it, but that is his theory of the case.

Mr. Watkins: To the extent that it is a tenable theory, it is a theory applicable without the application of, or regard to, or reliance on the Paramount case to the extent that similarity of action can be used as a reasonable basis for an inference of conspiracy. The facts speak for themselves, and there has not been any basis, and they do not testify going back to something that occurred in 1945. But, on that particular point, I want to call your attention to the statement by Judge Chesnut in the Windsor case, in 94 Fed. Supp., on page 392, the last paragraph in the left-hand column:—

The Court: Would you wait until I send for it? 393, you say?

Mr. Watkins: 392.

"There is no evidence tending to show any conspiracy or concerted action by the distributors; that is, there is no 'horizontal' conspiracy in these cases. To some extent it may be said that some of the distributors have much of the time acted similarly with respect to Rosen and Gold-

berg; but similarity of action under substantially like cir- [fol. 1400] cumstances affecting each distributor is not proof of conspiracy."

And both of those holdings, that similarity of action, under similar circumstances, is not evidence of a conspiracy, were affirmed by our Court of Appeals.

The Court: I think that is very sound reasoning, but I do not see that that militates against Mr. Rome's theory of the application, of the prima facie application of the Paramount decree, and the facts before me. What really happened in the Windsor case, as Judge Chesnut analyzed, and I think analyzed very thoroughly and correctly, an affirmed decision in the Supreme Court—he took into account the question was not raised in the same way there as here would have to be; and I think he no doubt gave the correct decision with respect to its application on those facts.

Now, here, all Mr. Rome is asking is that I give to him the benefit of having the jury know that there was this decree, and that it is prima facie evidence.

Mr. Watkins: But prima facie evidence of what, Your Honor?

The Court: Prima facie evidence that these,—first, that the jury is entitled to know that these defendants have been restrained from doing certain things, and that among the things, the category of things that they were restrained from doing, was conspiring to institute clearances in restraint of trade.

[fol. 1401] The Court: Mr. Rome contends that he can show, convince the jury that the clearance here is in that category of prohibitive clearances if he can show that there was conspiracy by concert of action in doing that. Isn't that in A, B, C, language what you are asking?

Mr. Rome: Yes, sir.

The Court: And while I think this may be a borderline case, but I am now disposed to give to the plaintiff the benefit of the doubt and let them present the decree to the jury for what they may be worth.

Mr. Watkins: Your Honor, I am faced with the very practical problem that I think confronts your Honor, and that is what is the jury going to be told this is prima facie

of? We are dealing here with certain specific situations, or is Mr. Rome going to be permitted to ask, and is Your Honor going to instruct the jury, and that is what I think is required——

The Court: I think your point is well taken. You just cannot play fast and loose as to that decree, but I propose to tell the jury in my instructions, and perhaps also at the time they were allowed to be introduced, substantially what Mr. Rome has put on the fourth page of his separate brief on this question with the possible exception of the first paragraph in his third heading, which I think is not as clearly stated as it might be, and I would not give that, I [fol. 1402] would give just the last sentence and then explain what the statute says, that this is only prima facie evidence, and, of course, they have to find in any event that there was a concert of action, intentional and deliberate to violate the law, and that would have to be coupled up with my instructions as to what is a violation of the law.

Mr. Watkins: Well, would Your Honor say that those four things existed in Baltimore in 1945?

The Court: There is a statement, as Mr. Rome pointed out, that they did exist in 1945. Can you refresh my recollection on that? The jury does not have to believe it. I do not know what the jury is going to believe.

Mr. Rome: Sir, I undertake to say to you that I can furnish Your Honor with specific quotations coming from the testimony of the present case from the chief representative of every one of the distributors with the exception of United Artists, in which they admit that there has been a policy outstanding for many years. In some instances they carried it back as much as 20 years, and they excluded from first run, and limited first run to the downtown area of cities.

Now, Mr. Watkins has attempted to suggest to Your Honor that that was a question which did not come up in the Paramount case, but he is overlooking the well recognized principle of law, sir, which is also stated in the De Luxe Theatre case which I brought to Your Honor's atten- [fol. 1403] tion, that obviously it is incumbent upon the plaintiff to demonstrate the impact of that conspiracy upon plaintiff in the local sphere, but this does not mean in the

prior case, the Government case, that the Government was obliged to litigate all the issues that might arise in any given locality.

The case of Mack Motors Corporation versus General Motors is illustrative of this point, and in line with Mr. Watkins' contention that there is nothing in the present case that was brought up in the Paramount case at all, sir, I would just like to read a couple of sentences coming from the Paramount case itself.

The Court: What page are you now reading from?

Mr. Rome: This is 85 Fed. Supp., sir, at page 888.

The Court: When the case went back?

Mr. Rome: Yes, sir. This says: "The fixed system of runs and clearances which we felt involved the cooperative arrangement among the defendants was also designed to protect their theatre holdings and safeguard the revenue therefrom."

It says also on page 888: "We hold that the defendants had set up a system of fixed runs and clearances which prevented any effective competition by outsiders." That has to do with first run, sir, and we claim that is exactly what has happened in the City of Baltimore. There was a [fol. 1404] fixed system of runs and clearances which precluded any outsider, any independent—it so happened here in the case before Your Honor to be Theatre Enterprises—from coming in and getting access to first run.

Now, throughout the Paramount case the opinion of the Supreme Court, the opinion of the lower court, is permeated with the whole idea of the importance of first run. The Supreme Court opinion refers to it as the "cream of the business." "The whole test," said Justice Douglas, "is exactly for that, to see who shall have the opportunity to play first run pictures." The Court said—I don't mean to skip quickly, Your Honor,—but in the Supreme Court opinion——

The Court: What page are you reading from?

Mr. Rome: Page 166 and 167 of the Supreme Court opinion, at the bottom, sir. It is 334 U. S., sir.

The Court: Go ahead.

Mr. Rome: Justice Douglas, speaking for the Court, said: "The main contest is over the cream of the exhibi-

tion business, that of the first run theatres. By defining the issues so narrowly, we do not intend to belittle its importance. It shows, however, that the question here is not what the public will see or if the public will be permitted to see a certain feature. It is clear that under the existing system the public will be denied access to none. The central problem presented by these cases is which [fol. 1405] exhibitors get the highly profitable first run business. That problem has important aspects under the Sherman Act."

That is exactly what we raised before Your Honor: What theatre shall get the highly profitable first run business? We claim that this system of runs and clearances which was found as a fact in the Paramount case, was used to exclude independents, as the Court found, it was used to stifle any effective competition by outsiders, and that is the impact of that conspiracy upon the plaintiff in the present case, Your Honor.

The Court: Mr. Watkins, do you want to say anything more?

Mr. Watkins: Your Honor, the thing Mr. Rome has just been emphasizing is the fact the Supreme Court recognized that there should be first run. Therefore, there was no condemnation of first runs as such, and first run is recognized as being exclusive. Therefore, the Supreme Court did not condemn those as such and there is no reference in there to a condition existing in Baltimore.

Now, is Mr. Rome going to argue to the jury that because a condition exists somewhere else that it is true in Baltimore? That is what it comes down to. The Court has not deemed the mere existence of the method of distribution which is found here and which Judge Chesnut passed on and say that of itself is not improper. There is no finding [fol. 1406] that an improper arrangement with respect to that existed in Baltimore in 1945. Therefore, there is no estoppel with respect to that.

Now, under those circumstances, Your Honor, I say you cannot use a finding that somewhere a defendant has done something improper, his promise may be used to say that that very thing was done in Baltimore in 1945, and, there-

fore you may assume it exists in 1952, which is what would follow from what is being contended, Your Honor.

The Court: Well, I think you cannot go that far, but I think that the plaintiff is entitled to a reasonably broad construction of this very clumsy language of the statute, in view of the very broad nature of the Paramount decision and the decrees which have followed from it.

Now, it seems to me that if Mr. Rome is correct in his construction here of this clumsy language, or at least inadequate, inartistic language in the statute, it means this, that if the Government were prosecuting the defendants at the present time with respect to this period which is here in question, and could show that there was a conspiracy—of course you have got to show that, that is basic, and the absolute condition precedant—and could show that whereas in the Paramount decision and decrees first run requirements or failure to give first run certain clearance, all of those things were involved, if they could show that what [fol. 1407] was being done or had been done during the period that is here in question, was actually done with intent to monopolize the theatre business, then I think that is all the Government would need to do, the parties would be estopped from saying that they have not been ordered to refrain from that kind of thing by the Paramount decree.

That is your contention, isn't it, Mr. Rome?

Mr. Rome: Yes, sir.

The Court: If that is true, it seems to me under the language of the statute I have got to give the plaintiff the right to call the jury's attention to this decree and state that it is prima facie evidence, explaining that even though it is prima facie evidence it does not amount to anything, it has not force, no probative value unless they find a concert of action and unless they find that the adoption of this first run method and any other clearances involved were unreasonable under the given circumstances.

Now, that is all it comes down to, and it seems to me that the Court is required to let the jury have that decree before them with that explanation, just as Judge Chesnut had it before him when he considered the Windsor case.

Now, that seems to me that I am required to do that. We may call it a close case in view of the fact we are dealing

with the case which arose without doing as Mr. Rome points out. I cannot exclude this, it is in the case, that one [fol. 1408] or more of the defendants' witnesses say this is a long practice and that antedated the decree. He also points out that the Great Theatre was actually set up and correspondence had with respect to getting first run before the final decrees in the Paramount case were signed. All of those things seem to me to bring out the provisions of Section 5 of the Act. It may be a twilight zone case, but I feel that I should acquaint them of that.

Mr. Raftery, do you have a question?

Mr. Raftery: Before Your Honor reaches an ultimate conclusion, I should like to make a few observations about the Paramount case. I was in that case representing two of the defendants.

Regarding Section 5 of the Clayton Act, which our friend is relying on, it is nothing but a rule of evidence.

The Court: That is all we are talking about now.

Mr. Raftery: It is a rule of evidence and if the facts in the Paramount case were litigated between the Government and the defendants in that case Congress says, "Don't put a poor plaintiff to the expense of reproving those facts."

Now, in the Paramount case may I call to Your Honor's attention the Government never questioned the right of a distributor to license its pictures exclusively in downtown theatres. The Government never contended at any time that a distributor must license its pictures day and date [fol. 1409] downtown and with a neighborhood first run.

The Court: Nobody had complained about it at that time.

Mr. Raftery: Oh, yes——

The Court: Not in connection with this litigation.

Mr. Raftery: Now, that is the point I am making. That is the point I am making. In this case Mr. Rome advanced this new theory of distribution, and it comes here before Your Honor for a test. Now, the four points that Mr. Rome urges that he wants to use the Paramount case as evidence rather than come in and supply evidence as required in the ordinary lawsuit, Your Honor alluded to them. Mr. Watkins cited those four issues here.

Our point is that it is their burden and their obligation to prove those four issues rather than offer a decree in

another case, to wit, the Paramount case, where the issues here were not in issue.

Now, as Mr. Watkins aptly said, under the Emich case, Your Honor is required to read the four thousand odd pages of the Paramount case and the several thousands of exhibits, and from that find out how to explain to the jury the effect of the Paramount decree. The burden, as Your Honor aptly put it, would force an adjournment of this trial until next Fall. Now, all we say is this: Mr. Rome should not be permitted to substitute for the evidence he [fol. 1410] is required to produce here, a decree that litigated other matters not involving the City of Baltimore or not involving this lawsuit.

The Court: I think that is a broad statement, too broad a statement. Of course, an estoppel relates not merely to a specific item or a specific result, but to results that would naturally flow from that. I mean you have got to take that into account.

Now, you cannot say that the Paramount case did not have before it the question of whether a concert of action with respect to first run pictures, keeping them within the family, was not in restraint of trade. They said it was. And, similarly, they said any clearance, 21 days, 7 days, or 77 days, might very well be. So, you are dealing here with subject matter which is very broad. As a result of what the Supreme Court said, Heaven knows I am not inclined to extend the Supreme Court decision, it has been extended to such extent that I think I am precluded from saying that Mr. Rome is not entitled to the full benefit of that great breadth of extension?

Mr. Raftery: Yes, but your decree here that he is seeking to introduce in evidence, there was not litigated in that case the two issues that he brought his case here on. He says here "My client wants either an exclusive first run [fol. 1411] in a neighborhood theatre or if in the alternative I want a day and date in the neighborhood theatre with downtown." Neither of those issues were in the Paramount case.

The Court: I gave you my copies of the decree, did I not, Mr. Rome?

Mr. Rome: Yes, sir.

The Court: I would like those back, by the way.

Mr. Rome: Yes, sir.

The Court: Just read part of the decree, any one of the decrees that Mr. Rome wants to put in. They seem to me to cover this situation.

Mr. Rome: The first one, sir, is——

The Court: Read the most typical one you think covers this.

Mr. Rome: The very first one: "The defendants are enjoined from agreeing with each other or with any exhibitors or distributors to maintain a system of clearance. The term 'clearance' as used herein, means the period of time stipulated in license contracts that must elapse between runs of the same feature within a particular area or in specified theatres."

The Court: Of course that is broad enough to embrace first run situations.

Mr. Raftery: That covers where you have an agreement or conspiracy among defendants to enforce a uniform system of runs and clearances. For example, suppose all the [fol. 1412] distributors and all the exhibitors or a great portion of them, got together and said, "We will agree with the City of Baltimore there shall be the following clearance" and what they were passing on were cases of this kind where they all agreed exhibitors and distributors or a substantial portion that first run shall have 21 days clearance over the second runs. Second runs shall have clearance—and mind you, in all these cases in U. S. against Paramount, admission price was coupled into it. It said, "Shall have 21 days clearance over second run, charging 40 cents——"

The Court: Read the rest of that.

Mr. Rome: I claim, sir, the only one I did read applied to first run in the City of Baltimore.

The second one: "The defendants are enjoined from granting any clearance between theatres not in substantial competition." The burden of our case here is that the Crest Theatre is not in substantial competition with downtown by reason of its distance and, therefore, the 21-day clearance between the downtown theatres in favor of the downtown theatres as against the Crest Theatre, is an

illegal and unfair practice which brings it squarely within that language.

Mr. Raftery: He does not need that decree in this case. Mr. Myerberg said, "I am not in substantial competition." Dr. Hawkins laid the basis that he was in substantial competition. The maps and charts and studies of the Century [fol. 1413] and of the Stanley showed there was substantial competition. All of the witness- testified there was substantial competition. We submit, Your Honor, without that decree and without referring to it could instruct this jury that Mr. Myerberg says no competition, the other witness-say competition.

The Court: I think that is undoubtedly true, but I must give both sides whatever statutory right they have. I agree with you. I do not want to be misunderstood here as deciding to prejudge any of the facts. I do not have to do that at all, I am happy to say. That is the jury's job.

Mr. Raftery: Another thing I want to straighten out, and I know Mr. Boyd has something to say, on this question of applicability of Section 5, that has nothing to do with the Government's suit where a Government would come in after a decree. Section 5 only applies to a private party such as Mr. Myerberg coming in on a treble damage suit or on a suit for an injunction.

The Court: How would you clarify that sentence?

Mr. Raftery: Very simply.

The Court: As to all matters with respect to which said judgment or decree would be an estoppel, an estoppel unfavorable to him?

Mr. Raftery: It is an estoppel in favor of the party litigating, to wit, the private party, and against the defend- [fol. 1414] ants who were parties to the Government's suit.

The Court: Yes, but you would test it, assuming the situation where the Government were suing the second time, saying that you have to stop this because you are doing just what the Supreme Court said you could not do, it would be an estoppel, wouldn't it?

Mr. Raftery: No, it would not be an estoppel.

The Court: But that illustration clarifies the case, doesn't it?

Mr. Raftery: No, Your Honor, I don't believe it, with all due respect. If the Government thought any defendant is violating a decree then all the Government has to do is go in and punish for contempt.

The Court: That is true. And it will make the motions for contempt and offer the decree.

Then it will be estoppel.

Mr. Raftery: Then it will show—and this is what is meant here in this case—it will show the fact that the party named as defendant has violated a specific provision of the decree.

Now, the decree is the language which says what you cannot do. The Government says they have done what you cannot do. We, therefore, ask the Court to punish the guilty party for contempt. That contempt proceeding has no bearing of any kind or character on this provision. This [fol. 1415] provision merely says that where a plaintiff, third party, private party, begins an actions against a group of defendants or even one defendant, alleging a violation of the Sherman or Clayton Acts, then instead of proving the facts that exist at the present time, it may offer as estoppel and as prima facie proof the facts.

Now, our friend here has not offered these provisions as proof of facts. He has not shown in one iota that the true provisions we have been discussing here for three weeks, to wit, first run exclusive downtown, Baltimore only, as against day and date neighborhood and downtown. He has offered no facts——

The Court: Mr. Raftery, from that one would infer you mean first run has never been discussed in the Paramount case? It was one of the main elements in the Paramount case.

Mr. Raftery: It was discussed ad nauseum in the Paramount case. But the Baltimore situation, as Judge Chesnut so aptly points out in the Walbrook case, that was not litigated nor were the facts that have been brought out here been litigated. The Government raises no question of the legality and right of each distributor to sell first run exclusive.

The Court: Of course, if everything were raised that might be brought under the Paramount decree in the first

instance, of course we would have no more litigation in-
[fol. 1416] volving the Paramount decree. It would be all cut and dried.

Mr. Raftery: In fact, in discussing clearance in the Government case, which of necessity ties in to the decree which he is seeking to put in, the Court expressly found clearance reasonable as to time and area is essential in the distribution and exhibition of motion pictures.

The parties have proven utility in the motion picture industry and reasonable necessity for the conduct of the business. Now, based on that, I would say that these decrees are being offered, not for the purpose of proving any fact involved in this case, but merely to give Mr. Rome an opportunity to stand before that jury and say these defendants have been guilty. Now, he used the word, "guilty" on every one of our witnesses, when he knew he was discussing a civil action.

The Court: You have got to rely on the Court to prevent any violation.

Mr. Raftery: I meant as of the present state of the case, he has made consistent reference to the Paramount litigation, and that is the feeling of my brethren here.

The Court: Of course, I do not want to restrict unduly the argument, but do you want to say something, Mr. Boyd?

Mr. Boyd: There are two aspects of the matter, Your [fol. 1417] Honor, that I would like to call to your attention. I certainly do not hold myself forth as any expert on the Paramount case, and I think anyone who does may be foolish. I have never seen a more complicated situation.

The Court: I believe most people say the Supreme Court members were not experts on it.

Mr. Boyd: As far as I can say so, with due respect and in my humble position, I will agree with Your Honor. They have not left an easy trail of understanding or projected a path of procedure that is easy to follow out. But one of the things they did do, while this may be a supplemental point, if Your Honor has reached a decision, I think it is an important one for you to be considering in the light of what you will have to tell the jury and explain to the jury, in the February 8, 1950 decrees, which I understand are the ones Mr. Rome has offered; is that correct, Mr. Rome?

Mr. Rome: In Section 5, is this provision: "Nothing contained in this decree shall be construed to limit in any way whatsoever the right of each major defendant bound by this decree during the three years allowed for the completion of the plan of reorganization provided for in Section 4 to license or to in any way provide for the exhibition of any or all of the motion pictures which it may at any time exhibit, in such manner and upon such terms, and subject to such conditions as may be satisfactory to it in [fol. 1418] any theatre in which such defendant has a proprietary interest, either directly or through subsidiaries."

The Court: Well, if I should allow these, you have a right to stress that in your argument.

Mr. Boyd: I should think, sir, it would be an essential part of your charge to the jury.

The Court: Well, I will insert that.

Mr. Boyd: Because it would have a very vital effect upon the interest of Loew's.

The Court: Give me a photostatic copy and mark the place. I think you are entitled to have that put in.

Mr. Boyd: Roman numeral 5. That would apply, sir, particularly to Loew's, and I am permitted to say also for Warner's, to both the Warner defendants, if they are both in the case.

[fol. 1419] The Court: What was your second point?

Mr. Boyd: The second point, sir, is that in the paragraphs to which reference has been made, that Mr. Rome wants Your Honor to read to the jury, my interpretation is not quite the same. I am talking about the paragraph which talks about granting or enforcing any clearance. It is No. 4 on a letter which he supplied us at one time, but I think it is No. 3 in the paper to which you have been referring. Do you find that paragraph, sir?

The Court: I have it here.

Mr. Boyd: I refer particularly to the second sentence of that paragraph.

The Court: Beginning——

Mr. Boyd: "Whenever any clearance provision is attacked as not legal under the provisions of this judgment, the burden shall be upon the distributor to sustain the legality thereof."

Now, the point I make, and I am advised by persons more experienced than I am in the Paramount case, but it seems quite clear to me that the attack which is being spoken of there against a clearance not being legal is an attack by the Government pursuant to its enforcement of this decree, and it is not applied to a private situation. For, if that is so, sir, then this decree by its terms would seem to have judicially legislated some change in the law of burden of proof.

[fol. 1420] The Court: What have you to say about the first sentence of the decree?

Mr. Boyd: From granting or enforcing any clearance against theaters in substantial competition with the theater receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the [illegible] granted.

I think that is one of the things they are pr[illegible] from doing, but I think the second sentence me[illegible] Government sees fit to charge you with grant[illegible] reasonable clearance, then the burden is on you in the Government suit, but only in the Government suit. That burden is on the distributor to prove.

The Court: I think you are probably right on that. Why isn't that right?

Mr. Rome: I differ with Mr. Boyd about that, sir. Specifically, to my knowledge, sir, I am informed that that question came up in the Bordonaro case in Buffalo. That came up before Judge Knight in Buffalo recently, and to the best of my knowledge, sir, that specific provision has in effect caused a switch in the burden of proof, and that is one of the grounds for our objection to a number of suggested requests for instructions of the defendants here. I say that as a result of this particular provision where a clearance provision is attacked. It is exactly their burden to justify, and that has been so because the Government has [fol. 1421] placed that on the shoulders of those who were most capable by reason of the information at their disposal to do it.

Mr. Boyd: If Your Honor please, I do not know if Mr. Rome participated in the Bordonaro case. I did not, but I am advised by counsel in the room, who did participate in the Bordonaro case, that the exactly opposite is true, and

that the jury was instructed that the burden was on plaintiff to prove its case in that particular respect.

I think my interpretation of the language of the decree is correct, and that it applies only to Government cases. I do not see how Courts can change the laws of burden of proof, in a Government contempt proceeding following a decree, this particular decree, sir. That is what I think that means, and I think Judge Knight in the Bordonaro case so ruled.

Mr. Aarons participated in that case and he advises me that the rule was as I stated it.

The Court: I must say I had not thought of that point at all until you raised it, and I think there is great weight in it, Mr. Rome.

Mr. Rome: Sir?

The Court: I say, I am inclined to agree with Mr. Boyd.

I notice in a number of your requests for instructions, you seem to apply new rules for burden of proof and the [fol. 1422] burden of proof here is on the plaintiff.

Mr. Rome: There are two differences with regard to it, sir. I have just been trying to find the specific language in the Paramount case which treats on this problem of the burden being placed upon the defendants with reference to the legality of clearance, but the other problem of burden of proof which Your Honor has in mind, I believe, has to do with the burden of proof being placed upon these defendants to repel the inference of conspiracy that can be drawn from their uniform conduct, and there are cases specifically that hold on that, sir.

The Court: I think it is nothing more than saying even though the defendants admitted they even spoke to each other or had any concert of action, if their conduct is to the contrary, it is up to them to refute the prima facie presumption which flows from that. I think that is true. If you want to point out to me tomorrow some language which bears on this particular point which you have here, some language in the case just referred to, I will be glad to hear it. I am disposed—but of course counsel can object to instructions I give—I am disposed to allow the plaintiff to introduce these decrees with the understanding that I shall expand it to that effect. If counsel do not like what I say,

they can ask me to say more, and I can rule on that. I am not going now into a re-statement of what explanation I [fol. 1423] will give, because I think I have already explained it several times, with the possible qualification that tomorrow, if you want to give me more information about that burden of proof rule and the cases, I will reserve any finding or conclusion as to how much paragraph 3 from Plaintiff's brief I can use.

Now, that brings us to the subject—but the hour is getting late, and I think we might as well take a little recess—but before I do that, I want to say—and I do not say this with any acrimonious motive—I think that the Defendants' motions for instructed verdicts are instructions which the Court cannot grant, because I thought they lose sight of the fact that we do have here basically a question of facts for the jury to determine. In other words, if they believe the Defendants, why, if they are honest in their conclusions, they are bound to bring in verdicts for the Defendants. But I cannot tell them that they must believe in witnesses on either side. I do not want to cut this discussion shorter than is appropriate, and I will give counsel full opportunity to be heard, but to give you an illustration of what I mean, take the paper that you have given me and I have given a lot of thought to it, and take under the first cause of action, Paragraph 3, which reads:

"There is no evidence that any Defendant conspired with any other Defendant against the Plaintiff."

Now, I cannot give the jury such an instruction, because [fol. 1424] even though all of the Defendants have emphatically and categorically denied, through their duly accredited representatives, that there was any concert of action. I think the jury are entitled to weigh the question as to whether or not they should believe that in the face of uniformity of action that has persisted with respect to the downtown first run theater arrangement.

Again, I am not saying whether I think they ought to be believed or not. That is a question for the jury. And I think the failure to take into account the factual situation runs all through these grounds that are alleged for a directed verdict. Take for example Paragraph 4, the first page, again:

"The plaintiff is in substantial competition with downtown Baltimore first run theaters and the defendants are separately entitled to license their pictures for exclusive first run exhibition in the downtown first run theaters 21 days over the plaintiff."

The question of extent, substance, materiality of the competition is one of the factual issues in the case. I cannot instruct the jury as to that as a matter of law.

Take Paragraph 9: "The Plaintiff has offered no competent evidence of injury occasioned by the alleged conspiracy of the Defendant."

The Defendant says that the figures which they have given are fantastic, and that they are speculative and not borne [fol. 1425] out by the earnings of the Plaintiff's theater. The Defendants say, as I understand it, from their subsequent clearance pictures that it is fantastic to say they made any such earnings they claim and that the injury has not been proved, but they put in that evidence and I think that has to go to the jury.

I am just taking illustrations. Take under B-1, page 2:

"Agrees that the Defendant Warner Brothers Circuit Management Corporation, is not engaged in the licensing of pictures for exhibition by others."

I do not see how I can instruct the jury that that shows that they should not have been in any conspiracy, because it is possible that the party might be in conspiracy to monopolize the business and do licensing of it or it did not actually do any licensing at all if it was one of the parties to the conspiracy. And so it goes, it seems to me, by virtue of this.

Take 3, under 3-B:

"The Defendant, Loews, Incorporated, in exhibiting pictures in the Century, Valencia and Parkway Theaters, is exercising its right to license its pictures by exhibition in its own theaters in such manner and upon such terms and subject to such conditions that may be satisfactory to it."

[fol. 1426] They undoubtedly have that right. But I think in view of all the evidence, the Plaintiff has a right to have the jury consider whether given the circumstances of uni-

formity of action with respect to first run, may not be evidence of an agreement to control the situation.

Now, then, it seems to me it runs to the grounds given under the second cause of action.

Take Paragraph 3 on page 3:

"There is no evidence that any Defendant conspired with any other Defendant against the Plaintiff."

I have already covered that. And that is really, it seems to me, to be just a re-statement of what is attempted to be obtained by way of instructions under the first cause of action.

Paragraph 7, page 4:

"Plaintiff has offered no evidence of damages from the alleged conspiracy."

Well, the jury may believe they have not been damaged, but there is some evidence, for whatever it may be worth.

Take Paragraph 11, there is no legally sufficient evidence of refusal to grant the Plaintiff reasonable clearance over other theaters in substantial competition with it.

Well, there are two questions of fact there. Are those other theaters in substantial competition and, secondly, is the clearance reasonable? So, without going over all of [fol. 1427] those various reasons, I think they fall into one or two broad classes, and I think that the case must go to the jury. It is filled with factual questions which the Court cannot instruct them as a matter of law, and I think that is borne out, gentlemen, really by the arguments, which is a very forceful argument presented on behalf of Defendants. The argument is we have a situation here which is absolutely different from what was involved in the Paramount cases and a situation which shows, contrary to what the Plaintiff says, that from every reasonable business point of view we have a right to do what we are doing, because the situation is different from what the Plaintiff claims it is. Well, is it? That is a question of fact for the jury.

I cannot rule that it is, because that would mean that I would be saying the Court would be telling the jury "You cannot believe what the Plaintiff's witnesses say." I cannot do that in this case.

I do not want to prevent counsel from arguing this motion further, but that is the way the Court views it. Do you want to say anything?

Mr. Raftery: May we have a short time here at the table and answer Your Honor right now?

The Court: We will take a recess for ten minutes.

(After a short recess, the trial was resumed as follows:)

[fol. 1428] The Court: Do you want to say something more?

Mr. Watkins: Your Honor, only that my colleague and I have reviewed our motions for instructed verdicts, and in the light of Your Honor's analysis, and in view of that, we do not believe there would be any useful purpose served by argument on the motion. That, of course, Your Honor, is not a withdrawal of the motions, and it is to be understood that we may renew our motions.

The Court: I understand you have the right at any time to renew your objections.

Mr. Raftery: I wonder, Your Honor, if we are clear? Mr. Rome, I believe, has not made his formal offer of the decrees, but as I understand it he is only going to offer those four paragraphs with the interlineation, that may be made tomorrow morning, and that is the elimination that may be made tomorrow of that paragraph 3. Is that my understanding?

Mr. Rome: That is right. That is what I am offering in evidence in line with Your Honor's request.

The Court: You are going to have typewritten copies of that offered in evidence? You are speaking now of the one Mr. Boyd referred to?

Mr. Raftery: Mr. Boyd, in the interest of simplification, one of our instructions has that reduced down to about three of the sentences, and it may be that instead of de-[fol. 1429] crees, which we do not want to offer, we can submit the request to charge and see if Your Honor can present the decree and simplify it. That is all we want to do.

The Court: That is, you may *be* do it either way you want to to.

Mr. Boyd: Our request No. 26 is in line with that, sir.

The Court: I don't think this is numbered.

Mr. Boyd: Up in the right hand corner, Your Honor.

The Court: I thought that was the page number.

Mr. Boyd: Number 27 as to Warner's, Your Honor.

The Court: I had marked those as No. 1 that would be granted anyway.

Mr. Rome: If I may be heard very briefly on those two.

The Court: I thought I would take those up first. I might say, Mr. Raftery, the procedure is to be when the jury comes back, since this is testimony, it could be put in in the presence of the jury, and I will make an explanation explaining in line with what I have said in the course of the argument this afternoon, as to what is the reason for its admission and its limitations, and I suppose if either side then wants to make any observation on it to the jury, they can do it, but it is a matter of later argument, really.

Mr. Rome: That is what I contemplated doing for ours, [fol. 1430] Your Honor.

Colloquy Between Court and Counsel re Proposed Instructions

The Court: Taking up first the plaintiff's request for instructions, both sides have put in very voluminous instructions. Of course, yours is pretty much in the nature of a brief for the plaintiff, in a way. I shall give the substance of what you have,—not grant all of it, or probably none of it literally,—on the first three pages.

Mr. Raftery: May I point out an error on page 1, Your Honor? That has included Warner Bros. Pictures, Inc., in the first paragraph, who, at the outset of the trial, have not even been served or appeared, as yet.

The Court: Yes; I noticed that.

Mr. Raftery: At the bottom of page 2, Your Honor, may I call to your attention that production is not involved here in this lawsuit in the second line of 3?

The Court: That is true. And, as I say, I think a good deal of this is historical, you might say, or explanatory; and I am not saying I am going to put it all in.

Mr. Rome: Sir, if I may reply to that, production is included in the sense that these people, or the defendants

here, produced the most desirable and most sought after motion pictures in the industry.

The Court: Yes, I understand. I am disposed to explain what the three phases of the business are; but I think this is more introductory. Now, then, when we get down to [fol. 1431] the middle of page 4——

Mr. Raftery: Would Your Honor hear me? The first four are absolutely contrary.

The Court: The first four?

Mr. Raftery: Number 4, at the top. The first here: "The Anti-trust laws forbid monopolies and restraints of competition." That is not the law. The Anti-trust laws forbid monopolies and unreasonable restraints of trade, not competition.

The Court: That is true, yes.

Mr. Raftery: And then the third line Anti-trust laws do not particularly refer to motion pictures because they refer to every form of enterprise.

The Court: I think that is true. I noticed that, and I intended to call attention to that. What you really mean, I suppose, Mr. Rome, with respect to motion pictures because of the public interest involved, or something like that. They do not single out motion pictures. That is not what you mean?

Mr. Rome: No, sir, that is not what I mean.

The Court: It reads that way. They were put in italics in the Sherman Anti-trust Act.

Mr. Rome: I make no contention of that sort, at all. With regard to restraint of competition which Mr. Raftery says is not embodied in the restraint of trade——

The Court: Trade implies competition.

[fol. 1432] Mr. Rome: Exactly. And, secondly, restraint of trade is meant to include restraint of competition, as it so says.

The Court: If you do not like any words I use in the charge, you have a right to object to them.

Mr. Raftery: We have only one suggestion on No. 5, Your Honor, but we think our No. 6 is a better definition of conspiracy. We have 5 and 6. Out of the two of them you may get something that is worthy of giving.

The Court: I think the first sentence of yours is correct,

and isn't it the same as the first sentence of Mr. Rome's? I think it is the same, exactly the same, isn't it?

Mr. Raftery: Exactly the same.

The Court: I am not going to follow precisely the language of any of these requests, probably, as I think you understand. I do not grant them separately as such, but weave them into my instructions.

Mr. Raftery: Number 6 strikes us, Mr. Rome, as simply being an abstract statement of law. It is not anything that will be helpful to the jury.

The Court: Probably not.

Mr. Rome: Sir, with regard to that, I think it is of moment because there has been language coming from my friends on the other side during the course of the case with regard to questions directed to their witnesses: "Did you ever agree?" "Did you have any consultation or anything of the kind?" And, of course, as Your Honor knows, the [fol. 1433] burden of proof with regard to establishing conspiracy has been considerably lightened now, and it doesn't have to have actual agreement or simultaneous action, and it was to that end that this No. 6 was directed.

The Court: I will give some word of explanation to that.

Now, turning to 10, I don't think 10 or 11 or 12 are appropriate as worded, to be granted. The defendants in this case have the burden of attempting to explain away inferences of conspiracy, which the Court says you may infer from a uniform course of conduct. That is a construction, in condemnation of the defendants' right away, reading all through this, it seems to me, a great many of these, Mr. Rome, are, it seems to me, condemning the defendants and exonerating the plaintiff. I have put this all in a very neutral way.

The defendants, you do not need to have direct proof of the conspiracy if you find that there has been a concert of action. We believe you will find that from a uniform course of conduct or something like that.

[fol. 1434] Then, 11, "The uniformity of policy on the part of Defendants in this case of first unanimously denying the Plaintiff access to first-run motion pictures, even though Plaintiff," and so forth. Is evidence which supports strongly the inference of concert of action.

I won't go that far. I will tell them they must weigh all the facts and circumstances and then determine whether or not they think any uniformity they might find is indicative of concert of action.

Mr. Rome: I understand Your Honor with regard to No. 10, Your Honor will not—

The Court: I am not suggesting that, no.

Mr. Rome: What I had in mind is the problem of the burden being upon the Defendants of explaining it. I have no insistance upon the language as such.

The Court: I think all that is to be said on that point is that you may infer from that, from such uniformity of action you may find that that indicates concert of action. If that action is in restraint of trade, as I will define that to you, then you will find the Plaintiffs made out a case of conspiracy. I think these are too disjointed.

Take 12, "The past proclivity of these Defendants to unlawful conduct violating the anti-trust laws, as found by the Supreme Court of the United States in an action brought by the Government, may be considered by you in reaching your decision in the present case since the conspiracy charged by the Plaintiff here is identical in scope [fol. 1435] and nature to one of the conspiracies, the existence of which was condemned by the Supreme Court."

I will not grant that. I have explained how I am going to explain the Paramount case, but I will not explain it in that language, because I do not think that is sufficient. I am going to explain what the broad issues were, as you have them on the brief, with a slight amendment, and use that as an explanation.

Mr. Raftery: Your Honor, we passed up 7, 8 and 9 on page 3, and Your Honor skipped to 10. I think there is a distinct error in the last sentence.

The Court: Of what?

Mr. Raftery: In No. 7 on page 3 toward the bottom of the page, Mr. Rome says: "Both kinds of evidence are of equal validity and in arriving at your verdict you are to consider all of the evidence, both direct and circumstantial."

You may have circumstantial evidence that is far better evidence than direct evidence, and vice versa. It is the

quality of the evidence rather than the nature of the evidence that determines the validity.

The Court: I thought it ought to read "Both kinds of evidence may have equal probative value."

Mr. Raftery: That is all right.

The Court: No. 8. I don't think in this modern era of increasing subtleties. I am not going to use that.

[fol. 1436]

Mr. Raftery: I didn't think you would.

The Court: I do not have the other item, gentlemen. I probably will not follow any of this precise language. I am pointing out the ones I think definitely should not be granted. But others I am saying I think only the substance of them should be granted.

Now, where were we?

Mr. Raftery: No. 9.

The Court: We had gotten beyond 9, had we not?

Mr. Raftery: The suggestion I had on 9 was I think that you might put a notation after 9 that 13, 14 and 15 of our request should be considered in determining how Your Honor is going to frame No. 9 when you give it.

The Court: We are now down to 13. "The words 'restraint of trade' in the Sherman Act are to be construed as including 'restraint of competition.' The requirement of the law as established by the Congress is full, free and untrammelled competition in all branches of interstate commerce in order to secure equality of opportunity."

That may be a little broad.

Mr. Raftery: The sentence ended "in all branches of interstate commerce in order to secure equality of opportunity." It may come within the cases. You see, practically all of these are actions in which the United States of

[fol. 1437]

America was a party, with the exception of the Goldman case, which we are not in accord with, I assure you, but the first four are all Government cases where the Government is seeking to protect the public.

Mr. Rome: Mr. Raftery may not be in accord with the Goldman case, sir, but all these defendants here sought certiorari from the Supreme Court, which was denied, and that case included the words "in order to secure equality of opportunity."

The Court: What case is that taken out of?

Mr. Rome: The Goldman case, the last one, 150 Fed. 2d, 738, 744. That is the case in which Judge Parker, of the Fourth Circuit sat.

Mr. Raftery: "In order to secure equality of opportunity." That isn't the purpose of the Sherman Act. You are completely eliminating the individual. You may have a man who is a great genius and a man who is a bad businessman.

The Court: I think it is misleading.

Mr. Rome: Sir, I would like to press that, "equality of opportunity" is at the heart of this case. The Crest Theatre was asking for equality of opportunity in getting access to first run pictures.

The Court: If you stop there I do not think that is a fair statement, because there are other circumstances which may justify their not being given that opportunity. It is like [fol. 1438] saying that the Declaration of Independence, "all men are declared to be free and equal," but what do you mean by that? They really aren't. They start with an opportunity, but there may be conditions which interfere with their becoming free and equal. And you have that situation possibly here. I am not blaming you gentlemen but it is very difficult for the Court, I find, sitting with the jury, to make it clear to counsel that while the Court does not disagree with a lot of requested instructions, it does not feel that it is necessary to give them everything you request, because they are disjoined from explanation and understanding alone, they are probably not sufficient. So, I think the best way is for me to point out wherein I am going to grant substantially what you ask, and wherein I do not feel I can grant any one or more of the instructions, and then leave it to you to seize the opportunity after I have made the charge, to object to it and ask me further to clarify it. Otherwise, we would have to go into a committee on style in order to get any agreement on prayers.

Now, No. 14. That is an example of what I said. I think that that, while it is all right, but when it sticks out like a sore thumb, it is not further explained. "The public interest is as much concerned with the improper control of the inter-

state market for the single city of Baltimore as for the country as a whole."

[fol. 1439] The public interest here is not involved except as the Supreme Court has said A must not treat B in a way which is contrary to public interest. This reads more like a criminal docket.

No. 15. I think No. 15, as a bald statement, is all right.

Mr. Raftery: I just want to note there, Your Honor, next to 15: "See 18 of defendants." We think this is a rather trite statement on Hornbook law, and we believe what we have got is a little bit better.

The Court: If that percentage is right in 16, why, I suppose—

Mr. Raftery: There was no evidence—

The Court: Was there any evidence on that?

Mr. Rome: Yes, sir, there is evidence in the case saying that these defendants operate and distribute by far the largest number of most desirable, most sought after feature motion pictures.

The Court: Is it more than 90 per cent?

Mr. Rome: I confess, sir, the figure of 90 per cent does not appear.

The Court: Operates and distributes by far the majority. That is what you mean?

Mr. Rome: Yes.

The Court: 17. I do not think it should be granted.

[fol. 1440] Now, I say that for the reason that the second sentence is more an argument on behalf of Plaintiff. "No such operator can reasonably be expected to survive in the competitive field of the motion picture industry unless he is given a fair opportunity to license pictures distributed by these defendants."

It stops there because "a fair opportunity" has to be defined so carefully by other things that the Court has to say that I do not think any such instruction like that ought to be granted by itself.

Then similarly 18, "Under all the evidence in this case you may conclude that the Plaintiff's Crest Theatre has all of the necessary qualifications, including size and equipment."

Mr. Rome, I think you sort of misconceive the function

of a judge in his instructions to the jury. If I were going to give them a running narrative of this whole case, which I do not intend to do, and this would tie in some further discussion of the picture, and so forth, that may be all right, but it is up to the jury to determine whether it is entitled, by reason of all these things, to have first run pictures.

Mr. Rome: That is right. I agree with that, sir. What that request was designed to do was to point out to them their function with regard to that fact and that they could conclude—

[fol. 1441] The Court: I will state it a little differently.

19, I think, is all right.

Mr. Raftery: Before you leave 18, Your Honor, the word "location" is one of the most controversial facts in the case. We have submitted some requests based on it. I think practically every witness of importance called by the Defendents told what a terrible location the Plaintiff's theatre had, and that was one of the primary reasons for not licensing pictures out there.

The Court: Well, I think 19 is all right. There is not only one factor, but it is the important factor.

Mr. Raftery: That is the point. These reasons, to minimize the importance of location, while not important as expressed in the evidence, is mentioned because of its terrible location and its short drawing.

The Court: I think, as I pointed out, running all through these, it is perhaps an unconscious turn on the part of Mr. Rome to write another brief for Plaintiff. I find that in the Defendants' instructions, too.

Mr. Raftery: Is it not when in Rome, do as the Romans do?

The Court: No. 20. There is a definite instruction. I cannot give that. "Under all the evidence in this case you must conclude that the Plaintiff has made sufficient efforts to obtain first-run feature motion pictures from the De-

[fol. 1442] fendants."

I cannot tell them that the Plaintiff has. Maybe they will think the Plaintiff has. That is a factual question.

21. I think 21 is substantially all right. I shall not use exactly the same words.

I think 22 is all right. However, instead of saying that it would also be proper, it is your duty to consider. Well, "You are also to consider."

Mr. Raftery: Well, of course, that thing is so contrary to the facts. I think Your Honor has got a question of fact to submit in this morning's exhibit which Your Honor contributed so much to, 63 per cent of the first run features shown downtown Baltimore were shown in independent theaters as against 37 in theaters owned by distributors. Now, we think a construction on that fact for the jury, instead of saying that these companies like Universal, Columbia and United Artists, who own no theaters anywhere, would be influenced—"to unlawfully favor the theater of Defendants in a situation such as Baltimore" when the evidence is over here on the board.

[fol. 1443] The Court: Well, I think I will say they are to consider the chart, giving something like 22, and then telling them to look at the chart.

Mr. Rome: The reason for these points, it is based on the evidence in the record, that these theatre-owning defendants deal with the non-owning defendants throughout the country, and consequently it is not only Baltimore to be considered, but the fact that these people seek and get advantage throughout the rest of the country. The mere fact that there are only two distributors owning theatres in the City of Baltimore is of no moment. For instance, in the other case, there was no evidence that a distributor owned a theatre in the area involved.

Mr. Raftery: The Milgram case is an interesting thing. Mr. Rome, in his statement, reiterates the Milgram case, but Mr. Rome and his firm represented these theatre folks up there, and was practically on the same side as the defendants; and here he is arguing that Milgram case is a strong case.

I say that "22" is wholly improper, and an instruction should be based on the evidence as it applies to Baltimore only. We are not interested in discriminations out in Pittsburgh, if there are any. It is Baltimore. Nor is there any evidence in this record on these discriminations as to any place, not even Baltimore, but what we think, and I agree [fol. 1444] with Your Honor a hundred per cent, it is im-

possible, when you take these little paragraphs, without having them in a narrative, like a charge usually is,—and I am only warning Your Honor that it is our contention, and I think we have proved it, that Baltimore is the only place where we have an issue; and the overwhelming weight of the evidence is that the independent theatres get just the same treatment as the others.

The Court: I think it is proper. It is in the case. A great many of these defendants, being nationwide in the distribution and production, I think something substantially equivalent to that, but not quite in that language, is proper.

I think "23" also is substantially all right.

I am hurrying through these, because it is getting very late. I assume you have read them over, as I have. I would not be doing this if I had not studied them carefully. Of course, I have forgotten a few of the items. I haven't made notes of all of the things.

I think No. 24—

Mr. Raftery: No. 23, there is no evidence at all here—in the last sentence on the top of the page—I have no quarrel with the first sentence.

Mr. Rome: It is a statement of the plaintiff's claim, sir.

[fol. 1445] The Court: I don't think that is improper. I do not say that I will put it that way, but it is a correct statement, I think, of one of the plaintiff's claims.

Mr. Raftery: The evidence that is in the record is all on the chart. The only first-run pictures, 75 per cent of the playing time at the Stanley was consumed by Warner pictures which, Your Honor, as I pointed out, we had a perfect right to do. The balance of the time was used up in 18 Paramount pictures, and there are only two other pictures played during that period. In other words, he has no complaint that we have favored the Stanley Theatre.

The Court: This claim may be entirely without any support in the evidence, but it is just a claim he makes, and that is what he has made. I don't think we have time to go into whether or not it is a sound claim, Mr. Raftery.

"24", I think, is a substantially correct statement. I won't give it all in that language. It relates to the alleged conspiracy.

Mr. Raftery: But what he is saying here is that there is

some evidence to the effect that Warner Bros. Circuit Management, and Stanley, and Loew's at the Century, had a substantially better opportunity to obtain product than the opportunity afforded the plaintiff. I do not just see that.—no evidence.

The Court: "25" is an attempted statement of the law. I [fol. 1446] do not think it is incorrect. Similarly, "26".

Mr. Raftery: I will tell you where it is wholly incorrect. No. 25 says, "a union or combination of an exhibitor with a distributor in a program which restrains or limits the competition that may be offered by the owner of a theatre equipped to compete on first-run may constitute a violation of the antitrust laws". Every contract a distributor makes with an exhibitor for the exhibition of a picture on any run restrains trade.

The Court: They say it may constitute a violation.

Mr. Raftery: Oh, well, there is no one who has ever held that the making of one contract between a supplier and a user—

The Court: It doesn't say "one contract".

Mr. Raftery: That is what he says here,—"a union or combination".

The Court: And he is not talking about one contract. He is using it in a general sense.

Mr. Raftery: And it further in no way protects Warner's absolute right to sell their own theatre.

Mr. Rouse: I want to address myself to that, because there is no absolute right on the part of Warner's to sell their own theatre. That came up once before, and I attempted to point out that, although there is language in the decree that must be read in the light of the earlier mandatory lan- [fol. 1447] guage, that these defendants are enjoined from selling clearance for theatres not in competition—we claim the Crest is not in competition, it is so far away, that it is capable of playing day and date. It is a question for the jury. They have no absolute right to put their own pictures into their own theatres; and, as a matter of fact, these defendants have testified that generally, as any rule, in Baltimore, Loew's pictures and Warner's pictures, at least Loew's pictures, are given to other theatres than to the Century Theatre.

The Court: As I understand, they have an absolute right only to put it in their own theatres—or, I will strike that out, and put it this way: A, if B has his own theatre in Baltimore, can put his own pictures only in his own theatres, if he keeps them there; but if he starts putting them out to C's theatre, and to D's, and to E's, then he has to be careful lest he is not also affording F's theatre the same treatment, if it can be shown that F is on a parity with C, D and E. That is the law.

Mr. Rome: I would agree with everything Your Honor said, except the very first portion, which says A can put his own pictures in his own theatre. That is all right, if A is enjoined from granting any clearance to any theatres not in substantial competition. If it is the Century Theatre, if it is not in substantial competition with the Crest, then [fol. 1448] Loew's has no absolute right.

The Court: You have to show me—I haven't read anything in a case which says, if I have a theatre, or motion picture theatre in Baltimore, and I have my own pictures in my own theatre, I just cannot take them there!

Mr. Rome: That is taken from the provision of the decree, itself.

The Court: That is all tied up with the other situations. They say you cannot do it, because it appears that you are not confining it just to them, or that you are in conspiracy. You are helping others who are not confined to just that. That is my understanding of the law. I do not find anything in any accredited case that says that a man—that would be just taking a man's property away from him.

Mr. Rome: I don't mean to pretend, Your Honor, that that would be the net effect of the thing, but that is one of the reasons why these defendants were required to give up their exhibition business and to separate it from production and distribution.

The Court: That was because they were all in concerted action. But in the case I have put, do you mean to say that if you have a theatre in Baltimore, or Buffalo, or anywhere else, and you have what you think are a lot of good pictures for your own theatre, that the Paramount case says you [fol. 1449] cannot play them except in your own theatre!

Mr. Rome: I respectfully submit, sir, that the Paramount case says it as to these defendants because it is a punishment put on them for their violation of the law.

The Court: But I am not going to give an instruction which does not make it clear that if the practice, if exercised, is devoid of any conspiracy to hurt the Crest Theatre, ... it is devoid of that, they could do that all they wanted. That is all this amounts to. I am not going to confuse the jury with a lot of refinements of the law that do not have any application.

What number are we to, now?

Mr. Raftery: No. 26, Your Honor. It only suggests that you may not—this wholly illustrates three phases of the antitrust laws; and, in our Instructions 3, 4, 13, and 14, if read in conjunction with this, you may be able to get something out of it.

The Court: No. 26, I think, will not be granted.

Mr. Rome: May I respectfully suggest that one of the things that has been amply borne out by the testimony in this case is that all the defendant-distributors have a policy applicable not only to Baltimore but anywhere throughout the country.

The Court: Well, Mr. Rome, I think all I can say is, as I read this as it stands, what you have given me as an instruc-
[fol. 1450] tion, it is incomplete and not sufficiently accurate, standing by itself; and that is why I have marked it as one I will not grant. The principle which I understand you are trying to bring out, I will try to develop in other language.

Mr. Rome: Thank you.

The Court: No. 28.

Mr. Raftery: That is something they have up in the 3rd Circuit. We object to that. There is no evidence here of any kind on that.

The Court: I think there is evidence. That question was asked of two or three witnesses. I am sure it was asked. They had knowledge. They must have had it.

Mr. Raftery: No, sir; as that denial.

Mr. Rome: I submit, and I can point out in the record, that these defendants testified they knew of the existence of

pictures for exhibition in the downtown houses.
the part of all the theatre-owning defendants to license their

The Court: I think it would be rather absurd if they did not. They would not be on the job if they did not.

Mr. Raftery: All of them testified about the preferred way of distributing pictures, to get first-run downtown, and that they knew, generally, everybody in the business preferred it. It is an economic simple axiom.

Mr. Rouse: You claim I was denied

[fol. 1451] Mr. Raftery: In the form you have put it here.

The Court: That is just a restatement of one of the issues. No. 29.

Mr. Raftery: No. 29, we object to that.

The Court: Yes; I will not grant it in that fashion. Nor will I grant No. 30.

Mr. Rouse: As to No. 30, the evidence is that all of the defendants did deny first-run, and they granted the first-subsequent-run, which resulted in the——

The Court: It is more than that. This reads as though that was the first and original and continuous manner in which they got around granting it, when the defendants' testimony is that they simply had never done it anywhere before, under like circumstances, and that they did not do it for the Crest, and they gave what they thought they were entitled to give in relation to all of the circumstances.

Now, my difficulty with a lot of these requested instructions is the manner in which they are phrased; and you will have to leave it to me. Of course, you do not have to accept all correct what I do; but if we didn't treat it this way, I would have to ask counsel to write my charge for me.

Now, the rules do require—and, I think properly——that the Court shall tell counsel what it intends to do in the way of instructions, and give them a reasonable opportunity [fol. 1452] to object; but we cannot have the objections so minute and meticulous that we will spend hours over it. When you have a right to bring these points up, if you are not satisfied with what I put in.

In other words, to add to what I have said, I probably will not give instructions on a number of what I call the minutiae of the case, and you have a right to object to that. I probably will still feel that it is unnecessary for me to

put them in, to tell the jury about them; but you have a right to enumerate them; and, if I won't put them in, to take exception. But that remains to be seen, after I have delivered my instructions. And what I said, therefore, applies to Nos. 31 and 32.

In No. 32 there is no substantial competition between the plaintiff Crest and the first-run. That is a basic question of fact in the case. No. 33, the mere fact that some competition may exist between the Crest Theatre and the downtown first-run theatres, and so forth, has no bearing on the real issue in this case, which is whether a general system of clearance, uniform in that it carried out, and so forth, is a lawful restraint upon commerce. You have evidently taken pieces of very good English language, of cases that may be very sound. But I just cannot put that into my instructions.

[fol. 1153] Well, I think No. 34 is sort of an essay, and I am not disposed to grant that.

Of course, No. 35: "The president of the plaintiff corporation who was the active operating executive managing the Crest Theatre * * *"——I do not instruct a jury as to the financial responsibility, or anything else, about the plaintiff or defendant. It is for the jury to consider all of those factors. That is all I tell them about the plaintiff's or defendants' position.

I think No. 36 is substantially all right.

Mr. Raftery: The question we raise there is the use of the words, "to estimate the amount of damage."

The Court: I think they estimated from the evidence that has been presented. That is all they could do. I instruct them that they have to decide this case on the evidence. They can reject all of the figures here, as computed, provided there be some basis for their view, based on the evidence, and they can arrive at some other figure. I cannot tell them that they can take anything.

Mr. Raftery: What I had in mind, the worst case possible that has ever been decided was the Bigelow case, about as far a departure from what we used to think was the law, as anything; and the whole crux and substance of it was allowing the jury great latitude. But that said they had to have before them some reasonable [illegible]

[fol. 1454] could fix with some degree of certainty the amount of damages.

The Court: Well, they have figures here to a large extent diametrically opposed to one another. They may reject or accept either one.

Mr. Raftery: They are not allowed to estimate. They have to base a verdict on the evidence before them.

The Court: That is correct.

Now, then, No. 37.

Mr. Raftery: He gets in here a hypothetical measure. He says that the loss of gross revenues; but what he can recover against us is his net profits.

The Court: Net profits; yes.

Mr. Boone: No, sir. I respectfully submit that that is an exact accurate measure of damage which has been used in decided motion picture cases, the rule being that you can take the gross of the plaintiff's theatre and compare it with the gross of another theatre, or the gross that the plaintiff's theatre would have earned out for the wrongful acts of the defendant; and we have attempted to do that here, and we have included it in our calculations, taking off the additional amount of film rental they would have to have paid. And that was the measure of damage in the Bigelow case, which Mr. Raftery scorns, but it was decided by the Supreme Court, and is a leading case on measure of [fol. 1455] damages in motion-picture law, and was used in the Bondomaro case, and every case I know of.

Mr. Raftery: I am sorry to disagree with my friend. In the Bigelow case, they took the gross figure of one theatre and the gross figure of another, and took the gross and worked up the net from the gross. My friend in this case has not compared the gross of the Crest with anything. In his measure of damage, he takes one picture, and I won't argue it, that will be later——THE STRATTON STORY——and then seeks to build up by surrounding the speculative gross, or any name you want to call it; and there is only one picture, one play-off, and one theatre; so, when he talks about gross revenue, he is not using the proper measure for this jury.

[illegible] morrow. I would like to see it. I do not think [illegible]

any different rule for moving pictures than for any other kind of business.

Mr. Rome: I am not attempting to suggest that there is a different law, but the Bigelow case is a case that happened to deal with the motion picture industry, and there was used comparable earnings of a comparable theatre.

The Court: It stands to reason that A should not recover from B the gross revenue because it is actual loss that he sustained that he is entitled to recover, and if he [fol. 1456] got his gross revenue, he would not have had any expenses against that, so he would be recovering more than he would get if he had gotten his first run. That is the result of what you say.

Mr. Rome: No, sir. I would say this to Your Honor, that is not so, for this reason: what the plaintiff would be recovering would be the amount of additional money that he would have taken in at the box-office if he had access to first-run. There would be deducted from that the additional amount of film rental.

The Court: Deducted by whom?

Mr. Rome: Deducted in the calculation which we have already submitted.

The Court: Then it is not gross.

Mr. Rome: It is gross, in the sense that it is the additional amount of money taken in at the box-office. Perhaps "gross" is an inartistic word for it, but it is the additional amount of revenue that would be taken in at the box-office.

The Court: I think, Mr. Rome, you are wrong. You mean I should use the words "gross income", and I don't know of any case that says so.

Now, we come to No. 38.

Mr. Raftery: And that is another on the same line as the previous one, in which he wants Your Honor to in- [fol. 1457] struct the jury on some estimated or speculative manner of trying to get Mr. Myerberg some money.

The Court: I think I have already indicated how I will confine the language to the evidence of the case.

Mr. Raftery: Would it be helpful to Your Honor if in the morning I gave Your Honor the exact position of the Supreme Court in the Bigelow case? It was the last opinion written by Mr. Justice Stone.

The Court: Very well.

Now, on No. 39, I think I have already covered that. I will consolidate what I think is the proper rule in one short paragraph.

Now, No. 40.

Mr. Raftery: No. 40, if you read it literally, he is asking you to direct a verdict and tell the jury to go out and estimate the damage.

The Court: I think that is too broad.

Mr. Rome: Sir, I do not want to labor the point, in view of Your Honor's indicated ruling on the thing, but it has never been our intention to ask for such a point until the testimony in the case from these defendants developed in the manner it did; and it is because of the fact that every one of them has admitted to the existence of a national policy, and they knew of the policy over a number of years.

[fol. 1158] The Court: You are asking for a directed verdict now.

Mr. Rome: I think the testimony in this case can properly support it.

The Court: I cannot grant it.

Now, No. 41.

Mr. Raftery: And that is another statement——

The Court: That is not sufficiently extensive. I have already covered that. I have also covered No. 42.

Now, on No. 43, I would not grant that in that language, because, again, it is in effect——it is worded too much in favor of one side.

Now, No. 44.

Mr. Raftery: That is another directed verdict. You must reach a verdict for the plaintiff——

Mr. Berenholtz: If you find——

The Court: Well, I think, if Mr. Rome means that the plaintiff must receive the verdict, if the jury finds what is said in the first part of "44", plus the other factors which are necessary to find, and that it was done by a connected action——

Mr. Rome: That is included in the very last wording of No. 44.

Mr. Raftery: No. The joker in that is: "conscious

parallel action". That is a 3rd Circuit term not recognized [fol. 1459] generally in this Circuit. However, the main objection, if you look to the second line: "was fairly entitled"——under our system, that is not the antitrust law.

We submit, Your Honor, if you will look and make a note to look at our 12th, 13th and 14th instructions which we have prepared and set forth, we think that is the instruction the Court should give.

The Court: Very well.

Mr. Rome: Sir, Mr. Raftery keeps deriding the 3rd Circuit rule on the "conscious parallelism", but that language was based on the Milgram case, which was affirmed by the Circuit Court of Appeals for the 3rd Circuit; and again, the gentlemen sought certiorari from the Supreme Court, ruling that very point, and certiorari was denied.

Mr. Raftery: Judge Chesnut, in the Windsor and Walker cases, affirmed in this Circuit, are entirely different on that point.

Mr. Rome: On the contrary, there is no difference between Judge Chesnut's ruling and the ruling in the 3rd Circuit.

The Court: I think we can speed up here a little. I have read carefully, before the hearing today, Nos. 45, 46, 47, 48, 49 and 50, and I think all of them are, as stated, not appropriate to be granted. They may express something, some points which I think, if they had not been [fol. 1460] covered by other prays we have gone over, I think they are probably appropriate, and they are sort of double-talk on what we have been over, and I think it would be futile to take them up one-for-one.

Now, No. 51.

Mr. Raftery: That is equally bad. I know Your Honor is going to charge the jury as to the credibility of witnesses, and the weight to be given.

The Court: I think they suggested too much.

Mr. Raftery: They single it out. It is a sore thumb, and is contrary to the facts put in evidence.

The Court: No. 52, I think is likewise too isolated and limited.

Mr. Rome: Excuse my interruption, but may I go back one minute to No. 48. That, in our minds, has importance

by reason of the fact that it states something which has not been referred to elsewhere, and that is where the restraint of trade results, the fact that these defendants came along and denied that they intended a restraint of trade, and deny that they intended to enter into a conspiracy, is of no moment if, in fact, the restraint does result.

Mr. Raftery: That is not the law. The law is simply, if restraint results, as the result of a conspiracy, you may violate the Sherman Act.

[fol. 1461] The Court: I think it could be covered by telling the jury that they had to take into account the testimony on both sides.

Mr. Roome: Excuse me. I think it goes a little beyond that. As Your Honor has stated, if restraint does result, I think the jury is properly to be instructed that they may disregard the protestations of the defendants that they did not intend to conspire.

The Court: You think it is sort of like the case of crossing-accidents, where the testimony is the man said he did not see the train, and the weight of the testimony was that it was two yards away from him. I do not think that is this case. I think where there is a contradiction in the testimony, all the Court can do or say is, "Who do you believe is telling the truth?"

Mr. Roome: I was relying on the last sentence, which says the ordinary rule of law applies here,——"You may disregard such testimony, because persons must be held to have intended the necessary and direct consequence of their acts, and cannot be heard to say the contrary."

The Court: I am not sure that that is the situation here.

Now, I am down through No. 52. No. 53, the same reasons, I think, apply.

Nos. 54, 55. No. 56 is all right. It is a very broad [fol. 1462] statement.

Mr. Raftery: I think we might be able to cure the badness in it, if at the end of the subject it was inserted: "on some run". In other words, when a man owns a theatre, he has the right to expect some patrons.

The Court: I think it is rather broad.

Mr. Raftery: If you add the words, "on some run", it

does not mean he is entitled to first, second or tenth run, but he is entitled to get some pictures.

The Court: Yes. I think No. 57 is all right. Of course, again, it has to be taken in the light of the rest of the instructions about what is restraint of trade.

Mr. Raftery: The thing that is bad in that, is the fifth line, "an arbitrary system of clearances". What he is trying to say is whether it is created as part of a conspiracy.

The Court: Yes.

Mr. Raftery: That is the test. Someone may think it is arbitrary, and, if done separately and individually, it is not violative of any law.

The Court: No. 58.

Mr. Raftery: There is no monopoly issue in this case, Your Honor.

The Court: What do you mean, exactly, by that, Mr. Rowe?

[fol. 1463] Mr. Rowe: That has to do with the problem of the fact that these distributors produce and distribute by far the greatest number of desirable motion pictures, and we had anticipated the possibility that there might be some contention raised here that there were other companies which also had desirable pictures.

The Court: This point really is not at issue, is it?

Mr. Rowe: We will not press that point.

The Court: I think No. 59 cannot be granted, as written. ——"Where a number of motion picture distributors engage in a consistent course of conduct directed toward a common end, it may be presumed that they do so as a result of a tacit or explicit agreement or understanding between themselves". We have already been over that point. I have already said how I am going to cover that.

No. 60, I think, is probably substantially correct. "The fact that he could obtain motion pictures for exhibition on subsequent runs and so operate his theatre as a subsequent run motion picture theatre does not prevent the actions of the motion picture distributors and those with whom they combine and conspire from being in violation of the Sherman Act".

Mr. Raftery: That is a point. As written now, you cannot follow it.

[fol. 1464] The Court: No. 61, I think, should not be granted.

Mr. Rome: Sir, that has been one of the reasons given; for instance, Fox in this case, in its answer to interrogatories, said they would not give the Crest access to pictures, because they had a satisfactory customer.

Mr. Raftery: Downtown.

Mr. Rome: Downtown. And that has also been in evidence from some of the other defendants, and I think the jury should be instructed, Your Honor, that that policy of preferring customers has been used by these defendants in the past.

The Court: You can argue that, but I do not think I am going to give you that in the instructions.

Mr. Raftery: Windsor and Walbrook support Your Honor in that position. It is 4th Circuit law.

The Court: I think No. 62 is a correct statement of the law. I do not know that I have to give them that, in this case.

Mr. Raftery: That is contradicted in the Dipson case, and contradicted in the right of Loew's and Warner's to license their own pictures to their own theatres. He is trying to say it is a conspiracy, if Warner licenses its pictures to the Stanley Theatre.

The Court: You may have such a thing.

Mr. Raftery: I do think, under Section 5, which Mr. [fol. 1465] Boyd read to Your Honor, that decree gives Metro or Loew's the absolute right, without restriction, for a 3-year period to license their own pictures to their own theatres, irrespective of the decree. Warner's has the same right, under the next section; and what he is trying to do is overcome that by saying you can have a combination and conspiracy, if that is all you have. In other words, they lead up to the——

The Court: I do not think it is sufficiently descriptive. Similarly, I do not think No. 63 can be granted, because that, Mr. Rome, again, does not take into account the right of the

other side with respect to first-run, and whether this is competition or not. It is not adequate, and it is too incomplete.

Mr. Rowe: All this point has to do with is getting access to product. Here, the defendants, as we see it, and it is our contention, have denied access to product.

The Court: I cannot grant it in that shape.

Now, nor 64, nor 65, nor 66. I think No. 67 is substantially all right.

Mr. Raftery: We have stated that accurately in our No. 40. If you put a note on No. 40, the second sentence, for instance, if he stopped right after the first sentence, there would not be any quarrel with him. He is asking you to tell the jury they are to divide by 3, and a lot of other [fol. 1466] stuff. Then he has this stuff about the will of Congress concerning the punishment of those who are guilty of violating the law.

Mr. Rowe: I appreciate Mr. Raftery's tremolo, but I suggest that that is exactly the net effect of this next there. There is no dispute about the fact that the trebling of damages is punishment.

The Court: I think it is substantially correct.

Now, I do not want to shorten the discussion unduly on the rest of these, but my study of them yesterday indicates to me, for substantially the same reasons which I have already announced in rejecting so many of the requested prayers, and for these same reasons, all of these from No. 68 on to the end, appear to me either to be superfluous or incomplete, or have already been covered.

Mr. Rowe: Sir, I would ask Your Honor to consider those points which have to do with the Paramount case. I have attempted to frame points here that would embody to the best of my poor ability, sir, the kind of thing I contemplate is meant by the Emkay case, with regard to instructing the jury as to the net effect of the Paramount case, and we have attempted in this relatively small number of points to set forth the fact that these defendants have had certain things adjudicated against them in the Paramount case.

The Court: I am going to try to cover that very much [fol. 1467] more briefly, when you introduce the figures, and in a brief statement in my charge, and if you do not think that covers it, you can object.

Well, now, gentlemen, I have given you at least a general idea of what I propose to do with the plaintiff's requested charge. I think I can go all over the defendants', and then I will have covered all of these, and have given you an opportunity to raise any additional points you may want to develop.

As to the defendants' instructions, I think No. 1 is all right.

No. 2 appears to be correct.

Also, No. 3.

Mr. Bonne: As to No. 3, we contend that there should be included within that some statement with regard to the burden being placed on these defendants as to the inference that may be drawn from uniformity of action, and also——

The Court: Well, I think, to the extent that I have granted that in your prayers, I will do it.

Mr. Bonne: There would also come within this, one other point, and that is this problem which Your Honor has suggested we might bring to your attention again tomorrow, the burden being placed upon them when the legality of the clearance is raised.

[fol. 1468] The Court: Very well. If you want to submit that tomorrow.

No. 4, I think, is all right.

Mr. Bonne: The same remark may be made with equal application there.

The Court: Yes.

No. 5 is all right. No. 6. No. 7. No. 8.

Mr. Bonne: May I say, with regard to these points concerning the burden of proof, my earlier statements would also be applicable; but I should like also to say that there is this other point, that Mr. Raftery has attempted to brush aside: that is the problem of conscious parallelism. If I may take one moment to read two sentences from the Milgram case. There, the Court said the burden of the prosecution, and proving of conspiracy in antitrust cases, has been lightened and simplified to a marked degree by the decision in the U.S. Interstate Circuit case, followed by the American Tobacco case.

The Court: That is nothing more than saying the jury

might find, by reason of this similarity or uniformity of action, that they did conspire.

I think on Defendants' Exhibit No. 9——

Mr. Rome: I object to No. 9.

The Court: I do not think No. 9 is necessary. I think it is confusing to a jury. I know there is a line of language [fol. 1469] like that in some of the cases, but in this case the whole point is, there is nothing mystical about this antitrust form of litigation. It is, what is the weight of the credible evidence? So, when you get into this philosophical line, I just do not think a jury understands it, and I am not disposed to grant it.

Similarly, on No. 10, I do not think that is correct, because it is incomplete. It is not sufficient if the defendants acted in accord with what they believed to be the best business interests. It is something more than that involved. It is all right as far as it goes, but I have the same objection to that as I have to a number of Mr. Rome's requests.

Similarly, I do not think No. 11 can be granted. I say "similarly", because it speaks of the sound business reasons. I think that, in effect, if I charge the jury, and if I said the defendants thought they might lose money if they did it, that in itself is not enough, it involves relationship with outside noncompetitors, and also with others with whom they have had contract, and to whom they have accorded privileges that have not been accorded to the plaintiff. So, it is totally insufficient as far as it goes.

Mr. Raftery: I am wondering, on that, if it is not good law that, if acting independently and separately, the [fol. 1470] defendant makes up his mind, for good and sufficient business reasons, to license a first-run downtown rather than the Crest Theatre, that it cannot be inferred from that act, alone, that others do the same; that unless it was done as a part of a conspiracy.——In other words, if you link-in conspiracy to this situation——

The Court: That is not what it says. It says, "then you cannot infer a conspiracy".

Mr. Raftery: That is right.

The Court: I don't think the language is sufficiently accurate.

I think No. 12 is all right. I do not know that it is necessary.

Mr. Borne: As to No. 12, they say all they have to do is to come along and deny it, and that is enough. Actually, it is a question for the jury.

The Court: Well, I agree with you. In other words, you are determining what weight to give to it, if it is denied.

No. 13, I think the same.

Mr. Borne: There is some evidence.

The Court: Yes; I think it is too far a statement.

Mr. Raftery: That is practically out of Windsor and Walbrook.

The Court: That is a finding by Judge Chesnut. I do [fol. 1471] not think he would have put it that way to a jury. He says that it is not——it is his finding, just a finding of fact by him; but I cannot instruct the jury that way.

I think No. 14 is substantially all right.

Mr. Borne: There is one point with regard to No. 14, and that is the definition which is pointed out again in the Milgram case, where these defendants have a common problem, and meet it locally, in the same way. That is one thing. But where they erect or acquiesce in a national policy, which is applicable throughout the country, that is different; and the very fact that here, where they have an admitted policy engaged in by these defendants everywhere throughout the country, that makes it a different situation.

The Court: Gentlemen, you will have to leave it to me to see whether I put that properly.

I think the same applies to No. 15.

Mr. Boyd: You mean the same applies to the language that is generally stated there?

The Court: Yes.

Mr. Borne: There, again, you say you would not be justified in finding that.

The Court: I do not think it ought to be granted in the way it is put there.

No. 16, I think that is wrong, because it may be a fact that each distributor granted 21-day clearance over [fol. 1472] the next succeeding run may be evidence of a conspiracy.

Mr. Raftery: That issue is out of the case. The witness Myerberg conceded 21-days clearance was proper. The only thing he said, he was the one that should get the 21 days, rather than a downtown theatre.

The Court: Even so, I do not think he meant to attempt to admit that it was not evidence of a joint arrangement.

Mr. Raftery: He said he wanted it from every distributor.

Mr. Rome: With regard to No. 17, there is nothing at all in the evidence showing any limitations on prints having any effect in Baltimore.

Mr. Raftery: There is a ton of evidence all through the record as to prints, eight prints in the Washington allotment, and we got the cost of the prints through Mr. Rodgers.

Mr. Rome: I grant all that, but not a single statement saying that would create any problem with regard to the Crest Theatre, under the first-run.

The Court: I do not think that it ought to be granted, because it requires too much additional explanation.

No. 18, on the question of copyright.

Mr. Raftery: That is the Westway-Fox case.

Mr. Rome: The second paragraph of No. 18 would [fol. 1473] give these defendants carte blanche to do anything they wanted. It has the jury being instructed that it is lawful for them to fix the place and time of exhibition, and such other terms as may be desirable.

The Court: Down at the bottom, it says, "The plaintiff must show that these license agreements were made pursuant to a conspiracy in which each of the distributors gave up its right to license . . . ." I do not think that is necessary, and it is not worded very clearly. You must remember, we are dealing with laymen on the jury, and not with lawyers arguing the legal points.

Mr. Rome: As to No. 19, there has never been any contention on the part of the plaintiff advocating a system of simultaneous releasing for all theatres, and Your Honor has indicated, with regard to the plaintiff's instructions, that you would instruct the members of the jury that clearance may become unreasonable if it is extended too far.

The Court: I think the first two sentences of that are all right.

Mr. Raftery: The last sentence, as a practical matter, the motion picture industry could not operate if a system of simultaneous releases.——"and this fact underlies the doctrine that clearances and runs are not illegal per se".—— that is right out of United States v. Paramount, and adopted by Judge Yankwich in Fanchon & Marco, and also [fol. 1474] in the Westway case.

The Court: I don't know that this Court ought to deal with the question of whether the industry could not operate on a system of simultaneous releases. It does not. It has not found it practical, and it is not illegal not to do it, provided these other conditions are met which the Supreme Court laid down. I will give that substantially, but not in the same words.

I think No. 20 is all right.

Mr. Rome: I object to No. 20, because it says, "each distributor acting individually has the right to grant or to withhold clearance between theatres which are in substantial competition."

That is contrary to what we believe to be the law. They cannot withhold it.

Mr. Raftery: It is just the opposite. We cannot grant clearance between theatres that are not in substantial competition.

Mr. Rome: This has application to the situation where the Crest, on a subsequent run, was compelled to play day and date with the Uptown and the other theatres with which it was in substantial competition, and they have no right to do that; but they compelled the Crest to play pictures in competition day and date.

The Court: Do you want to say anything more?

[fol. 1475] Mr. Raftery: Well, no; I think this is clearly covered, and we are entitled to it.

The Court: I think you are.

No. 21, I think is correct.

Mr. Rome: There, they are limiting the element of proof to direct proof only, and excluding circumstantial evidence. They say, "If you find from the evidence that there is no direct proof". We do not have to have direct proof.

The Court: I think they are right, there.

Mr. Raftery: I am willing to cross out the word "direct".

and add the word "sufficient," and make it read "If there is no sufficient proof".

The Court: I think you are right on that.

I think No. 22 is correct. Part of it is quoted right out of——

Mr. Rome: The only point I would ask Your Honor to include with regard to that, is that the plaintiff is entitled to opportunity, along with other exhibitors, and that the defendants cannot conspire to exclude the plaintiff from access to the proper run.

The Court: Well, I will try to cover that.

I think No. 23 is not properly grantable, as it stands.

Mr. Raftery: That is the wording in the Westway case, [fol. 1476] and was affirmed as late as 1951, in the Famous-Marco case, that any distributor acting independently and not in concert or conspiracy, has the right to select its own customer. The Windsor case said it again, in the 9th Circuit, and it is a fundamental thing in ordinary American business. Everybody who deals in exclusive articles, like an automobile dealer, or Johnson & Murphy shoes, may select a given customer in an area, and that is it. And we say, we can, if we act separately and independently, we can elect to sell our pictures to any theatre, providing we do not combine or conspire with anybody.

The Court: I think the same applies to No. 24. "If you find from the evidence that each of the defendants in licensing its pictures for first-run exhibition in Baltimore endeavored to select that customer which would ultimately yield it the greatest revenue, having due regard for its past business relations with the customer, the skill and character of management of the theatre, the size, location, equipment and drawing power of the theatre, then you should find for the defendants on the first cause of action."

Mr. Raftery: I think that is absolutely correct.

Mr. Rome: There should be added with regard to No. 23, that, morally, there is no duty on the defendants——excuse me, there is a duty on the defendants to treat all exhibitors fairly, and that the exhibitors have a right to equality of [fol. 1477] opportunity in access to run.

The Court: That will be covered by other parts of the charge.

Mr. Raftery: I think your equal opportunity would cover. You said you would take care of that in the proper way.

The Court: No. 25.

Mr. Rome: No. 25 leaves out entirely the whole problem of day and date first-run.

The Court: Yes. I do not think that is sufficiently conclusive.

Mr. Raftery: Unless, of course, Your Honor, in this case, the first run was exclusive, and then you go through a series of jumps here and there, and hither and yon, and finally, at the end of the case, he says he will take either exclusive or day and date with downtown. That was Mr. Myerberg's last stand. So, we have directed it solely to the question of exclusive, in view of that last position, that he would take either.

Mr. Rome: That is just a completely erroneous statement of the position of the plaintiff.

The Court: Now, No. 26 takes up a point we have argued at some length today, and I think that is a correct statement of the law. I think 26-A——

Mr. Rome: Sir, with regard to No. 26, it is an undisputed [fol. 1478] fact in this case that Loew's Theatre played product other than their own product. For instance, Paramount product played in there, in one of its houses, which is the Warner's Stanley Theatre; and as to the Century Theatre, as well as the Parkway, it means, in fact, that the exhibitor was not exhibiting only the product of its parent company; it was exhibiting the product of one of the other companies.

The Court: This instruction does not say they do. I do not think it is right, as far as it goes. You can argue that additional point.

Mr. Rome: Do I understand correctly, sir, that your view is that even as to the day and date proposition, it is inapplicable to Warner's and Loew's, if the Crest Theatre was not in substantial competition?

The Court: What was that, again?

Mr. Rome: I was attempting to inquire whether Your Honor was taking the position that even though the Crest Theatre was not in substantial competition with Loew's

Century Theatre, or Warner's Stanley Theatre, that, nevertheless, it would not have the right to have access to product day and date with those two companies?

The Court: I think that is the law; yes.

Now, as to 26-A, of course, I do not think it is necessary for this Court to go into these individual situations to the [fol. 1479] extent that these prayers ask for. You can assume this, gentlemen; I am not disposed to single out any of these particular instances. I think it is just going to be confusing to the jury. For instance, this last sentence: "Therefore, I instruct you that plaintiff has failed to sustain its burden of proof as to its claim that clearance was granted to theatres not in substantial competition with the Crest Theatre."

That is an incorrect verdict.

Mr. Boyd: There is no dispute as to the facts contained in that.

The Court: I am not going to grant it that way.

Mr. Raftery: The next one is important. It is a corollary of No. 26. It is Warner's Stanley Theatre, which is one of the main theatres under attack by Mr. Boone, and merely restates the provisions of the decree.

The Court: Yes; I think you are right there. If No. 26 is granted, I think that should be granted. Is that your point, Mr. Raftery?

Mr. Raftery: That is it.

The Court: No. 28 is, I think, a correct statement. I don't know that I will point that out separately. It is a matter for argument.

Similarly, with the nature of business of Paramount and RKO, similarly, United Artists. I think those are cor- [fol. 1480] rect statements of their business.

No. 31. I do not think that can be granted because it is not complete. "There is no prejudice to the public interest in each of the defendants individually refusing to license its pictures for first-run exhibition at the Crest Theatre."

That, standing alone, might probably confuse the jury, because, using the words, "public interest" there, leaves out the defendants individually refusing, after they have entered into an agreement so to do. It is entirely insufficient.

Well, we have already covered No. 32, I think. It is just old wine in a new bottle, isn't it?

No. 33. I think that is a correct statement.

Mr. Rome: The only thing is that should be linked, in our opinion, with the fact that these defendants have been found, in the Paramount case, in order to dominate or control over the exhibition of motion pictures——

The Court: I will not grant that separately, but I think it is a correct statement as far as it goes.

Mr. Rome: As to No. 34, that ignores the duty placed upon these defendants, which has been testified to and admitted by them on the stand, to license theatre-by-theatre. Here, you have the competition. If the Court Theatre is in substantial competition with the theatres [fol. 1461] located in downtown Baltimore——

The Court: Also, why do you use 10 and 15 per cent?

Mr. Raftery: We have evidence in the record here, in excess of 15 per cent. All we are trying to do is show what constitutes competition. I would be willing to——

The Court: I think, what is substantial competition is a question of fact for the jury.

Mr. Rome: Exactly so.

The Court: I do not think I should give any figures at all.

Mr. Raftery: In other words, if you find there is sufficient competition——

The Court: Now, on No. 35, I think that brings in and emphasizes too much separately, the business of these defendants——

Mr. Rome: And it is also bad because it violates the injunctive provision requiring them to play theatre-by-theatre.

Mr. Raftery: That is not true at all. We have testimony from witness after witness that it would be physically impossible to service theatres on runs in the manner requested by Mr. Myerberg. Day and date with downtown, unless you have common ownership, where you can control the end of the runs. It throws your runs and clearance, and everything, into chaos. The purpose of the instruction [fol. 1462] is, if they find as a fact that it is impossible to service these runs, then the defendant-distributors were

justified in refusing to license pictures in the manner suggested. I think that is substantially the thought.

Mr. Reese: I agree that theatre-by-theatre is not involved, as I stated; but it must be in there, because, as you have repeatedly stated, these distributors would not be licensing theatre-by-theatre. They would be taking into consideration two theatres.

Mr. Raftery: That is exactly what Myerberg asked for. Myerberg asks for a day and date run, and this witness Norris put it at two theatres, to get a day and date run, up to the point he tried to do it. Norris said Myerberg said "yes", and all of the theatres downtown said "no"; and in addition, Mr. Myerberg testified on that point, that he talked to Schamberger and others, and the sum and substance of it was "no". That is the point of our putting it in there.

Mr. Reese: The refusal of the downtown theatre owners to enter into competition, as they view it, has nothing to do with the proposition as stated in No. 35.

The Court: No. 36, I think, is a correct statement of the law.

Mr. Reese: I do not believe there is any evidence that the plaintiff was not acting in good faith.

[fol. 1483] The Court: There was some attempt to prove that point.

Mr. Raftery: I think there was plenty.

The Court: Through the defendants' evidence. Whether the jury believes it or not, is not for the Court to say.

Mr. Raftery: No. 37 is not short.

The Court: That is always what I tell the jury. It is up to them to determine whether they think a witness has lied or not; or, if he has not deliberately perpetrated a falsehood, whether he is mistaken.

I do not think No. 38 is correct.

Mr. Raftery: I think No. 38 is a good instruction as to the plaintiff, and any witness for the defendants.

The Court: I think you need to deal with that. It is sort of like—— it states you may disregard any portion of the testimony. We have already told them that they can do that, if they do not believe a man. I think it is surplusage.

Now, I think Nos. 39 and 40 are correct statements of the [illegible] I believe Mr. Rome did tell me what I left out. You gave two additional instructions, didn't you?

Mr. Rome: Yes; they are largely directed to what has been referred to as the second cause of action, having to [fol. 1484] do with the playing at the Crest Theatre on a first-subsequent-run availability.

The Court: No. 82, I think, is a correct statement of what you claim.

Mr. Raftery: It is entirely in conflict with the evidence.

The Court: It may be, but it is just a statement of what is claimed. Now, I think all of these that follow are not grantable. It No. 83, "I charge you that the distributor-defendants are under a duty to license their pictures picture-by-picture, theatre-by-theatre, without discrimination, in favor of affiliated circuit theatres." Mr. Rome, that is the same objection. It is not complete in itself.

Mr. Rome: No. 83 is based on the language in the decrees entered against these defendants.

The Court: It may be, but you have to take the facts in this case into consideration. Now, in this jump over to No. 91, the mere fact that Loew's Incorporated owned the Parkway Theatre, in no way entitles that theatre to preferred playing position for their complete subsequent-run theatres in Baltimore—it may be entitled—it may be given that right in view of other facts which you do not speak about.

Mr. Raftery: No. 93 is the old bugaboo, putting the [fol. 1485] burden of proof on us.

The Court: You what to submit some case, do you, on the burden of proof?

Mr. Rome: Yes; the language in the Supreme Court, in the Paramount case, at page 148. It is in 334 U.S., at page 148.

The Court: All right, do you have it?

Mr. Rome: It is stated there on page 147 as follows:

"Objection is made to a further provision of this part of the decree stating that 'Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to

sustain the legality thereof." We think that provision was justified. Clearances have been used along with price fixing to suppress competition with the theatres of the exhibitor-defendants and with other favored exhibitors. The District Court could therefore have eliminated clearances completely for a substantial period of time, even though, as it thought, they were not illegal per se. For equity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid—in order to rid the trade or commerce of all taint of the conspiracy. United States v. Bausch & Lomb Co., 321 U.S. 707, 724. The Court certainly then could take the lesser step of making [fol. 1486] them prima facie invalid. But we do not rest on that alone. As we have said, the only justification for clearances in the setting of this case is in terms of the special needs of the licensee for the competitive advantages they afford. To place on the distributor the burden of showing their reasonableness is to place it on the one party in the best position to evaluate their competitive effects. Those who have shown such a marked proclivity for unlawful conduct are in no position to complain that they carry the burden of showing that their future clearances come within the law.

Mr. Raftery: That is an entirely different proposition that what we are talking about. In every equity cause brought by the Attorney General against an industry, if they think certain things have been done that they wish to correct, they impose penalties. Now, the penalty they impose because of fixing uniform clearances and admission prices, just as the Court said, gives the monopoly.

The Court: You mean, after the decree?

Mr. Raftery: Yes; they say, after the decree, "Little man, you are being spanked, and we are going to spank you so that if there ever comes a contempt proceeding, and we go into court on contempt, the burden will be on you."

The Court: Why is that? You are talking about an [fol. 1487] alleged violation of a decree, and here we are talking about the burden before the jury in the first instance.

Mr. Rogge: The language in the decree, itself, on which

we rely, says: "Whenever any clearance condition is attacked under the provisions of this judgment, the burden shall be upon——" ——

The Court: Yes; but we haven't established any wrongdoing at all. In the situation we are talking about, it is a question of what the jury shall be told about what the burden of proof is in the first instance. I do not think that is applicable to this case. I think the burden here is on the plaintiff to establish the unreasonableness, and to establish the basic proposition of restraint of trade and the unlawfulness of it.

Mr. Rome: I submit to you that this language in the decree, and this language of the Supreme Court, actually effects a change in the burden of proof on that sole point.

The Court: I think that the Court here means, as in this situation, as this Court frequently does in trade-mark cases, if it is found that a person has violated some other person's trade-mark, and it signs a decree saying what it shall do, and a little while thereafter, the party who is enjoined is brought in as a violator, and it is found he has violated the decree, then the burden is upon him to [fol. 1486] show that he has not. That is the situation here.

Mr. Rome: May I suggest that our view is borne out by one of the last witnesses in the record, Mr. Adams, the branch manager——

The Court: Now——

Mr. Rome: I bring it up to show that the view taken by these distributors——

The Court: Even if they did, if they were unduly unkind to themselves, I have to correct that for their benefit.

Mr. Raftery: Your Honor, in every case that has been tried, the burden has rested on the plaintiff.

The Court: Now, 94, 95 and 96, it seems to me it is more of an essay, again. I don't use that in any critical sense, but you have already covered that, and I would not be disposed to cover that again.

Mr. Rome: No. 95 seems to do with the question of allocation of portion of damages. The defendants have attempted in depositions, they have indicated they want to find out how much was allocated to each defendant.

The Court: I think I have given you a pretty clear indication of how I am going to define the measure of damages, and I do not think I need put it the other way.

Now, No. 97.

Mr. Raftery: That is just the same point raised——

The Court: I have covered that. That goes to the treat-
[fol. 1489] ment of another form of the Paramount case, and I do not propose to elaborate now what I have said I would grant.

Mr. Raftery: Could I indulge myself, Your Honor, with one request: Tomorrow morning, when we come here, I have or will have prepared a requested charge on the subject of clearance and prints, which more or less arises over Your Honor letting in this Paramount stuff; and I assure you it will be brief, on one page,—but it is in such a messy state now.

The Court: All right, you may submit that tomorrow; and I think we will reconvene at 11 o'clock, and give you a half-hour before the jury comes. I have another matter at 10 o'clock. I do not think it ought to take very long. We may have to delay this case a little bit. I think I said 11:30, before the jury, didn't I?

Mr. Raftery: Yes; 11:15 will be all right with us.

The Court: All right, 11:15.

Mr. Raftery: And we take judicial notice, on this side of the table, that Your Honor had a full day.

The Court: I think we all did.

Mr. Rosenholtz: There is uniformity of feeling about that.

Mr. Watkins: Therefore, conspiracy.

(Whereupon, at 7:35 o'clock p.m., an adjournment was taken until Tuesday, May 27, 1952, at 11:15 o'clock a.m.)

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[fols. 1490-1492] Reporters' Certificate to foregoing transcript omitted in printing.

# TRANSCRIPT OF PROCEEDINGS OF MAY 27, 1952.
## 12:45 P.M.

[fol. 1483] Argument on admissibility of Paramount decrees and requested instructions to the jury.

The Court: Mr. Rowe, have you the copies of the decrees or the parts of the decrees you want to introduce?

Mr. Rowe: Yes, sir; I have.

The Court: Mr. Raftery, I believe you said you had a statement you wanted to submit?

Mr. Raftery: Yes. One request or prayer on the subject of clearance, which I do not think has been covered by either party.

The Court: Have you a copy of this, Mr. Rowe?

Mr. Rowe: Yes; it has just been handed to me.

The Court: Do you propose this just as a basis for framing the clearance principle?

Mr. Raftery: That is all.

The Court: Do you see any objection to this, Mr. Rowe?

Mr. Rowe: I submit, sir, that this is a very argumentative way of putting it, and it takes them out of the text on the problem of clearance, the rest of the clearance, the problem of substantial competition, the fact that there have been cities where subsequent-run theatres have been able to get access to first-run pictures, by their own statement, without causing disaster in the motion picture industry, and so on. As I see it, Sir, this is a very argumentative way of putting it.

[fol. 1484] Mr. Raftery: The first two paragraphs are copied verbatim from U. S. v. Paramount. That is the way the Court defined the clearance and considered clearance.

The Court: I think it serves this purpose: it does not attempt to go into the factual situation in this case, but the Court feels it ought to give something into this. This is not exactly explaining the position of the defendants in the industry with respect to the clearance principle. There is nothing in here which either rejects or supports the present clearance situation that you are trying to change. For instance, take the last paragraph—it is just a statement which is undisputed, about the cost of prints, and its relation to the price for exhibiting them. And on the second para-

graph. It starts off: "Without regard to period or of clearance licensing pictures for exhibition on successive dates is essential."

I do not mind saying that if I grant it, similar instructions will be considered by the defendant companies with regard to [redacted] motion pictures.

Mr. Rome: Sir, I agree certainly, that something must be told the jury with regard to the matter of clearance, and the defendants have already submitted to Your Honor at least three other requests for instructions relating to the matter of clearance which Your Honor has indicated that you would in all likelihood cover in at least language which [fol. 1496] approaches their own. Those are requests 19, 20 and 21, sir.

The Court: Your requests?

Mr. Rome: No; the requests of defendants, sir.

The Court: I am disposed to grant this more in the nature of an introductory statement on the question of clearance.

Have you examined these copies that Mr. Rome proposes to put in? Do you want to say anything about it?

Mr. Raftery: Just to renew our objection to their entry, that is all. Mr. Rome, I think, has copied accurately each of the provisions we discussed, including the provision that Mr. Boyd discussed yesterday. The only thing that we do question is that burden-of-proof provision in No. 4, that last sentence.

The Court: "Whenever any clearance provision is attacked as not legal under the provisions of this judgment that the burden of proof shall be upon the distributor."

That was the point we made yesterday.

Mr. Boyd: That was the point I made.

The Court: I construe that, what was said about it, as not controlling the original determination of a case of this kind. I am not saying you cannot put this in as part of the decree. It says: "Attacked as not legal under the provisions of this judgment." In other words, there has been a judgment. [fol. 1497] They are talking about a judgment here. There has not been any judgment yet in this case. My construction, as I explained yesterday, is in accordance with the defendants' interpretation, that if you have a judgment and if any

clearance provision in it is attacked, then the burden is upon the distributor to sustain the legality.

Mr. Rome: Sir, it is our view that that language has to do with the entire problem of clearance covered by letter denominated paragraphs 2, 3 and 4.

Although it is perfectly true we do not have a judgment in the present case, we are discussing the conditions imposed upon the Great Theatre, such as what was found in the Paramount case, and I take it counsel for the defendants would not be raising any contention of the Government, itself, were in here raising the question of the legality of the clearance; and, as we construe Section 5, sir, we think there is no doubt of the fact the plaintiff in the present case is entitled to the same measure of estopped, as would be the Government, itself, entitled to it, were the Government the plaintiff here; and, secondly, it is as though the Government itself were raising the question here and, therefore, the burden is upon them just as much as it would be if the Government itself were raising this.

Mr. Raftery: Your Honor, yesterday, as I pointed out, [fol. 1497] the Government could attack, in a contempt proceeding, any alleged violation of the decree, and in the event of such an attack, and in the event of such an attack only, the party charged with violating the existing judgment, as Your Honor put it, would have to sustain the burden of the legality of any clearance.

The Court: I think that is correct. This decree is talking about what happens when he is attacked and where the burden lies when he is attacked. We have not any decree in this case as yet.

Mr. Rome: I respectfully submit, sir, the position advanced by Mr. Raftery would be very drastically limiting the utility of Section 5, which is shown to give a plaintiff in an antitrust case the benefit of everything the Government itself would have if the Government were pursuing it. Of course, the Government could go ahead and bring contempt proceedings, if it chose. But that is only one method of the enforcement of the antitrust laws. The other method is obviously through private litigation, through private plaintiffs, which we are attempting to pursue here.

The Court: There is no decision in this case yet. There has not been any verdict in this case as to any clearance provision.

Mr. Rowe: But, sir, if I may sum up our position in a [fol. 1438] nutshell, our position is we are attacking the method of clearance under the provisions of the Paramount judgment.

The Court: You can put that in as prima facie evidence, put the decree in as prima facie evidence, that is all. You have to make out a case.

Mr. Rowe: Unquestionably, we must make out our case, but in line with the fact we are attacking our clearance under the judgment of the Paramount case, which requires them to do certain things, and refrain from doing other things, we submit this problem of burden of proof is equally imposed upon them.

Mr. Rafferty: The last sentence here is a statement of law. Section 3 of the Clayton Act gives them the right to offer the decree, he gets an estoppel, and the estoppel goes only to facts. Now, to say the Government has a remedy, is stating something that has nothing to do with the estoppel that is created. The estoppel is on the facts, and the facts only.

Now, what Mr. Rowe says, "This is in addition to giving me an estoppel on the facts; Section 3 of the Clayton Act also gives me every remedy the Government would have been entitled to as a matter of law under the decree."

Now, Your Honor can take care of the situation in either one of two ways: the first way would be to deny Mr. Rowe the right to read that provision. The second way would be [fol. 1439] to permit him to read the provision and then tell the jury that that provision, as a matter of law, Your Honor will take care of under the instructions on the burden of proof.

Now, that is the logical way to handle it, and the legal way to handle it, in our humble opinion.

The Court: I think so, Mr. Rowe. I passed on that yesterday, and I do not think it is necessary to have further argument. Of course, you have the right to take exception.

Mr. Rowe: I want to differ with Mr. Rafferty for the first time. I do not think that ought to be read to the jury. It

was so clearly prejudicial. Your Honor was correct when you said it was on them, the burden of proof to prove the case.

The Court: I think its meaning is clear. Otherwise, it seems to me, Mr. Boone, that you would easily defeat the prima facie evidence created by Section 5 of the Clayton Act. Of course, that is the trouble with trying to put in a decree from another case. Congress apparently did not have the lawyer's zeal they were getting into when they put this in here. I am unwilling to throw this in, in just any arbitrary fashion. If it is to be put in it should be put in an intelligent way. Just because you have the right to show a jury, as prima facie evidence, the prior conviction in a criminal [fol. 1901] case of defendants, where clearance and freight were involved, it seems to me absurd to say that therefore, that means where you have a situation which was not before the Court, that you cast the whole burden on the defendants of showing that the clearances in this particular case are valid. I think that is not what this means to say, and I think that where there is a variance between the literal language of the decree which is being put in as prima facie evidence, and the obvious sense of the whole proceedings, you have to take the sensible view.

Mr. Boone: Sir, I am not attempting to claim, as Mr. Raftery has inferred, that I am entitled to every remedy. What I claim is, under Section 5, I am entitled to the estoppel in the same manner that the Government would be entitled to it, except here it becomes only prima facie evidence in the plaintiff's case. It is practically true that the estoppel goes to matters of fact, but the decrees, with regard to the terms of the decree, sir, they equally deal with problems of fact, and it is on that question of fact the decree says there is a burden. These people are not precluded from saying that this is a perfectly reasonable and legal clearance. There is no conclusiveness with regard to that fact. They are perfectly free to go ahead and say anything they want to, and to refute the inference or to carry their burden of proof, which the decree says is imposed upon [fol. 1902] them.

The Court: I apparently have not made the point clear. I do not know whether I can make it any clearer, but it

seems to me what you are trying to get here is something you are not entitled to. All you are entitled to is what I understand to be the bald principles that are announced in these decrees.

Now, to say that you can go further, and impose upon the defendants the burden of showing that this local situation does not come within these decrees, I think would be changing the whole principle of burden of proof in the case; and that is what you are asking for.

Mr. Bunne: No, sir; I am not attempting to suggest that, for a moment, that they cannot say that this problem of clearance does not have some special significance here, locally. All I am attempting to say is, that is their burden, that is what the decree specifically says. I am not attempting to foreclose them from the slightest thing with regard to bringing in all of their defenses and all of their explanations of it. They can say this is perfectly reasonable, and so on. It is simply a problem of the burden between the plaintiff and defendants, and that flows from the fact that if the Government itself were here, there is no dispute that these defendants would have the burden; and, under the stripped section, of Section 5, we are entitled to that same [fol. 1502] advantage only to the extent of a prima facie conclusion with regard to it.

The Court: Of course, I do not think it really makes a great deal of difference, if the defendants are going to put their case in.

Mr. Boyd: No, sir; but it makes a great deal of difference to have the jury instructed that we have the burden to prove something, when it is not our burden. The burden is on the plaintiff to prove his case, and the only thing this is, is following a case where the Government charged something against the same defendants. That is what that language means, and nothing else; and I think that would be highly prejudicial for them to read it to the jury; that the burden is on the defendants in this case, when it is not. Mr. Bunne says it is not that, but it is.

The Court: I do not think it would be prejudicial if I told the jury what I think that means. I am going to do that, Mr. Bunne, and I am going to do it in a way I have just described. You can except to that.

Mr. Rome: I want to say one more word and then I am through with it. I recognize that we have the burden of establishing conspiracy, and so on.

The Court: Of establishing what?

Mr. Rome: Conspiracy, the burden of our case. So, all this says is related to the problem of clearance. The burden [fol. 1503] is as to that small segment, and as to that small segment of the case, the burden shifts to them. That is all.

I would like to address myself briefly to one other point, which came out yesterday, and which Your Honor said you intended to instruct the jury upon in a certain way. That is in regard to the right claimed by Loew's Incorporated and Warner Bros. to license their pictures to their own theatres, regardless of anything else; and may I say, sir, that although in line with the discussion of yesterday, I have included in the portions of the decree which have been summarized there, the provision stating the fact that there is nothing contained in the decree that limits them from putting their own pictures into their own theatres. We urge upon you that that be read in light of the requirements of law, that there be a right to put their own pictures in their own theatres, so long as they do not violate the law, which means, also, that where a theatre is not in substantial competition, they have no right to impose a clearance in favor of their own theatres, where their own pictures may be playing.

That is borne out, Sir, by two cases that come readily to mind. In the Goldman case, which came up in Philadelphia, Warner's had a theatre there, and a decree was ultimately entered by the Court, providing that the successful plaintiff [fol. 1504] was to have access to Warner products, the same as anybody else; and that also came up in the Chicago case, where once again Warner had theatres, and Fox had theatres, but the fact that these defendants wanted to put their own product into their own theatres did not preclude some other equally-equipped exhibitor from having access to their product on some equal basis.

The Court: There were other questions involved in that. I shall not instruct the jury, because I do not think it is the law that A cannot have its own pictures shown where it wants, in its own theatres, regardless of anybody else. If

that is the only question that is involved. I know of no law to the contrary. If I built a theatre, or you built a theatre, and have your own pictures, I don't know any law that says that you cannot put them in your own theatre, and do it exclusively.

Now, I have been shown no case which says that; and it just does not make sense to me to say that the law is otherwise, any more than if a man makes a bicycle or automobile, and he cannot sell that product in his own store if he wants to, but if he proposes to give some kind of clearance or priority, or whatever you want to call it, on these bicycles, to A, B and C, and then X can come along and complain, that is the law; but I am not going to make any statement which would confuse the jury on a perfectly [fol. 1305] simple proposition.

The trouble with this Clayton Act, if I may say so, with all due respect, is about what the Supreme Court has said in a lot of its opinions, and what other Judges have said in their opinions, that it confuses the issue by bringing in a lot of subtle language which does not make sense when applied to a concrete situation.

Now, I am trying to do my best to make this clear to a lay jury, and it is hard enough, at best; but when we go into refinements that I do not think are involved in this case, the jury is going to be befuddled, and it is as unfair to your client as it is to the other side to befuddle the jury; and I think the best way to resolve this might be that if you don't like what I instruct the jury, you have the right to except to it. I probably am not going to include a good many points in my instructions that you ask instructions on, and you will have to leave it to my discretion, and to your right to object when that is done, if it is done.

Mr. Rome: Very well, thank you, sir.

The Court: You can have the jury brought in. I do not propose to make but a very brief statement now, Mr. Rome, to the jury, explaining why this additional evidence is put in.

Mr. Rome: Very well, sir.

[fol. 1306] Mr. Watkins: I understand, then, that your ruling is that you will admit those portions of the decrees which have been tendered, and I want to note our objec-

tion, for all the grounds that have been given to Your Honor in previous argument.

The Court: Very well.

Mr. Boyd: That applies to us.

The Court: Very well.

Mr. Watkins: For all the defendants.

The Court: Very well.

(The jury thereupon returned to the courtroom and resumed seats in the jury box.)

The Court: Members of the Jury, we will now continue this case, and in a few moments the arguments will begin; but counsel for plaintiff has asked to be permitted to introduce, as part of the evidence, decrees in an equity antitrust proceeding brought by the United States against [illegible] defendants, and the Court has ruled that under the Clayton Act the plaintiff has the right to present to you those decrees, or the parts of them that it desires to introduce, because under that Act, in a situation of this kind, the Clayton Act provides that those decrees may be introduced as prima facie evidence.

I will not at this time give you any further explanation of why these decrees are being introduced or allowed to be [fol. 1002] introduced, except to explain to you that they arise as the result of [illegible] litigation brought under the Restraint of Trade Statutes by the Government against these various defendants, and that the decrees do require these defendants to refrain from agreeing with each other, or with any exhibitors or distributors, to maintain a system of clearances, the term "clearances" as used meaning a period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres; and also they were restrained from granting any clearance between theatres not in substantial competition, and also they were restrained from licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre-by-theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres, or others.

Now, as I have just explained, these decrees, or parts

of them, which the plaintiff wishes to introduce, and is permitted to introduce, are to be taken as prima facie evidence in this case of what has been done and prohibited to have been done by these defendants, but we have here, as the issues before you, which will be fully explained to you in the course of instruction, that you must still, of course, pass upon and find whether there has been any concerted action, [fol. 1508] any conspiracy, to prevent this plaintiff from having what he is entitled to have by way of proper appearance.

I am just giving you a very broad statement now, in order that you may understand the reason for allowing these decrees to be put in as prima facie evidence in the case. The Court will give you, no doubt, in connection with or as part of its instruction on the law of this case, a further explanation of the weight and effect to be given to these decrees as part of the evidence in the case.

Now, with that introduction, you may read them.

Mr. Watkins: Your Honor, may I first object to the form in which Your Honor has stated the purposes and effect:

My more fundamental objection, which is made with the greatest reluctance and respect, is that I do not feel that Your Honor has applied the limitations and requirements in the Enoch case, in that I do not think that Your Honor has pointed out to the jury that these decrees spoke as of 1945.

The Court: I did not, but I am going into that later, and instruct them.

Mr. Watkins: I was going to anticipate that.

Further, that Your Honor has not explained to the jury the scope and effect of the former judgment, nor its applicability to Baltimore as such.

[fol. 1509] The Court: I expressly said I would go into that later.

Mr. Boone: With permission of the Court, I offer in evidence, as Plaintiff's Exhibit 97, Members of the Jury, summaries of pertinent portions of the decrees which have been entered against these various defendants; and, in order not to unduly prolong it, I will attempt to read one as typical of them all, members of the jury.

For instance, the final decree as to RKO, dated November 6, 1946, reads as follows:

"A. The defendants, Radio-Keith Orpheum Corporation and RKO Radio Pictures, Inc., their officers, agents, servants and employees are each hereby enjoined:

* * * * * * *

"2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term 'clearances' as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

"3. From granting any clearance between theatres not in substantial competition.

"4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiv- [fol. 1510] ing the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to establish the legality thereof."

There is also included in the decrees, as to the five defendants which owned theatres, RKO, Warner's, Loew's, Paramount, and Fox, provisions similar in language to the following:

"A. Nothing contained in this decree shall be construed to limit in any way whatsoever, the right of RKO Radio Pictures, Inc., during the period required for the completion of the reorganization of the RKO defendants, which shall in any event occur within one year of the entry of this judgment, to license or in any way to provide for the exhibition of any or all of the motion pictures which it may distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which Radio-Keith-Orpheum Corporation has or may acquire pursuant to the terms of this decree a proprietary interest of nine-five percent or more either directly or through subsidiaries.

"B. From and after the effective date of the reorganization of the RKO defendants, the provisions of the preceding

paragraph shall terminate and be of no effect, and from and [fol. 1511] after such date all licenses of motion pictures distributed by The New Picture Company or RKO Radio Pictures, Inc. for exhibition in any theatre, regardless of its owner or operator, shall be in all respect subject to the terms of this decree."

I offer these all clipped together in one.

The Court: How many are you offering? You left out one paragraph which you said you wanted to introduce. I do not think you read it. I do not know whether you want it in or not.

Mr. Rowe: Excuse me, there is one other paragraph. I appreciate your calling it to my attention.

Mr. Raftery: Which one is that?

Mr. Rowe: This appears, Members of the Jury, in the decrees as to all defendants with the exception of RKO. This enjoins all of the other defendants:

"From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken therefor by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others."

Mr. Boyd: Is that all you intend to read?

Mr. Rowe: Yes.

Mr. Raftery: You haven't read the different portion that appears in the decrees of Loew's, Warner's, and Fox. [fol. 1512] on the right to license to their own theatres.

Mr. Rowe: I read Mr. Raftery's similar language.

Mr. Boyd: It is not similar. Without waiving any of our exceptions, if Mr. Rowe doesn't want to read it, we would like to read it.

Mr. Rowe: I will be glad to read it.

Mr. Boyd: It is materially different.

Mr. Rowe: This appears in the decree as to Loew's, Warner's, and Fox:

"Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for the completion of the plan of reorganization

provided for in Section IV, to license or in any way to provide for the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or through subsidiaries."

(Portions of decrees in case in United States District Court for Southern District of New York, U.S. vs. Paramount Pictures, et al., Equity No. 87-273, were marked Plaintiff's Exhibit No. 47.)

The Court: That concludes the testimony?

[fol. 1513] Mr. Rowe: Yes, sir.

Mr. Wallace: Nothing further from the defendants.

The Court: Very well, we will start the argument, unless you would rather suspend for lunch right now, and begin right after lunch.

Mr. Rowe: If I may request it, I would much prefer to go through my summation to the jury without the interruption.

The Court: Very well, we will recess now until 2 o'clock, members of the jury.

(Whereupon, at 12:45 o'clock p.m., a recess was taken until 2 o'clock p.m.)

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[fol. 1514] AFTERNOON SESSION

(Met, pursuant to the taking of the recess, at 2 o'clock p.m.)

The Court: Counsel and Members of the Jury, we will now proceed with argument in this case until 3:30, at which time we will take a recess until tomorrow.

Very well, Mr. Rowe, you may proceed.

Mr. Rowe: Thank you, sir.

ARGUMENT ON BEHALF OF THE PLAINTIFF

Mr. Rowe: Members of the Jury, I should like at the outset to thank you most kindly indeed, on behalf of the plaintiff, for the attention and the consideration that you have

shown throughout this case. It has been a long one, I know, and it has been a great help to know that you have been following the facts which we have attempted to develop before you with interest and with close attention. Actually, as you know, it goes without saying, this is a case of great importance to the plaintiff. It involves the matter of the life and death, economically, of the plaintiff corporation. But, even more than that, I think it must have been made perfectly clear to you by now, that this is a matter which involves the economic life and death of other persons similarly situated throughout the country and, consequently, this is a matter of considerable importance, although I think in [fol. 1515] its final analysis, the essential facts are relatively simple.

What are the facts? Back in 1947 and 1948, Mr. Myerberg and his brothers came upon a business site at Reisterstown Road and Rogers Avenue, in the City of Baltimore, which seemed to them to be a very fine commercial location. They made studies of the area. They were perfectly familiar, as everyone indeed is, with the fact that cities in the United States, particularly large cities, are growing out, they are moving out in all directions. They are no longer concentrated in a relatively small downtown area and, therefore, the plaintiff in this case made the kind of decision which business people all over this country, members of the jury, make every day of the week—"This seems to us to be a fine location for a theatre; let's go ahead and put one up; let's go into business."

Remember, Mr. Myerberg, himself, had had a number of years' experience in the motion picture industry, and he was thoroughly familiar with it; he had worked, as a matter of fact, with some of the companies that are, themselves, defendants here. But, being a businessman with some judgment and experience, he did not rush into this thing. He made the analysis that has been testified to here, but beyond that, in January of 1948, he went to Washington and saw the representatives of the distributors, went, as Mr. Glenn Norris of Fox told you, with an elaborate set [fol. 1516] of plans and drawings, so he could show these distributors exactly what he was trying to do at that location at Reisterstown Road and Rogers Avenue. And, mu-

formly, all those distributors said, "We cannot do anything about that now; come back when you have a theatre". And secondly, not being deterred by anything they said to him at that time, they went ahead with the construction of the Crest Theatre; and in October of 1948, when the theatre was under roof, once again Mr. Myerberg went back to Washington, was able to tell the distributor representatives at that time: "Here, the plans which I originally had with me, we carried out."

Mr. Norris said, when he was called out of that conference of Mr. Myerberg, he had a conversation in which Mr. Myerberg had showed him what progress had been made, and Mr. Myerberg said: "Oh, the fine plans for the fine theatre have been made a reality, they have been carried on."

And on those occasions, in October, 1948, every distributor was approached for first-run pictures, for access to first-run pictures. Uniformly, uniformly, members of the jury, every one of the distributors turned that request down, with the significant addition in the turndown of the request, they said to Mr. Myerberg, "Write us a letter and [fol. 1017] we will get in touch with New York," because it remains the fact none of these gentlemen representing these companies in Washington had anything to do with the ultimate making of policy for any of those companies.

It is very understandable, here is a very important plan coming up with a theatre costing more than $4,000,000, seeking first-run. That is obviously the kind of thing to be taken up with the New York offices, and they all said, "We will have to take it up with New York."

Now, there are two exceptions to that: Mr. Smeltzer, of Warner's, said: "We have your own theatre here and we put Warner product in our own theatre." And Mr. Adams, of Loew's, said Loew's had its own theatre, the Century Theatre, and "we put Loew's product in that theatre;" that "we cannot put it in the Crest."

Members of the Jury, it was still the understanding that the matter was to be taken up with New York, because that was where the ultimate responsibility lay. But, uniformly, the answer came back: "There shall be no right on the part of the Crest Theatre to have access to first-run pictures."

There has been considerable discussion on the part of the defendants' witnesses as to whether a request was made for an exclusive first-run picture or a day and date first-run picture.

Actually, we submit to you, members of the jury, that [fol. 1518] that is really a smokescreen on the part of the defendants, because there can be no doubt that, before the Crest Theatre was opened, it was brought home to every one of these distributors that what the Crest Theatre was seeking was access to first-run pictures, and it was Mr. Myerberg's view that because the Crest Theatre was located 5½ miles away from the nearest downtown house, it was necessarily far enough away as not to be in substantial competition with the downtown theatres and, hence, it was eligible to play first-run product on a day and date basis.

When he was told, however, that the Crest Theatre was in substantial competition with downtown, and consequently it could not play, in the view of the distributors, on a day and date basis, he was perfectly willing to meet them on that score and say, "Very well, then, if I am in substantial competition with downtown, at least give me the opportunity to compete, let me have the right to have access to first-run pictures on an exclusive basis, if that is what you think this situation requires." But, uniformly, these distributors turned down not only the request for an exclusive first-run, but the request for a day and date first-run. They were absolutely adamant on it. And you will recall, I am sure, the numerous efforts made on behalf of the plaintiff, and the trips to Washington. Some defendant witnesses [fol. 1519] have testified to some of these things coming out of the blue, to use Mr. Raftery's expression, and unsolicited, and, in your own judgment, it is obvious that a new distributor in the field cannot do anything else to bring home to these exhibitors that he has a new theatre, and wants these pictures.

In order to show and demonstrate his good faith, to show the potentialities they had out here in the Crest Theatre, a fine, first-run outlet, that was offered to them, in addition to everyone else they had in Baltimore, the plaintiff kept requests for pictures, and accompanied those requests

with an offer or certified check by way of guarantee for film rental in the event any one of the distributors would permit the Crest Theatre to have access to pictures first-run.

Now, those efforts, ladies and gentlemen, were actually in writing. There can be no dispute about that. They are in the record; and, despite the fact that Mr. Lichtman attempted to say that he never knew about these offers, his own co-ordinate, Mr. Smith, wrote letters, which are in the record before you, in which he dismisses the offers of certified checks by way of film rental.

So that, in the final analysis, when the theatre was constructed and opened in September, there was no first-run. Uniformly, the Crest Theatre has been denied access to [fol. 1520] first-run. Uniformly, these defendants came along and said, "We will permit you to play on the first-subsequent-run availability, 21 days after downtown." There was no exception to that. Every one of them took the same view.

Now, the plaintiff had to get his theatre opened, in order to get it into operation, in order to minimize the losses that arose from having that large building, with its considerable overhead, remaining closed; and so, reluctantly, under protest—and there is no dispute about that, because, again, the letters are perfectly clear on it—under protest, the Crest Theatre opened on this first-subsequent run availability, and played pictures on that availability, under protest.

Now, we claim, members of the jury, that uniform action on the part of these distributors was as the result of a conspiracy, a joint action, a common understanding and agreement on the part of all of them to deny access to first-run pictures, not only to the Crest Theatre but to any theatre located outside of the downtown area. That conspiracy stems from this common understanding between them.

Now, I am sure you will understand that in this modern day and age, with the refinements of business practice, it is hardly to be supposed that we would be in a position [fol. 1521] to come before you and present you with direct evidence showing that the representatives of these compa-

also got together and sat around a table, and reached that conclusion. Things do not happen that way, in modern society. And, consequently, there is no requirement on the part of the plaintiff here to show you that kind of direct evidence, that kind of direct testimony. The law recognizes that difficulty, and says we may establish our case, if we can, by virtue of circumstantial evidence, the kind of evidence that would lead you, in your own good judgment, to conclude that the uniform acts on the part of these defendants necessarily were the result of a knowing participation, and going along with the other fellow, knowing that each one of the other defendants was following along the same course of conduct; and, on the basis of that, I ask you to conclude and to find that there was this conspiracy known to each one of these defendants, the purpose being that no theatre outside of the downtown area in any city of this country—it so happened that it hit the plaintiff here—shall have access to first-run pictures.

Now, since we claim that there was a conspiracy, I think you would also recognize that it is not to be supposed that any of these defendants' representatives would come in here and admit that they were in a conspiracy,—of course not. Every one of them, as was to be expected, denied it. [fol. 1522] But the point we make with regard to that is, if those denials do not square with the facts, then you are perfectly justified in disregarding those denials as not being true, not being fair statements of the reasons and the motives that led the defendants to do what they did.

The conspirators, as we claim, these defendants, would also come along and mask their uniform conduct with a lot of high-sounding business reasons, things that would ordinarily impress members of the jury and members of the public generally as being sound reasons why a theatre located as is the Crest Theatre, shall not have access to first-run pictures.

One of the kinds of reasons they advanced was very interesting and very important. Yet, they said the location of the Crest Theatre was bad. They said that they wanted a theatre in an area having a shopping center. They were interested in matinee patronage, which would not be available, in the area of the Crest. They said the plaintiff could not pay enough to return to the distributor companies an

adequate revenue by way of film rental if these fine pictures they were going to license were shown in the Crest Theatre. It was said by these defendants that the subsequent-run revenue from the City of Baltimore, that flows into the coffers of these defendants, would be ours. The people operating subsequent-run theatres would not license [fol. 1023] pictures from these defendants if the Crest Theatre were to have access to first-run. They said that, "Downtown is the place where we get the exploitation, the advertising." And they said, also, "We have satisfactory customers downtown." And they said, finally, "We have just never done it and will not do it for you. There is no reason that there should be any variance in our uniform policy."

Now, let us examine those reasons, members of the jury, and I think you will readily conclude with me that those statements were not the reasons that dictated the motives on the part of these defendants. They came about in order to try to put up a attack to try to hide the real motives and purpose on the part of these defendants; and let me say that is not literally true. They talk about location. Here is a theatre, and there has been no dispute, members of the jury, regardless of what happened, there has been no dispute, here is a theatre located in the hub of a population of 125,000 people, as of today, approximately 100,000 as of the time it was built. There was no dispute as to those figures, members of the jury; and, surprisingly enough, it has been testified by these defendants themselves, that a population of 100,000 is amply sufficient to support a first-run theatre.

Moreover, as you, yourselves, know from your own experience, cities are moving out, as I have said, so that the business enterprises which at one time were concentrated in the downtown areas of cities, are moving out; banks are moving out; stores are moving out,—all kinds of business enterprises are moving out to the outlying areas today, because the people running these enterprises want to make it more convenient for the public, want to bring their products to be sold to the public, rather than placing obstacles in front of the public, rather than going downtown, where there are all sorts of problems.

traffic, parking, and it is difficult for persons in the areas of the Crest Theatre, or in the Northwood area, to struggle downtown and have to pay additional money for parking; and then, on top of that, go into the theatre and pay first-run admission prices down there.

So, we claim that, actually, this location argument is not a substantial argument, not the substantial argument that these defendants would have you believe. But there is more to be said about that, in a moment.

They talk about shopping, the necessity of a theatre being in a shopping zone. Now, actually, that is ridiculous, because it has been demonstrated by these witnesses from the stand, there is no dispute about it in the industry, that the best day of the week is Sunday, and that is the day that practically every shop is closed, so there cannot be any magic in this idea of being in an area where shopping [fol. 1020] is centered. That simply cannot be. And curiously enough, members of the jury, there is another element which serves to say this. These defendants, themselves, testified that the worst week in the movie industry was the last week just before Christmas. That is the time the shops are swarming with people, and you have difficulty getting through the streets downtown, and that is the time when the theatres do the least business of the year. So, how can it be that the shopper's has any real value bearing on this problem?

They talk about matinee patronage, but they disprove it, because the greatest phenomenon in the motion picture industry in the last several years, and one that is particularly well-known to you, I am sure, is the development of the drive-in theatre. There have been more drive-in theatres built in this country in the last several years than any other kind of theatre, and those theatres, the drive-in theatres, by their own statements, only operate at night; there is no matinee patronage. So, how can it be there is a necessity for matinee patronage? It simply does not bear it out, members of the jury.

They say this theatre, the Crest, could not pay enough. Now, what a dilemma that is! Let's see how they could that. The Crest Theatre made substantial offers. When they made substantial offers, these defendants said: "They

are extravagant; we will not accept them." If the offers [Vol. 1526] were not extravagant, the defendants took the stock, "We are not getting enough from the Crest Theatre; we think we can get more elsewhere." So that the Crest was in the position, in the eyes of the defendants, that it had to lose, whichever way it turned. They said, "You cannot pay enough," and turned down extravagant offers of film rental which were not extravagant at all, because I am sure you will remember, members of the jury, because some of the offers, or bids submitted on the part of the Crest Theatre, worked out almost to the dollar with the film rental these defendants actually received from the first-run showing of the particular showing downtown in the City of Baltimore.

And then, finally, they add the crowning paradox of all: Mr. Lichtman, the estimable gentleman, who was one of the founders of the motion picture industry, who helped to establish, by his own statement, the development of the policy of these companies, in court, on nearly the last day of this trial, finally said in front of you people, that he would accept the offer made a long time ago on behalf of the Crest Theatre—in this instance, an offer of $15,000, in the form of a certified check as film rental for the picture "Diplomatic Courier." Then Mr. Lichtman said that he had not known before that any offer was made on behalf of the Crest Theatre.

[Vol. 1527] Would he have accepted this offer, if he had known about it? He said he didn't know, but he goes on—he must have known about it, because the very letters that are in evidence put before you were addressed to Fox. Mr. Myerberg, when he wrote to Mr. Lichtman, enclosed, as his letter says, copies of the correspondence that had already taken place between himself and Fox, so that Mr. Lichtman was not stating it accurately when he said he had not known; but the mere fact that he accepted the $15,000 film rental for Diplomatic Courier, and made the statement that that was more money than he could get out of all runs in the City of Baltimore, shows that there simply is not any substance in the claim that the Crest Theatre was not able to pay enough by film rental, pay comparable prices to the downtown houses.

Then they talk about exploitation and advertising. How can they hope to persuade you people that there would not be the same kind of exploitation and advertising if the Crest Theatre were to have access to first-run, or in that area which lives from the downtown theatre?

As a matter of fact, if the two theatres were playing day and date, there would be double the amount of advertising, and it remains undisputed in this record that the theatres in the area of the Crest that were continuing to play on subsequent-run would actually benefit from [fol. 1029] the [illegible] advertising that would be carried on in the very area of the Crest Theatre.

Mr. Myerberg has testified that he is perfectly willing and intends, if the Crest Theatre gets access to first-run pictures, to increase the amount of money in his budget for advertising, and the operating expenses before you show that in the 12-months period that was involved there, he spent over $11,000 for advertising. That is a substantial amount of money.

These defendants come along and talk about elaborate exploitation campaigns; but remember, those were campaigns joined-in by the distributor with the downtown exhibitor. This was not the exhibitor spending an enormous amount on his own. He always has, on the big pictures—and it is true in the industry, on the big pictures—the distributor comes along and shares some equitable portion of the advertising expense. So there is no advantage to that, either.

Now, they say that they have satisfied customers downtown for over 20 years. Fox had a satisfied customer in Mr. Mechanic, and Mr. Rappaport was an estimable customer for RKO and Columbia. We agree with that, that they were splendid customers. I don't take any issue with them. But you recall, time and time again, from this witness-stand, the defendants themselves told you that but [fol. 1030] it is no answer to the claim on the part of a new theatre, or any theatre, to access of product, that the distributor has a satisfied customer. How else could our enterprise system ever continue, on that basis, if one person has already entered a field, and no one else can enter it? They have said it, themselves, from the witness-stand

that the mere fact that they have a satisfied customer in no way grants the right to anyone else. Why did they do it here?

They also admitted, if the Crest Theatre were downtown, it would have access to first-run product; but if that is so then it cannot be said that there is any substantial basis in the idea of the satisfied customer; so that all of those reasons are spurious reasons. They are designed to mask the real thing.

What is the real thing? I have said to you that we were in here intending to have to rely on circumstantial evidence. Frankly, we never thought we would be able to present before you direct evidence of the reason why the Crest Theatre was unable to get access to first-run pictures. And the extraordinary thing is that these defendants, themselves, have supplied the answer; and it is in the record out of their own mouths, before you; it is the most extraordinary situation I know of in the motion picture industry.

[Vol. 1538] What is the reason? The reason is that the so-called Big Five, Metro, Loew's, Fox, Warner, RKO and Paramount, themselves own theatres; and you will recall how, time after time, they admitted readily that the greater number of their theatres are first-run theatres, at least a very large number of their theatres are first-run theatres. Mr. Murphy, for Loew's, said almost every one of his theatres was a first-run theatre; and, moreover, those theatres are concentrated in the downtown areas of cities. That is the real reason, not only that these five companies, the so-called Big Five, and despite Mr. Meyers' attempted scoffing reference to Big Five, that he never heard of it, Mr. Zimmerman, from RKO, was perfectly familiar with the term. Mr. Lichtman was perfectly familiar with the term, and so were other defendant witnesses.

These five companies had their own theatres and played in those theatres all over the country, these hundreds of theatres all over the country, not only their product but the product of the other distributor-defendants in this case, and they admitted that there were very substantial sums of money that passed back and forth for the rental of the pictures, so that Fox got large sums of money from the

other distributors for the rental of its pictures in its theatres, and so on each one scratching the back of the other throughout the country; and that is why this policy has [fol. 1531] been developed.

Even as to the three companies, Universal, Columbia and United Artists, that do not own theatres, the same reason really holds true, because their best customers throughout the country are these hundreds of theatres owned by the other five defendants and, consequently, the real motive back of this whole conspiracy, back of this whole plan, is the fact that if some theatre outside of the downtown area were to come along and get access to the first-run pictures, these gentlemen feel they would be hurt in their pocketbooks, and the revenues flowing into each one would be cut down by virtue of that fact, and their thought, in their opinion, and, therefore, they are not going to let anybody come in, no matter how fine a theatre it is, no matter what it might offer for a first-run picture, no matter what it might be willing to pay in the city, so long as it is out of the downtown area—where their own theatres are, that person will not be permitted to enter into competition in this territory. And we say that is wrong. It is illegal, and violates the antitrust laws, because the antitrust laws of this country set up as a policy of the economy of this country that competition shall be the rule, not combination, not joint agreements to limit competition, to restrain trade, but every person who has a theatre equipped to compete shall be given access to them.

[fol. 1532] What about the theatre, itself, the suitability of the Crest Theatre? I think that is amply demonstrated in the record before you. You have seen the photographs of it. It is a splendid theatre, that cost over $600,000 to build, such a fine theatre that it received the award from an exhibitors' magazine, an award that Mr. Raftery would at that time theatres in Baltimore, in three successive years, won that award; and it is indicative of the kind of facilities that the people in Baltimore want, and this distribution system won't permit it to have.

The suitability of the Crest Theatre, itself, is amply demonstrated by the fact that these distributors recognize and admit that if it were downtown, unquestionably, it

would have access to first-run pictures. Moreover, what have some of the defendants, themselves, said about it?

Mr. Benson, of Paramount, the Washington branch manager of Paramount, wrote to the home office, that is, to Mr. O'Shea, that the home office knew the Uptown Theatre was one of the finest theatres in the country; and then he went on to say that the Crest Theatre is equally as beautiful and is even larger.

Every one of these defendants, so far as the theatre is concerned, said it was a splendid and fine theatre, and the only thing they found wrong about it is that its location, [fol. 1533] in their opinion, is off; and we have attempted to show you, members of the jury—and I think your own good judgment would demonstrate the fact—that that location is eminently satisfactory, and we have the ultimate proof of it, that playing on a first-subsequent-run availability 21 days after downtown, having to play day and date with three theatres in a mile or a mile-and-a-half away, the Crest Theatre was still able to produce a gross of $122,000 at first-subsequent-run admission prices. Those admission prices were 50 per cent lower than the first-run admission prices downtown. And, with all that, despite that the Crest Theatre comes within $3,000 of matching the gross of the Valencia Theatre downtown, and the Crest Theatre is a theatre, members of the jury, that Mr. Murphy said he would not have as a first-run house if it were given to him,—does that make sense? It simply cannot.

The gross of the Crest Theatre matches favorably the kind of grosses turned in by the downtown houses at their first-run admission prices, and we have attempted to put in evidence before you what would happen if you were to take the same number of people who attended the Crest Theatre on subsequent-run, and projected that into the first-run admission prices. The gross of the Crest Theatre would have been around $210,000, which shows that it is a wonderful outlet for these defendants, and why they would deny themselves the right to that outlet, to that [fol. 1534] revenue, if it was not for some conspiratorial purpose!

Mr. Smeltzer, himself, said, on first-run, the Crest Theatre might lose a few of its subsequent-run patrons, but he

also recognized, as did every other witness, that it would gain other patrons, so that by even Mr. Smeltzer's own reasoning, the gross would have increased, the Crest would have attracted the same number of patrons, and if it played to that same number of people at higher admission prices, the income received at the box-office would inevitably have been larger. And, finally, it comes from the defendants themselves, that that is generally recognized in the motion picture industry, that if you have a theatre, and play it on first-run, its gross will go up; if you have a neighborhood house, and move up its availability and give it opportunity to get pictures earlier in point of time, its gross will go up. So that the suitability of the Crest Theatre is unquestionably established, I submit to you; and then it comes back to the reasons why they wouldn't do it.

I have attempted to suggest to you that we have this by way of direct evidence, and we got it on the very first day when Mr. Raftery, speaking for all of these defendants, every last one of them, addressed you in his opening remarks. He gave the case away, in our opinion, because this is what he said on that day, about the efforts made [fol. 1535] by the Crest Theatre to get access to first-run pictures. He said:

"That is this thought of the new manner of distribution which he wants to put into Baltimore and thus change the entire manner and method that has been in existence in this state and most of the states of the United States for years and years."

That is Mr. Raftery speaking for every one of these defendants,—changing the entire manner and method, which means that they did have a manner and method, and that nobody shall be permitted to change that. This was not Mr. Myerberg's idea, about changing it in any way.

Mr. Lichtman came in here, and you heard about the speech that he made in different parts of the country, in Philadelphia, New York and Boston; and he recognized the fact that the population of cities is moving out, that the downtown areas are spreading out, that these defendants have made a mistake in keeping their pictures in the downtown areas, and weighing it with advertising and ex-

quotation; but Mr. Leibman, in the final analysis, would not go along with it, either, because this ironclad policy bound even him; so that Mr. Raftery started out then by telling you that, on the very first day of the case; but then Mr. Zimmerman came in for RKO, and Mr. Zimmerman said the same thing. He was asked, if the Crest Theatre were downtown, would they have the right to access? And he answered Yes.

[fol. 1536] "Q. It would have a right to have access to RKO pictures on first run in the City of Baltimore?

"A. It would be offered a competitive opportunity.

"Q. So, if I understand you and follow you, it is only by reason of the fact that it is located outside of the downtown area that it has been denied that right of access to RKO pictures?

"A. I think that is a fair statement of the reasons for our decision.

"Q. And that would be true as to any theatre located outside of the downtown area, no matter how fine it might be?

"A. That is correct. I mean it is true of any theatre in Baltimore. It is true of any theatre located outside of the downtown area.

"Q. Is not that true also with regard to other cities in the country?

"A. Yes, generally true with respect to other cities, depending on circumstances. * * *"

So that RKO had a policy, unquestionably, and moreover, RKO knew that the other companies had a policy.

Mr. Zimmerman was again testifying here, and he said this:

"I will say this: the effect of our position naturally is [fol. 1537] to confine our first-run exhibition of our pictures in the downtown area, where it belongs, is that what you mean.

"Q. You said you were not interested in the policies of the other companies and don't know anything about them?

"A. I don't say I don't know about them. I don't care

about them. All you have to do is look in the newspapers. You can see where Warner's play W. R. Z pictures.

"Q. And that is in downtown areas?

"A. Yes, sir; they are."

So that RKO had a policy, and RKO knew what the others were doing, according to Mr. Zimmerman's own statement.

That is true not only as to RKO. Mr. Smeltzer testified that Warner's did the same thing, members of the jury. He was asked:

"Q. Isn't it a fact to your knowledge that your company usually licenses its product for first-run exhibition in theatres located in the downtown areas of cities?

"A. Wherever it is possible, they make every effort to get it.

"Q. That is the general policy of the company?

"A. Yes.

[fol. 1538] "Q. I simply want to establish the fact that to your knowledge your company actually does it. That is the policy throughout the country, to your knowledge; isn't that a fact?

"A. Yes, I won't argue that point."

So that Warner's have a policy, and there is no question about it.

And then, finally, as far as Fox is concerned, we have the crystal-clear statement, the statement made by the gentleman who, according to his own admission here, is one of the men that instituted this policy throughout the country, which goes back many years. Mr. Lichtman said:

"The theory of motion picture exhibition, and I think I was one of the men that took part in establishing this, thought originally, was that we would have first-run in each of the key cities of the country, the so-called showcase theatres, where we would exhibit the pictures, where the greatest number of people in that community would have access to that theatre; and, secondly, it would act as an exploitation point.

"Q. Has there been any change in that policy over these years, Mr. Lichtman?

"A. Not basically; no.

"Q. So it remains a fact that the exhibition of pictures [fol. 1539] in first-run houses concentrated in the downtown areas of cities, particularly the larger sections, the larger cities of the country——

"A. That is correct."

If it ever needed demonstration that every one of these defendants knows the policy and carries out the policy, it is shown by the extraordinary interchange of personnel among all these distributing companies.

Members of the jury, within your own knowledge and experience, people who are in competition with one another, in competitive industries, do not switch personnel back and forth, but in this record there are at least 15 top executives whose experience has been not with one company only over the years, but they have switched back and forth.

Here is Mr. Lichtman, who, himself, has been with four companies, and was formerly president of United Artists, formerly assistant to the president of Metro-Goldwyn-Mayer, Loew's Incorporated. Now he is with Fox, and formerly he was with another company, too. Can there be any doubt about the fact that Mr. Lichtman, in his capacity as general sales manager for Fox, knows exactly what Metro is doing with regard to the licensing of its pictures? Can there be any doubt that he does not know what United Artists does with regard to the licensing of its pictures.

Here is another extraordinary example. Mr. O'Shea, now with Paramount, for years was with M-G-M, and he is followed by Mr. Rodgers, and then by a gentleman who [fol. 1540] was general sales manager for many years of Paramount, and he leaves Paramount and becomes the general sales manager of Metro.

Now, can there be any doubt about the fact that these people all the way along the line, in the top positions, know exactly what is being done?—because they, themselves, have been in half a dozen companies all along the line; and that is true, members of the jury, with Mr. Montaño, of RKO, formerly with Warner's; Andy Smith, formerly with Fox; and formerly with Warner's, and formerly with RKO; and the same as to Mr. Goldwyn, formerly with United Artists, and now associated with RKO.

Mr. Lichtman and Mr. Norris, the head of Fox, who, Fox has a Mr. Schenck, who heads production, and Metro has another, Mr. Schenck, who heads distribution. So there cannot be any doubt about these people knowing what is going on; and, consequently, they were not going to let any independent come in here; but they come along and state that in some instances they have done it, and they pointed out a few exceptions; but those exceptions served to convict them all the more, because in those rare instances, for the most part, these distributors have licensed first-run to a theatre, even a downtown theatre. They will do it for themselves. They will experiment in these other cities, but they won't experiment in Baltimore; and that [Vol. 1041] was pointed down by the letter in the record from Mr. Morgan, a lawyer for Paramount, who wrote to the branch manager in Kansas City and said, "We better give the independent in Wichita access to our product, because we have done it for Fox for a good many years, and it ought to be demonstrated that that happened in Washington, where Warner's got access, got access to first-run in a theatre outside of the downtown area, and then an independent came along, and the branch manager in Washington, wrote to New York and said, "This is very important; this could grow into a whopper." And, finally, on that score, gentlemen of the jury, the reason why these gentlemen have done it in some rare instances is made perfectly clear in the inter-office correspondence of Fox, where the lawyer for Fox writes to Mr. Lichtman, after Mr. Lichtman had asked for legal advice, and the lawyer says, "Speaking generally, I see no legal objection to the playing policy outlined therein. In fact, a picture establishing playing arrangement, made individually by a single distributor, usually appears to be excellent evidence of the absence of criminal conspiracy—" And these people refer to the setting up of a single situation, so as to avoid this pattern of uniformity, so we cannot say that it is the result of conspiracy; but there it is in black-and-white. Why did they do it? Simply to evade the plain fact.

[Vol. 1042] As early as yesterday morning, Mr. Rodgers came in here and testified from the witness-stand and told you that this policy of day and date with a theatre out of

the downtown area is, itself, a [illegible] possibility, because the example that he gave, members of the jury, was Boston, and he said yesterday that in Boston his back-bay theatre, a theatre out of the downtown area, actually outgrossed their downtown theatre.

How can it be, then, that there is any substance to the protestations of these defendants that this is not a successful policy? It has been practiced for years in Washington and elsewhere, and has been carried on, and no one has been able to come along and show you any subsequent-run theatres that have folded up and failed because of it, or that any first-run downtown theatre has folded up. I cannot produce full proof, although I tried to tell you the subsequent-run theatres would not fail, and the downtown theatres would not fail, but, actually, in the final analysis, they are guilty of this thing; and as for Warner's, they do not want any competition with the Stanley Theatre.

Had any downtown exhibitor really protested to these people, they could have put them on the stand; but Mr. Rappaport was not here, and Mr. Merhanie was not here. No subsequent-run exhibitor came in and stated that if the Crest Theatre gets first-run, they won't play the pictures [fol. 1048]. That is significant because, certainly, these people would have come in and said that from the witness-stand rather than trying to get it by way of hearsay through the defendants' witnesses, coming from their own offices.

As I have said, members of the jury, it is undisputed that if a theatre gets access to a first-run product, the grosses will go up. What we have done here is to point out to you a reasonable basis for you to reach the conclusion as to the increased income that the Crest Theatre would have had, had it had access to first-run.

It is a difficult thing to do, and the law recognizes that it is difficult to do that; and, therefore, the burden that is placed upon us is to present to you a reasonable approximation of that, and we have attempted to do that by showing you what happened with The Phantom Story, which played here at the Crest Theatre; and if they played at first-run admission prices, what the gross at Crest Theatre would have been.

It is not only The Phantom Story because Exhibit 46,

before you. Here every picture which was equally capable of demonstrating the same thing. Well that same thing is simply the increased admissions that the Crest would have taken in at its box-office if it had access to first-run. We have deducted the amount of film rental that would [fol. 1544] have had to be paid; but the operating expenses of the Crest Theatre would have remained approximately the same. There would have been an increase for advertising; but that is more than compensated for by the fact that the Crest Theatre actually had a loss of $12,000, and if you consider that $12,000 which we would be entitled to recover if we are successful in this case, that more than balances the operating expenses entirely. And I ask you, therefore, to conclude, members of the jury, that the activities on the part of these defendants stand as the result of a mass understanding, each one knowing what the other was going to do, or anticipating what the other was going to do, and each developing into the same course of action, with the result that trade is restrained in the City of Baltimore, as it would be restrained anywhere in the country; but why shouldn't it be that the people of Baltimore should have the convenience of going to see a picture first-run in an area near their homes, 5-½ miles from downtown? Every enterprise tries to make it convenient for a patron, and only the motion picture industry is still persisting in the same policy that was inaugurated in the year 1910, according to Mr. Rodgers or Mr. Lichtman, the horse-and-buggy days, when it was relatively easy to get to the downtown area. There was not the same transportation problem, and there was not the same parking problem, and there was not the same population problem. The City of Balti- [fol. 1545] more, I assume, in the year 1910, was a very different city than the City of Baltimore today; and, therefore, we submit to you, members of the jury, that under the fair-enterprise system of this country, which is protected by the laws of this land, someone coming along has the right to enter into competition without being restrained, without having his competition lessened by a joint activity and acquiescence and agreement and understanding. It must be remembered, members of the jury, that this product is a unique product.

This is not the situation of a hat, or an article of clothing, or something else. This product, produced and distributed by these defendants, is a product which cannot be bought anywhere else. It is undisputed in this record that these defendants produce and distribute by far the greatest number of motion pictures, that are desirable and suitable for exhibition throughout the country, and, therefore, unless the Crest Theatre has access as a first-run theatre—you heard yourself, the representative from Warner's say they could not get along if they did not have access to other companies' products; so, with Loew's, so it is undoubtedly a vital thing with them.

Even on first-subsequent-run availability, when granted to the plaintiff, these distributors insisted—they simply wouldn't get away from it, I guess—and they persisted in their conspiratorial conduct, doing the same thing, requiring [fol. 1036] the Crest Theatre to play day and date with theatres a mile or a mile-and-a-half away, in substantial competition with them, a thing which obviously cut down the gross of the Crest Theatre, which required the Crest to go along without a sliding-scale. They gave Loew's Parkway an additional advantage, a unique run in the City of Baltimore.

We say, these things cut down the gross revenue of the Crest Theatre, and we are entitled to be reimbursed for that amount of additional income that we would have received.

Now, you have heard the Court tell about the Paramount case. These defendants were sued by the United States Government under the antitrust laws for doing what we claim is exactly the same thing here.

In the Paramount case, it was found as a fact, members of the jury, that these defendants have either evolved or acquiesced in and fixed a system of clearances and runs, with the result, as it was found in the Paramount case, that no competition could come from independent exhibitors, and restrain, as a matter of fact, first, the first-run exhibition. It was found in the Paramount case that these defendants had actually excluded from the first-run exhibition field would-be exhibitors who wanted to enter into competition there. They had been found to have violated

[fol. 1047] the antitrust laws, and there has been a persistence on the part of these defendants to violate the antitrust laws.

As His Honor will charge you, the decrees from the Paramount case are prima facie evidence here, that we say the same conspiracy that was found to have existed in the Paramount case is the conspiracy which had impact on this plaintiff in the City of Baltimore, the policy of limiting pictures to downtown theatres only, and that policy was persisted in by these defendants through the Paramount case, and even today they continue it.

They use the same argument and have done the same thing; but when it comes right down to the point of the case, members of the jury, it means a financial situation to them, and they have adopted this policy of keeping first runs in the downtown theatres; and we are asking, in your judgment and wisdom, that you bring in a verdict for the plaintiff in the amount of damage appropriate to the case.

## Argument on Behalf of Defendants

Mr. Wardine: Mr. Foreman, and Ladies and Gentlemen of the Jury: I do not have the familiarity with motion picture cases that Mr. Bourne has, and I want to address ourselves primarily, therefore, to what the claims are in this case, and primarily to the situation with respect to the Crest Theatre.

[fol. 1048] The proper position of Warner's and Loew's will be dealt with by my associates, but I hope, not this afternoon, certainly, but a little later, to complete the broad outlines of the case.

Now, it may be because of my lack of familiarity, I tend to unduly simplify things, and it seems to me the case is summarized in two words, "conspiracy" and "competition".

Now, the word "competition" was not mentioned by Mr. Bourne until 30 minutes after he began his address to you, and then it was used in an entirely different connection than that in which it was used throughout the entire case, because there has been no controversy that if, in fact, the Crest is in substantial competition with the downtown

theatres, the downtown theatres are entitled to have clearance over it. There is no controversy about that fact.

I want in a few moments to show you that is the position Mr. Myerberg himself takes with respect to what he wants.

Now, the surveys were introduced for that specific purpose, and the surveys show that there definitely is—Mr. Myerberg categorically testified—"In my opinion, I am not in competition with downtown". Dr. Hawkins makes a survey, and finds 76.3 per cent of the people come from the Crest Area, and that 16.1 per cent of the people come from the next adjacent area; so I don't blame Mr. Rogge for [fol. 1548] sliding over competition, although it is critical to the decision in this case.

If I may state very briefly some of the general points, because these are important in the entire case and run through the specific claims which are made in the first and second counts of the complaint,—the first is that, obviously, Mr. Myerberg had the right, an absolute right, to build a theatre wherever he chooses. But instead of doing that, Mr. Myerberg takes the chance that any businessman takes when he goes into business, of selecting the wrong location. Nobody asked Mr. Myerberg to build the theatre there. No defendant held out hopes to him that, "If you will build a theatre here, you will get first-run pictures". No defendant said to him, "We would like to have you build there". No; it was purely incidental to the consummation of a commercial project.

The question asked Mr. Myerberg, clearly, if there were any doubt about it, demonstrates that:

"Q. Was any consideration given to the construction of a motion picture theatre in any reasonably convenient location, aside from it being part of a general business development?

"A. No."

So, the theatre was not built in response to any public demand, and the theatre was not even built because it [fol. 1550] was believed a theatre as such was necessary. This theatre was built as a part of a general commercial development, and it carries with it the same risk that the

balance of commercial development carries with it. And in that commercial development, we have almost the persuasive argument, exactly along the lines that our defendants witnesses have said in testifying about the importance and significance of location.

Now, Mr. Myerberg chose to put his theatre in-between Duryea's Ambassador and Garland's Uptown. He has the right to do so; but in so doing, he runs the risk of not having the people who want to pay, because you cannot ever do that. And the risk of his commercial development is indicative of that fact.

It took him one year before he could get people to rent the stores in his theatre building. Now, you cannot force them so. Unfortunately, we built on a fine only, but (garbled) other people did not figure the same.

When the barber opened his shop, I am sure he had as much hope as Mr. Myerberg had, that this was a fine location and people would patronize his shop; but they didn't do it. They didn't come there. He didn't have the draw. And so they failed.

When Mr. Mandell opened up his first-class high-priced restaurant there, I am equally confident he had the same [fol. 1631] hope Mr. Myerberg had; but it was not a good location and he could not get people to patronize him on that basis. So, what did he do? He went to a moderate-priced neighborhood restaurant, and he is prosperous. There would be just as much reason asking these defendants to pay-off Mr. Mandell as there is for Mr. Myerberg to ask that the defendants pay him. It is purely a practical way of saying what the defendants' witnesses have said, that location is such an important factor. If you are in the proper location, all right; but if you are not in the proper location, they won't come. If the people do not come, you do not produce revenue; and if you do not produce revenue, you cannot pay him rental. And it is illustrated in the case Mr. Myerberg selected, and what happened there.

The second factor, which has not been mentioned, and which is of critical importance, is this: Mr. Myerberg does not really complain about the method of distribution of motion pictures. He does not complain that there is a downtown first run, and that there are first-neighborhood-

runs and second-neighborhood-runs; nor does he complain of the fact that one theatre has clearance over another. His complaint, therefore, recognizes the validity of clearance. His complaint is solely that clearance ought to be imposed in favor of him, and not imposed against him. He very frankly stated from the stand that if he had exclusive [first run] first-run Baltimore. "What clearance would you expect?" And he said, "I would expect the same clearance that the first-run Baltimore houses now have over other theatres, 21 days." And he was asked: "Suppose you didn't get that, but day and date downtown, with downtown Baltimore, what clearance would you expect?" And he answered, "I would expect 21 days clearance over other theatres."

It —just a question of position. If it runs in favor of him, it is a perfectly legal system.

If United States vs. Paramount says this method of distributing pictures is wrong, then this position of Mr. Myerberg's is wrong, and he should not get the benefit of it, and it is just as wrong if Mr. Myerberg had a downtown house and got 21 days over Mr. Garman, or if he gets and has a day and date, and gets 21 days over Mr. Garman.—I don't understand the theory under which, if a clearance is imposed against him, it is illegal, improper, unlawful, unAmerican; but if Mr. Myerberg gets clearance over somebody else, it is a normal business practice.

There is the situation that the plaintiff, himself, has freely developed in his testimony. It is a one-way street.

None of these defendants has any neighborhood houses in Baltimore. Therefore, there is no inducement on their part to favor or discriminate as to a neighborhood house [not listed] because of any financial interest they may have. Only two of the defendants operate downtown houses. The others do not. None of the downtown exhibitors are claimed to be conspirators in this case. None of the neighborhood exhibitors are claimed to be conspirators. That is Mr. Myerberg's frank statement, that, so far as he knows, none of the downtown exhibitors and none of the neighborhood houses are part of this so-called conspiracy.

Now, that makes it rather unusual. If you had found out it was claimed that Mr. Garman was conspiring with these

defendants to get better treatment for the Uptown, or Mr. Lourie of the Ambassador was trying to get better treatment for the Ambassador, it might make sense; or, if you found Schanberger was conspiring with them to get better treatment for downtown, or Mechanic, or Rappaport, again, you might have some motive for it. But, in this particular case, the only suggestion is that for some reason Mr. Myerberg was singled out, because there is no claim that any of the competitors are involved in this conspiracy, none have been named as defendants, and there is no claim of any improper conduct with respect to any of them. The whole approach to conspiracy is—Let me put it this way: there is no contention, as I understand it, that if each one of these companies, acting individually and independently, had done exactly what they have done, and there would be no legiti- [fol. 1164] mate ground for complaint.

The right of the owner of a commodity to sell to whom he pleases is, as the Court will tell you, well-recognized as a fairly accepted problem. If you own an automobile agency, or, rather, if you manufacture automobiles, you have the right to sell them through one agency, or several agencies, as you please. You can select your customers. Therefore, there is nothing wrong, and I do not think it is claimed that there is anything wrong, in these companies separately reaching a conclusion that, independently and separately, they do not want to risk their high-priced pictures first-run in Mr. Myerberg's theatre. But it is said that because all of them reach the same conclusion, there necessarily is something wrong with the conclusions, or that constitutes a conspiracy.

Now, there is no direct evidence of any conspiracy, and I frankly was shocked when the suggestion was made that you would expect these men to come in and under oath deny the existence of a conspiracy, even though there was one. I must say that to suggest that men of the caliber you saw on the stand to come in and commit wilful perjury, is a rather astonishing basis on which to ground this suit.

It is clear from the exhibits—they had access to our files, and have given you everything we have in the files, and from which you can find no evidence of conspiracy. You [fol. 1165] find that each of these companies reached a

conclusion on what it believed to be a sound business basis.

There is another proposition, that if A knows what B is doing, and does the same thing, that makes them conspirators.

I had a lot of trouble with that idea, and still have. I just tried to work it out. If A doesn't know what B is doing, A can do the same thing; or, if B doesn't know what A is doing, he can do the same thing. But, if A knows what B is doing, he cannot do the same thing.

I tried to apply it to the Crest. Mr. Myerberg cites his application to Fox for first-run pictures, and Fox says No. Now, if Columbia doesn't know anything about that, Columbia can say No, and Universal, if it doesn't know, can say No; but if Fox says No, and Mr. Myerberg runs around to Columbia and says, "I tried to get first-run pictures downtown from Columbia, and they won't let me have them"—now, Fox knows what Columbia did, and in accordance with this principle, if Fox now says No, and Columbia says No, it is a conspiracy with Fox. And I say that doesn't make sense.

Let's carry it one step further. Fox says No, and Mr. Myerberg goes around to Columbia and says, "This is terrible; they won't let me have first-run pictures." And Columbia says, "All right; we will let you have them." And he goes to RKO and says, "One has given me first-run. [fol. 11536] and one has refused first-run." The third one knows what each has done; and if he says "Yes," he is conspiring; and if he says "No," he is doing what somebody else has done. It means the thing for which the plaintiff is contending is, if you know what somebody else has done, you cannot do the same thing without being in conspiracy with him, even though, although your best business judgment leads you to reach the same conclusion, if one says "No" and the other says "Yes", and the third has to go one way or another, that has to be a conspiracy for somebody along the line.

Now, this inference of conspiracy, it is so easy to say these people are going to be wrongdoers, and will break the law, and will do illegal things. We cannot prove that, we cannot show any record of it, but I have to prove it as best I can in one way or another. I have tried to explain the difficulty I am having with that.

The second is the so-called uniformity. Well, there, I think, we have a situation of the plaintiff arguing both ways. He says the uniform system of not allowing first-run pictures to be played anywhere except in the downtown houses —and then he says, "Look out here, in this place and that place, they don't do it that way, and if we don't do it out there, there is no way to do it elsewhere in Baltimore."

Now, what is it? Uniformity of what? It is perfectly [fol. 1107] clear to me that it is a uniform answer to a uniform request. What is odd about that?

Mr. Myerberg wrote seven identical letters, asking for seven World Premieres, and asking for first-run pictures from seven companies. Well, if you ask for the same thing from seven people, then the fact that seven have answered "No" would not mean there was a conspiracy among them.

Let me suggest the converse. Suppose all seven say Yes: is that a conspiracy? Does it work only one way? You mean, if Mr. Myerberg gets uniformity—and that word "uniformity" has been emphasized so much—makes uniform requests, identical to seven different people, that if he gets uniform answers, or the same answer, remember he is asking the same question of each one,—"Did you mean that there has been a conspiracy between them?" Suppose there are four-and-four. Four say Yes, and four say No. Which of the four is the conspirator? Suppose it is five-and-three, or six-and-two, or three-and-five, which are the conspirators?

Well, now, isn't it perfectly obvious that that perfectly uniform situation might call for uniform treatment? The fact that ten people put umbrellas up when it rains, doesn't mean or represent any conspiracy between the people. And the fact that eight business people are asked to rent a piece [fol. 1108] of property to an individual, and each of them say he would rather rent to someone else, is no conspiracy, but the exercise of business judgment, whether done by two or three people, is the exercise of business judgment, and the uniformity is in the uniformity with which Mr. Myerberg approached the situation.

He wrote seven letters in December, and Mr. Reese gets into the case and writes identical letters to all, saying: "I have been brought into the case, and I have made a thorough

study, and it seems to me we offer unprecedented opportunities here for first-run pictures in the City of Baltimore."

Why is it proper to make the same request, and not be attempting to collude or conspire? But, if you get the same answers, it means something wrong, even though the problem presented is exactly the same. "How can I best license my pictures in order that I might get the most out of this area?" And if it is true that, in general, the revenue is based upon first-run exhibition in downtown theatres, that is true no matter how many companies; and there is a perfectly reasonable basis for the conclusion that each one reached.

Now, suppose you apply to Mr. Myerberg's own Hill Top development—suppose someone—suppose he had gone to Hutzler's, Hochschild's, Stewart & Company, and Bruger's, and O'Neill's, and said to each one of those, "I want you [fol. 1034] to put a big branch store out in my development," and Hochschild said, "We have one at Edmondson, and one on York Road"; and Hutzler said, "We are going to put one up out in Towson," and O'Neill's said, "We are not ready," and the May Company said, "We are satisfied where we are,"—each one uniformly refuses to build or rent in Mr. Myerberg's Hill Top development,—is that a conspiracy between the five department stores?

I cannot see how you can change an economic situation by asking the same question of any number of businessmen, or how, if their answer is a sound one in each case, it becomes anything other than a sound one because eight people reach the right conclusion.

Further, the approach here assumes a control which it is obvious, and which the testimony has demonstrated, does not exist. They talk as if all you have to do, or all the defendants had to do, is just say "That is the way we want to distribute the pictures," and that is the end. Well, it is not quite that simple.

Mr. Norris gave you a homely illustration of that. He tried to sell a picture, for seven years, to a downtown in Roanoke, where he played golf with the exhibitor; and the answer was No. So it just does not work out in saying, "This is what I want to do," and when you come to this, that, or the other proposition it seems to me very clear

[fol. 15690] that there is no control which these defendants have over that.

I do not want to appear to be trite, but it is obvious that in order to have a day and date exhibition, you have to have a downtown theatre which is willing to play with an uptown theatre, and you have to have an uptown theatre which is willing to play with a downtown theatre.

Now, Mr. Roome attempts to make great capital of why we did not bring these people in. Well, I thought it was his case; I thought he was suing, and I thought he was the one complaining, and if he felt that these people were willing to play with his theatre, you can bet they would have been in here. But we had the evidence—Mr. Myerberg was asked, in his pretrial examination:

"Q. Did you discuss with anyone downtown operating a first-run downtown theatre the question of whether he was willing to play day and date with you?

"A. Yes.

"Q. With whom?

"A. With Mr. Schanberger.

"Q. What did he say?

"A. He was opposed to it.

"Q. Did you discuss it with any others?

"A. Yes; I discussed it generally in a conversational way with other downtown exhibitors."

[fol. 15691] "Q. What was their reaction?

"A. It was the same."

All right, what can the defendants do? Can the defendants go to Mr. Schanberger and say, "You have got to play your picture with Mr. Myerberg"? I don't know of any way you can do that.

Now, what you are forced to do there is one of two things. Schanberger says, "I won't play if Myerberg plays at the same time." Then you do not either play at Schanberger's Theatre, or you don't play at Myerberg's theatre. There is no control we have over that, because the defendants cannot, themselves, bring about a day and date arrangement anywhere. You have two independent people who do not have to bargain with each other, and who, according to Mr. Myerberg, were not willing to agree to play with him.

It is just physically, contractually, impossible, under those circumstances, for the defendants to comply with Mr. Myerberg's request.

[fol. 1636] At the end, if Mr. Schaaberger won't play with Mr. Myerberg, or Mr. Meyerberg can't play with him, that is a situation in which these defendants find themselves.

Now, they have appeared and testified as to their reasons, and those reasons are now referred to as after-thoughts, although it is claimed that this same thing has been going on for years.

It is remarkable the amount of scullduggery that these defendants engaged in in this particular case. This is unique, this is unprecedented. What is the evidence? Why should you refuse to accept the statements of apparently honest men, that we exercised use of business judgment in our opinion? I say we may be mistaken; I don't know. But in our honest business judgment, they thought this was the best way to run their business, and you are asked to disbelieve all of that, because there is a national policy to play pictures in downtown theatres.

Well, now, Mr. Rodgers gave in two sentences about as complete an analysis of that as you can hope or expect to find. He said: "Our national policy is to try to increase our pictures in any area in a way which will produce the most revenue for us in that area, but that we have found by experience that usually the way we get the most revenue in that area is by playing them first run in a downtown theatre."

Well, the national policy is to secure the best you can get. [fol. 1637] and if you can't get what you want, you take the next best thing. As a couple of them said, I think Rodgers and O'Shea: "Every time we produce a picture we have in the backs of our minds the thought: 'Can we get this in the Music Hall in New York and collect $50,000 rental?' There are a few pictures that cannot do that. So, if we can't get it in there, the prime place, we take the next best thing. What is that? A good downtown theatre.

Well, suppose we can't get it in a downtown theatre, the evidence is clear here that the difficulty some of these defendants had in getting a good downtown theatre to play in was great. And you heard the testimony of different

situations, some of these defendants were supposed to be scratching each other's backs, could not in Norfolk, Roanoke and Richmond, get playing time in a downtown house owned by others of the defendants. That is how close they were. They could not get playing time in those particular theatres. If they cannot get that should they yank the film? Of course not. If they do not get that they try to get the next best thing. Where is that? The neighborhood house. If they cannot get that they take the next thing. Of course, the best is the downtown house. I suggest that that is nothing more than what Mr. Meyerberg did and he is trying to do. He would presumably like to have had a department store out there, but if he cannot get a department store, he will take a kiddie shop.

[fol. 1036] Presumably Mr. Meyerberg would have liked to have had one of the large chain stores on that lovely corner or space ideally suited for a drug store. If he can't get a chain store, a drug store, he will rent it to a radio shop or television shop. And what is more revolting to a theatre man than having a television store right next door? If you cannot get it from anybody else, rent it to your competitor. That is the best you can do.

He naturally wants a large chain food store there, and he gets one, but most people do not want two stores of that kind within two doors of each other. But if you cannot get anything better, take two food stores. If you cannot fill the space, take three. That is nothing different on Hill Top from what these defendants individually wrought, that is, their method of leasing premises in Baltimore or Washington or Roanoke or Kansas City, or wherever it may be. If they could get downtown first run, they take it. If they cannot get downtown first run, they take the next best thing. And that is true, I believe, throughout business. And the fact that you try for the best and do not succeed is certainly nothing which can be held up as illegal, improper or reprehensible.

Now, we should experiment. Why should we? No one asked Mr. Meyerberg to experiment with his money at Hill Top. None of the defendants suggested to him, "Why don't you try it out? Why don't you put your money into a [fol. 1037] theatre out there?" He would probably show

them where they were wrong. What right has he to tell these people how they should market their product and say, "You must experiment with it"?

The evidence is clear that you are dealing with an exhibitive, perishable commodity as to each picture. You make a go of that particular picture or you don't, and of course they try to make a go of each picture the best they can.

But in an effort to prove some experiments were made, I think perhaps one of the most significant of those, two of those, Mr. Zimmerman testified that in Wichita they had a series of simultaneous runs, and the result was that they did not get as much from all five of them as they previously had gotten from a good downtown house. Mr. Lachman said that in Cincinnati they had tried a multiple run, they increased 14 pictures on it. Why did they do it? Because they couldn't make satisfactory terms for their downtown theatre. They did the next best thing, they increased 14 pictures to a neighborhood house. We tried to make it, hoping to get space downtown, and then it dropped that experiment.

You have the next one, and that is the tendency to try things out. You have Paramount trying out a system of multiple runs in Los Angeles at exactly the same time that Fox is continuing. You have there a difference in business judgment where they can get a good playing place for their pictures.

[Fol. 1688] Now, you have operations based upon the belief a particular company has got how it can better serve itself. Sure, it is the economic incentive. Why not? They produced these pictures to try to derive revenue from them. I say there is no reason you should disbelieve these witnesses, even when they give a perfectly reasonable answer to the question than you should disbelieve any other business man who wants to try to run his business the way he is doing it and be honestly believing he is doing it the way he should.

I was going to take up another point, Your Honor, but I think we are so near the 5:00 o'clock time you mentioned that, rather than take five minutes more, I might as well stop here.

The Court: If you want to go on and finish, you may.

Mr. Watkins: I would not be able to do it, Your Honor.

The Court: How long would you want to finish your argument?

Mr. Watkins: Your Honor, I don't want to scare the jury. I am afraid I would certainly take about three-quarters of an hour.

The Court: Or more?

Mr. Watkins: Or more, yes, sir.

The Court: Rather than go on now, you would prefer to stop?

[Vol. 1[illegible]] Mr. Watkins: I think this is a good stopping point, Your Honor.

The Court: Very well. Members of the jury, we will suspend now until 10 o'clock tomorrow morning.

(Whereupon, at 3:30 o'clock, p. m., an adjournment was taken until Wednesday, May 28, 1952, at 10:00 o'clock, a. m.)

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[Vols. 1[illegible]-1[illegible]] Reporter's Certificate to foregoing transcript omitted in printing.

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[fol. 1[illegible]] Transcript of Proceedings of May 28, 1952, 10:00 A. M.

(The following proceedings were had out of the presence and hearing of the jury:)

The Court: Gentlemen, I have given some further consideration to the question of burden of proof, and as a practical matter it probably becomes somewhat academic. I want to do my best to give the right instructions with respect to it, and I have attempted to outline what I think is the correct way to tell the jury the situation as the status of the pleas in the Parramore case is in this case, and in that connection I think it is very appropriate to make it very clear to the jury what is the correct interpretation that they must give, or what they must find with respect to the burden of proof, that is, upon which side it rests and when.

From a further consideration of the matter, I am disposed

to the view that plaintiff's counsel is correct in saying that there is a separation of the burden of proof, that there are two phases of it, and when it comes to the matter of clearances, the burden of proof is upon the defendants; but, of course, the basic burden of proof, that is to include conspiracy in restraint of interstate commerce, rests throughout the trial upon the plaintiffs.

I think, Mr. Bonne, that is what you have been contending for?

[fol. 1071] Mr. Bonne: It is exactly that, sir. Thank you.

The Court: I think the contrary position is tenable, and as you know, I thought so from the first, and I think it is very plausible to say that the language in that section of the decree, or one of the decrees which talks about the burden with respect to clearances being upon the distributors, it is quite plausible to say that that relates to a situation such as we have in the decree, because in that decree they are talking about a past event, that where there has been an allegation or a representation that the decree has been violated, that is to say, where the parties are in contempt of the order, then the burden of proving the reasonable clearance, as set forth in the order, has been shifted to the distributors. But I think, perhaps, a more reasonable interpretation is to say that that is not only, of course, true with respect to the Paramount situation, but where you are required or permitted, or where plaintiff is allowed to use the Paramount decree as prima facie evidence in a case of the present kind, it seems to me to make more sense, to be more reasonable to say that if there is conspiracy to restrain trade unreasonably, that is restraint of interstate commerce, as I shall attempt to define it in the rest of my charge, I think it is more reasonable to say, then, that the plaintiffs should have the benefit of the broader interpretation of that language about the shifting [fol. 1072] of the burden of proof.

Now, with that in mind, I give you now the way I think this ought to be presented to the jury.

In order to establish a right to recover, the plaintiffs in the present case must show, first, a conspiracy in restraint of interstate commerce and, second, injury to its business caused by such restraint. Of course, I will explain to the

jury it is not every restraint. It is only unreasonable restraint.

I am not now going into a lot of questions that are involved. I am just dealing now with the Paramount decree, its position in the case, and the burden of proof.

"The law further provides that if any acts prohibited by the antitrust laws which are alleged to have damaged the plaintiff, have previously been established by decree obtained by the United States Government in either a criminal or civil action, that is, any equity proceeding under these antitrust laws, the plaintiff, in and of its case, may rely upon said judgment or decree previously obtained by the Government including the existence of the prohibited acts, and the law provides that such previously obtained judgment or decree is prima facie evidence against the same defendants in a suit of the present nature—that is, of the nature of this present suit before us—brought by the plaintiff against them, that is, prima facie evidence as [fol. 1050] to all matters that were decided by the previous decree. I instruct you that in the previous equity suits between the government and these same defendants it was decided and covered by the decree in that case that these defendants had conspired together in restraint of trade, in violation of the antitrust laws in restricting these first-runs and in establishing certain clearances in numerous places throughout the United States.

"That, these proven facts, I instruct you, become prima facie evidence in the present case, which the plaintiff may use in support of its claim, that what the defendants have done in the present case in Baltimore is within the prohibition of this earlier decree. However, it is only prima facie evidence. There was not before the court in the prior case the present factual situation respecting the Baltimore theatres that we have in the present case.

"I say that because I understand that is true. The whole country was before it, and there may have been some evidence, a good deal of evidence about Baltimore, Philadelphia and San Francisco. If there was any about Baltimore, it certainly did not cover this point.

"Therefore, it is still necessary in the present case before the plaintiff can recover for it to prove to your satisfac-

tion, by the weight of the credible evidence, that these defendants or any of them have conspired in an unlawful [fol. 1574] manner to keep hot rods from the plaintiff, or also they conspired to restrict plaintiff to clearances which are unreasonable.

"If you find that the plaintiff has sustained the burden of proving conspiracy as just defined, then I instruct you that by virtue of the decree in the previous equity suit which forms part of the evidence in this case, the burden of proving the reasonableness of the failure to give plaintiff first run each day or day and date, and also the failure to give it other reasonable clearances, rests not upon the plaintiff but upon the defendant."

Now, after a more thorough, as far as I can judge, a complete study of the controlling cases on this point in the Supreme Court, that is what I understand to be the law. Of course, I might say we all know that, as a practical matter, this technical division of burden between the two parties fades away, because in an ordinary case, take a personal injury case, we have to instruct the jury that A has been injured, that B ran into him, and, of course, the burden is upon A to prove that by the weight of the credible evidence. Of course, A can take advantage of the evidence that defendant has put in as well as of the evidence he puts in, so there is a practical side to the situation which perhaps does not amount to very much after all. When you talk about shifting the burden.

[fol. 1575] Do counsel want to say anything?

Mr. Watkins: No, Your Honor, except we do not regard it as a correct instruction, and we will except to it.

The Court: You may, of course, have your exception.

I think we are ready to proceed, and I understand Mr. Watkins you only need about 20 minutes of your time.

Mr. Watkins: Your Honor, I spent yesterday evening in trying to reduce it, and I have succeeded in cutting it down a little. I will say, Your Honor, I will use only as little time as I possibly can. If you ask me to try to say what that would be, I would approximate another 30 minutes. It may be a few minutes one way or the other.

The Court: You may go over the agreed time limit if you find it is necessary.

We will go ahead now for an hour or perhaps a little more, and then take a short recess, 10 or 15 minutes, and then go ahead and see how that brings us towards the lunch hour. It would look like the case ought to go to the jury in ample time for the jury not to have to be worrying about getting home for supper.

Mr. Watkins: We would hope so.

The Court: We will see how it comes out.

Have the jury brought in.

(The Jury then returned to the courtroom and resumed seats in the jury box.)

[fol. 1576] Members of the Jury and Counsel, we are now ready to proceed.

ARGUMENT ON BEHALF OF DEFENDANTS (Resumed)

Mr. Watkins: May it please the Court, and Members of the Jury, I do not profess to be a mind reader, but I think I can safely say what is running through your minds is, "Let's get this case over and get out of here." To that, I have entire sympathy, to the extent that I spent most of yesterday evening trying to cut down the remaining remarks that I have, but I do want all of you to remember to bear this in mind, as I am sure you will: that is, we did not ask to be sued, and in representing these defendants we have a duty to them, and the client often has ideas as to how a case should be tried, and what points will be persuasive to the jury. What we are trying to do here is to give these particular clients the same kind of representation that you lady and gentlemen, would expect if you were being represented by counsel in a case in which you were being sued. We will try to keep this down, but we do not want to be put in the position where one can say to us, "You overlooked something."

There are two causes of action in this case, and both of them are founded upon conspiracy. There is no claim that the facts with respect to which complaint is made in either the first count or the second count, would give rise to a [fol. 1577] cause of action had they been done singly and independently by the various defendants. So, this case depends completely upon your finding of the existence of a

conspiracy. If there is no conspiracy, there is no cause of action. If there is competition, then what we have is justified.

Now, the first cause of action is that the plaintiff claims that by virtue of a conspiracy he has been deprived of access to first-run films. Apparently, that means either an exclusive run or a day and date run. In a few moments, I want you to see why I say "apparently."

The second cause of action is that by a conspiracy the defendants discriminated against the plaintiff in his neighborhood run, on three counts. Mr. Rome took about 2½ minutes yesterday in referring to the second cause of action. I am going to come as near matching that as I can, but I will not equal his record, I am sorry to say.

The first of these conspiratorial acts of which he complains is that in connection with the neighborhood run, on which this plaintiff was operating, or these defendants conspired to discriminate by exacting from the Crest Theatre a greater film rental than that paid by comparable or inferior theatres. Now, what I understand that to be is the claim, first, that by conspiracy these defendants charged the plaintiff more for films on a neighborhood run than [fol. 1578] they charged other theatres on first neighborhood runs. Now, the complete answer is, there has not been one word of testimony in the case to that effect. Let me give you in one line the background.

The plaintiff asked of us a record of every picture distributed by these defendants that played in the Uptown, the Pimlico, the Avalon, the Ambassador, the Senator, the Boulevard, and the Metropolitan Theatres for the seasons 1947-1948, 1948-1949, 1949-1950. At considerable time and expense we furnished them with the names of those pictures, the days on which they played, the terms on which they were sold, the amount they grossed, the amount we collected on over 2,500 pictures, and not a single one of those has been offered in evidence to show that the Crest received any different treatment with respect to film rental than the other theatres. That is the kind of case we have here. These charges have no substantiation whatever. Not one of the 2,500 pictures were mentioned, by way of proof, here.

The second point is that of imposing unreasonable clear-

ance against the Crest. That is restricted to the Parkway situation. There, the claim is, it again is restricted to Loew's because United Artists played only two pictures during this subsequent period, at Mr. Myerberg's house. The claim is that Loew's sometimes exhibited those pictures at the Parkway seven days before it permitted those [fol. 1579] pictures to be exhibited at other neighborhood theatres, including Mr. Myerberg's Crest.

Now, how there can be a conspiracy when only one company is involved is not explained. The complete answers to it are, first, as the Court will instruct you, that Loew's has the undoubted right to exhibit its own pictures in its own theatres at the time it pleases. The second is, what was complained of here was not directed toward the Crest. Every neighborhood house had the right to play these same pictures at the same time the Crest did. When Loew's played them seven days ahead at the Parkway, it played them seven days ahead of the Crest. It played them seven days ahead of the Northwood, and so forth, and the treatment given to plaintiff with respect to that was identical to that given to every other theatre. How that can be a discrimination is something that cannot be defined.

The other is the failure of the distributors to give reasonable clearance to the Crest. This is a different approach. This does not show the Crest had clearance imposed against it, that it was improper. This says the Crest was entitled to clearance over other houses and that we were wrong in not giving the Crest clearance over other houses. You see, we are wrong in every way. If we don't give the Crest Theatre clearance over other houses, we are wrong. And, if we give the Crest clearance over other houses, we are [fol. 1580] wrong. But to show you how far plaintiff goes in his claim as to what he is entitled to and what clearance he thinks he is entitled to and how the other houses should be treated with respect to him, I want to read to you from pages 56 and 57 of the deposition. These questions were addressed to Mr. Myerberg on October 22, 1951:

"Q. Do you consider the granting of clearance over the Crest on the competitive bidding pictures as a proper or improper practice?

"A. We are speaking solely about the neighborhood run situation?

"Q. That is right.

"A. No, I do not.

"Q. Why do you consider it to be an improper practice?

"A. Because the Crest Theatre should play, being a theatre with the potentiality, with the greatest potentiality in the area, should have this clearance with all pictures.

"Q. Even without bidding?

"A. That is correct.

"Q. You say you think the Crest is entitled to play ahead of the other neighborhood theatres?

"A. That is right.

"Q. Without competitive bidding?

"A. That is correct."

[fol. 1581] Now, in the final portion of this deposition of Mr. Myerberg's, counsel asked him, "Did you really mean that with respect to competitive bidding?"

The answer was "No."

"Then, regardless of what you may have said prior to this time, you mean that should the Uptown get pictures on competitive bid, you are not entitled to clearance?

"No, I do not mean that.

Q. But that applies only to two cases, RKO and M-G-M, that is where you have competitive bidding.

So, his answer still stands, on this deposition, he has a better house and he is entitled to clearance over other theatres. He is not willing to play on a parity. If a downtown house is given clearance over him, that is wrong.

Now, again, regardless—and I think you can see there is no evidence to support either one of these three propositions—but, again, it comes down to the claim that these things are the result of a conspiracy, and according to the opening argument yesterday here in this connection, you have the same action by the defendants, presumably the same uniformity.

[fol. 1582] Well, now, here is what the actual facts are: The sliding scale, to which some reference has been made, was given the Crest by Loew's, Warner Bros., Fox, Columbia, and Universal. Sliding scales were not given by RKO, United Artists and Paramount.

The Parkway situation is an objection only with respect to the conduct of Loew's, and they have the right to exhibit

their pictures in their own theatres, so Loew's is the only bad boy in that case.

In competitive bidding, RKO gave it right from the start. Loew's ultimately gave competitive bidding. Fox offered competitive bidding right from the start. The other five did not.

On Saturday openings, Loew's, the bad boy in one case, gave him Saturday openings right from the start. Warner's, Paramount and Columbia sometimes gave him Saturday openings, and the others did not.

Can you find any uniformity in that? There is complete disparity there. Each one apparently acted in this particular situation, as we claim they did in all, in accordance with what they thought was the proper way of acting.

In one case we are condemned for uniformity, and in this case we are condemned for not giving uniformity. That is the entire second cause of action.

Now, the first cause of action is a conspiracy to deprive [fol. 1583] the Crest of access to first run pictures and, according to the opening argument, thus to deprive them either of first-run or day and date first-run. Regardless of that, there are certain principles on which the Court will instruct you, which are controlling. In the absence of a conspiracy, any one of these defendants could have refused a first-run, could have refused a day and date first-run; so again it comes back to concert of action, an agreement, a conspiracy.

If the Crest is in substantial competition, it is recognized that clearance over it is proper, and I want, for the last time, to emphasize this one thing: you have heard a lot about clearance, and when it is proper and when it is not proper. This case has been simplified by the fact that the plaintiff, himself, has unequivocally stated that if he was able to get the run that the Hippodrome gets, or the Stanley gets, he would expect and want 21 days clearance over the other houses, exactly the same as those present first-run houses have over him, and that if he were able to play day and date, he would expect 21 days over neighborhood houses, so that he is in a position where he recognizes the propriety of this, if he gets it. So, his quarrel is not with the propriety of clearance, the extent of it, or really with respect to its application between runs. His only complaint is, "I am not

replacing the Hippodrome. I am not cutting that run out, [fol. 1584] yes. If I do, I would demand 21 days over the Hippodrome, just as the Hippodrome now gets 21 days over me." So, there can be no quarrel about the question of reasonableness of clearance, no question about the propriety of clearance, because he is asking for the very thing that others are getting, and he simply says, give it to him instead of to them.

Now, Mr. Rome, in his opening statement, said that the Crest started out requesting day and date, and when he couldn't get day and date, then he wanted to ask for exclusive. That is an anomaly in this case. A man that claims to have the finest showcase theatre in Maryland would run with a man along with another, but the inversion is important. The asking for an exclusive first-run is necessarily a recognition of competition with the downtown theatres. That was the fact. It cannot be subject to argument. The only reason he asks for exclusive is that if you let somebody else play with me, they would draw from me, or, if you let me play with somebody else, I would draw from them. So, this request for exclusive first-run necessarily carried with it a recognition of competition. But then, Mr. Myerberg so testified in his deposition and on the stand, that he did not believe he was in competition. You cannot take it both ways. If he was not in competition, then he is not entitled to an exclusive run. If he is in competition, then it is a [fol. 1585] choice between him and somebody else. So, how are you going to cover the thing up?

They wanted to tell you—and it is extremely important in that connection—that they started out by asking for an exclusive first-run, thereby recognizing that in their opinion they would draw from the entire city; and then he is faced with a proposition of how can he justify it, and a switch is made to day and date.

It is important in sequence to the order, and it is important not only because of the location and competition but because it bears upon the adaptability of the plaintiff to adjust his ground to meet situations as they come up, and his is not the only instance. It is perhaps the most important but not the only.

For example, when he was being examined on deposition, and the question was, "You are operating on a neighbor-

hood basis. Suppose you got first run. It would cost you a lot more, wouldn't it?

"A. Oh, no; it wouldn't cost much more. I would have an additional item of expense. Well, primarily, it would be increased advertising."

And then he was asked how much increased advertising, and he said, from $100 to $200 a week, "at the outside." That is his language, not mine.

Well, in getting ready for trial, he looked at the expe- [fol. 1586] diency of it, and the amount of advertising, and he knows he cannot do that for $100 or $200 a week; and you know you can't do that. So, on the stand, he puts it at $500 to $600.

Did he really know the facts of first-run operation when he built his theatre, and when he started it? The population—he was examined on deposition:

"Yes, before we started this, we wanted to find what our potential was and what could we draw, and so we made a survey. We have done that before, we have built other commercial centers. We made a survey and that survey showed that we had 175,000 to 200,000 people in this draw area. I cannot find the survey, but that is my best recollection of it."

When we come to examine him, he says he has checked back, and cannot find the survey, but he has found notes from which he has reconstructed. Now, the reconstruction is very interesting and significant—the reconstruction does not start with 1948, and work forward. The reconstruction starts with 1950 and works backward; and, even working backward, he comes out with a figure of not 175,000 or 200,000 people, but a figure of 105,000.

That sort of indicates that the man really never started out with any idea that this was going to be a first-run theatre, nor did it indicate he was even considering the pos- [fol. 1587] sible success of his commercial development. You have such a complete contradiction; and you come to another significant situation.

You remember he bid $35,000 for the right to play SAMSON AND DELILAH, and he was being examined about that,

and there was some—maybe it was the tone in which I framed the question—some doubt in his mind about his sincerity; and he says, "I didn't take these figures out of the air. They were the result of consideration. In fact, I have the papers on which we made the calculations."

All right, what are those calculations? We will gross $80,000, and will play these pictures eight or ten weeks—$80,000 in five or ten weeks. Then it was called to Mr. Myerberg's attention:

"Q. Now, how many people would have to attend this even at advanced prices before you could gross $80,000?"

The answer was: "Something over 90,000 have to attend." So he has to get 90,000 or more out of a total of 105,000, and have them nicely spread out over eight or ten weeks.

That was on May 14th. On May 15th, Mr. Myerberg appears in court and says: "I looked over these figures in the computation, and we would have to play SAMSON AND DELILAH—I forgot to bring them with me, but they show that we would have grossed $50,000, and that would be playing [fol. 1588] the picture five weeks."

Well, that was on May 15th. Today is May 28th, and those papers with those figures, whatever those figures are, have not been offered to you. He says this is a considered thing; it was not snatched out of the air. It was the result of calculation, and his calculation is between 40 and 50 per cent off.

Now, doesn't that bear upon this question of how can you deal with a man like that?

Suppose he comes and asks for first-run pictures. If that is the way he takes care of business, aren't you justified in saying, "I would rather stick with my people, where I have had experience, and know what they can do, and I don't have to depend on estimates. I know, if I play a picture in the Hippodrome or the New Theatre, these are the possibilities." This, against these three important factors which have been changed during the course of the trial.

Now, the remaining point there is—it seems to me that the record is so clear on that, that I hope you will pardon me in just trying to show why I say it is a fact. There is this exhibit offered here, this October 12, 1948 World Pre-

mier- letter, sent to seven of the companies. Now, I don't know how you can have day and date World Premier-. That is something that is just physically impossible, and the [fol. 1588-A] whole tenor of the letter is that, "I have the finest theatre in Maryland, and I have the finest outlet for your first-run pictures." And, in reading it last night, in view of the opening argument, there was one phrase in here which particularly impressed me. After building up a little bit as to how you will find it is so, he says: "This theatre undoubtedly is the finest showcase for films in the state of Maryland". So the standard is to remember that each company uses the same test. They want to play their pictures in the fine showcases, but they think the place you find these fine showcases from the population, from an exploitation, from a matinee and revenue basis, is downtown.

Now, Mr. Rome says, "Don't believe that; that is spurious." He says that is an afterthought. But when Mr. Myerberg says, "I have a fine showcase," what is that? I suppose that is a statement of fact, that is a sound proposition.

Now, if that is the standard he uses, why can you say or why should you say that these witnesses, who use the same test, disagree with him in its application—how can you say they are unworthy of belief?

Now, you have the request to [Universal, "Let me have first-run. You turned me down on that. How about day and date?" Then you have the other exhibitors getting [fol. 1588-B] a request, in Exhibit 12, in which he says to Mr. Moon, of Fox:

"You won't give me exclusive. How about day and date?".

And then we come to Mr. Rome's letter of November 9, 1949.

You recall that the uniformity pattern was set up by the plaintiff in this case, the uniform World Premier- letter, the uniform letters and the uniform November 1, 1949 letters from Mr. Rome: "I have made a careful study." And then, "How about letting us have first-run films?"

This letter is addressed to Mr. Smith, who had given his reason why he didn't think he wanted to play his feature

pictures first-run at the Crest. The second paragraph reads:

"While our opinions differ, we can understand your view concerning the advisability of serving a downtown theatre with first-run pictures rather than a suburban theatre."

And, next to the last paragraph:

"We can appreciate your disinclination to experiment on an exclusive first-run basis because of the possibility of risk outlined in your letter. We suggest, however, that the risk would not be present if you were to experiment with a day and date policy at the Crest.

"We feel that your letter has expressed a genuine interest [fol. 1589] in the problem involved and we are sure that you will give this new proposal full consideration. We repeat that our client stands ready to negotiate competitively and to offer any reasonable guarantee you deem appropriate."

Now, that shows, first that the Crest was asking for exclusive and, not getting that, Mr. Rome says, "Your reasons may be honest reasons, but how about trying day and date?" It shows then that at the start it was exclusive.

The second thing is, Mr. Rome doesn't say to Smith, "This is spurious; this is a subterfuge." He says, "I can well understand your reluctance to give this theatre first-run pictures. I can well understand why you may think that, though I disagree with you, that you want to play your pictures first-run downtown."

Now, it is a recognition of the opinion on the part of at least one distributor that he wants to play his pictures first-run downtown.

Now, there are similar other exhibits with respect to the others, but they are all in the same respect, and all of them lead to the same conclusion; and that is said to be evidence of a conspiracy.

Now, on the offers, which I will not take time to read,—they are here, and there is no possible doubt about the correctness of the quotations—Mr. Rome kept emphasizing the point here that the Crest Theatre was included in the De-
[fol. 1590] cember 20, 1949 bid on Columbia pictures, and

the bid was: "We are authorized to submit to you a bid for exclusive first-run exhibition in Baltimore at regular first-run admission prices of your picture JOLSON SINGS AGAIN."

Nobody may misconstrue that letter or explain it away. Exclusive first run is exclusive first-run; and following it, to show that there is a difference, and the difference is in dollars-and-cents, you have the short telegram, Plaintiff's Exhibit 31, again to Columbia Pictures:

"January 9th, 1950.

"Mr. Abe Montague
"Columbia Pictures, Inc.
"729 Seventh Avenue,
"New York, N. W.

"We request opportunity to negotiate or bid for Crest Theatre, Baltimore, for ALL THE KING'S MEN. Will guarantee Seven Thousand Dollars against Forty per cent of gross for extended first run. Alternative bid, Four Thousand Dollars against forty per cent of gross for extended run day and date with downtown Baltimore.

"(Sgd.) Gray, Anderson, Schaffer & Rome."

[fol. 1591] That shows conclusively that the Crest first was seeking first-run, and I submit the difference in value was recognized. He offers less for day and date position. When you play day and date, you are competing with somebody, or somebody is competing with you. The difference between $7,000 and $4,000 speaks, I am happy to say, more eloquently than I can.

Now, recognition of exclusive means exclusive, and you are given the benefit without having somebody compete with you, while, on day and date, somebody is competing with you.

For all of that, remember these letters. One was December, 1950. On October 22nd, 1951, Mr. Myerberg was asked these questions, on page 116:

"Q. It is a fact, is it not, you did attempt to secure exclusive Baltimore first-run for the Crest?

"A. No.

"Q. You did not?

"A. No.

"Q. What did you seek to obtain?

"A. We tried to get pictures exclusively for our area. When we bid for pictures, exclusive first run in Baltimore, we mean exclusive in our particular area. We don't feel that the downtown Baltimore section is in competition with us, nor are we in competition with them. We had no objec-
[fol. 1592] tion. Our bids are for our own area. We have no objection whatsoever to bidding on pictures in our area, and we think that should be instituted. First-run day and date in the City of Baltimore, the same as in Washington, and a great many other cities throughout the United States.

"Q. Didn't you attempt to secure pictures either exclusive Baltimore first run or day and date for the Crest?

"A. I never did, no, never that, no. The wording of some letters in our bids may have been a little confusing at times, but our intention was we had no desire to do anything but get pictures in the City of Baltimore in our area exclusively day and date."

What do you have to do to win a lawsuit?

If that is true, that he never asked for exclusive first-run, then how can you possibly say we should have given it to him? If he never asked for an exclusive first-run, how can you say there was a conspiracy to exclude him from it?

I respectfully submit that on that basis, in the first cause of action, the so-called right to an exclusive first-run, the man's own testimony has sworn him out of court.

How can he possibly say we have harmed him in not giving him what he didn't want? How can you charge a conspiracy not to give a man something he doesn't want? And [fol. 1593] that is exactly what it amounts to in this case, and I think that bears upon the good faith of every charge in this case.

The remaining one is the question of day and date downtown. There is no question but that he asked for that. He asked for it alternatively, secondly. There are two conclusive answers to that, one of which was discussed yesterday.

The first is, to play day and date downtown, you have to have a downtown theatre playing, and a neighborhood theatre playing at the same time; and, therefore, you have to have both agree to it.

Now, Mr. Myerberg's testimony was that he discussed this day and date question with Schanberger, and he said he would not play day and date with him, and he discussed it in a curbstone way with other exhibitors, and they said they would not play day and date with him.

Mr. Norris, who was trying to find ways to increase revenue, and he had this conference. He says that he talked to Schanberger and to Rappaport, and he talked to Mechanic, and that all three said they would not play day and date with a neighborhood theatre,—not the Crest, particularly, but with *a* neighborhood theatre,—and the Stanley man said he would not play the Stanley day and date with the Crest, and the Loew's man said he would not play the Century day and date with the Crest.

[fol. 1594] If they won't play day and date, you cannot have a day and date. And how can we be charged with wrongful acts?

Bear this in mind: these exhibitors are not being charged with conspiracy. These exhibitors are not the same as the defendants. Therefore, it is recognized that these exhibitors have the right to say, "We won't play day and date with him or anybody else." If we had the right—if they refused, how can we be charged with conspiracy?—because we do not control that. We are charged with conspiracy, and these men just would not play the other half of the day and date.

The last is the complete answer to both. Competition—they kept away from that, very carefully, in the plaintiff's case,—just the simple statement, "I do not think I am in competition."

Dean Hawkins gave information about 16.3 from the Crest Theatre, and 16.1 from the immediately adjacent area. If that is not competition, I don't know what is substantial competition; so what do you have in this case?

You have no evidence of a conspiracy. You have direct evidence of a substantial competition, both by the $7,000 against $4,000—money talks in this case—and you have heard direct testimony by Dr. Hawkins, and you have the other men. You saw them. You heard them. In order [fol. 1595] to find a conspiracy, and in order to find a getting together on this, you have to believe that every one of these men is a wilful and deliberate perjurer.

What this plaintiff is asking you to do is to take phrases, inferences, draw conclusions, against direct testimony; and, in order for you to find as he requests, you have got to ignore the sworn testimony of everyone of these men, and you have also got to believe that Dr. Hawkins does not know his business.

A singular thing—not one word of rebuttal testimony has been offered in this case. No one has attempted to bring in anyone to say what our witnesses said was untrue. No one brought another survey in. No one questioned Hawkins. No one said these men were wrong; and they did not try to bring in any of that on cross-examination. I loved the cross-examination,—it was better than the direct. There was not a word of rebuttal, and what you have here, he is asking you to take inferences and guesses against the direct testimony, the sworn testimony, of men who I think you can look in the face and see are telling the truth.

That is the case, gentlemen.

There is an absence of conspiracy. There is the existence of competition. There is no merit in this case, and I respectfully ask for a verdict in favor of all defendants on both counts.

[fol.1596] The Court: Mr. Boyd.

## Argument on Behalf of the Defendants

Mr. Boyd: May it please Your Honor, Mr. Foreman, and Members of the Jury: You have been extremely patient in this case, and I shall try not to impose upon your patience.

The purpose of my particular address to you is simply because of the somewhat different position that Loew's Incorporated,—which is the same as Metro-Goldwyn-Mayer, that is the trade name for Loew's Pictures,—holds.

I have had the privilege of representing Loew's in this territory for some years past and, therefore, they asked me to particularly follow their line in this case; and I am very happy to do so with Mr. Raftery, who is more generally experienced with cases of this kind.

Now, Loew's particular position, of course, stems from the fact that it owns its own theatres in Baltimore. There is another defendant that owns its own theatres. Warner's; and Mr. Raftery will talk briefly on that. The principles

applicable are generally the same, but Loew's does own its own theatres. It owns the Century. It owns the Valencia, and it owns the Parkway.

Now, I submit to you, at the outset, that there has been offered in this case no evidence—there will be offered in this case no valid argument, and I do not think His Honor is going to instruct you that there is anything illegal about [fol. 1597] the ownership of a theatre, at least in the particular period we are talking about, and even beyond that. We can use our own theatres.

Now, the Paramount decree has come into discussion, and I would like to get that out of the way, right at the outset. It is a rather difficult thing to understand, that Paramount decree. His Honor will instruct you about it. But we lawyers have our difficulties with it, and the Courts have their difficulties with it; but there is one thing that is very clear in it, and that has to do with this point I bring to your attention now, and that is the right of companies like Loew's to make use of their own theatres.

Mr. Rome read to you from the decrees yesterday, but if you will indulge me, I would like to read a particular paragraph, with a little different emphasis than he placed upon it. It is paragraph 5, and follows the other parts that were referred to and read to you. This is in the decree that applies to Loew's and Warner's, among others.

"5" says:

"Nothing contained in this decree shall be considered to limit in any way whatsoever the right of each major defendant bound by this decree during the three years allowed for the completion of the plan of reorganization provided for in Section 4 to license or in any way to provide [fol. 1598] for the exhibition of any or all the motion pictures which it may at any time distribute in such manner and upon such terms and subject to such conditions as may be satisfactory to it in any theatre in which such defendant has a proprietary interest either directly or through subsidiaries."

Now, that is our text with reference to Loew's. That governs Loew's position in this case.

We are like a dairy farmer who has his own milk dis-

tribution system, who certainly would prefer to place his milk in his own plant and distribute it under his own control and subject to his own conditions, than he would to be required simply at the demand of some outsider to place his milk elsewhere; and you can apply that little story down the line to any business in which you gentlemen or members of the jury are engaged. It simply is good common sense, and the Court has recognized that in the Paramount case. It is recognized in many other places, and I think His Honor will instruct you generally on that subject, but it is there in the bible of the Paramount case.

Mr. Watkins has covered most efficiently and fully a great many of the things that I could otherwise dwell on and, therefore, I will be just as brief as I can.

I share entirely with him his suggestion to you that what the plaintiff demanded was an exclusive run originally, and, therefore, sets himself up, the plaintiff sets himself up as [fol. 1590] in competition with other, every other theatre in Baltimore City.

Now, Mr. Adams told you that he felt, when he first met Mr. Myerberg, that, believing that Mr. Myerberg was an experienced theatre man, he knew Loew's had its own theatres and he knew it was a preferable policy, under those circumstances, to play in its own theatres; that it did so, and when he suggested playing at the Crest, obviously, he meant on a first-neighborhood-run. But, when we got the October 12th letter, all of that was dissolved. You cannot have a day and date run, or a neighborhood run, with a World Premier, so he had to revise his thinking; and here, Mr. Watkins pointed out to you, they first asked exclusive, and then Mr. Rome changed the situation around, again, and he was still demanding both, although the testimony doesn't support that.

There is just one other contradiction that I would like to call to your attention. Things come out under voluntary circumstances so much in a purer form than they do at rehearsals. I am referring to page 232 of the printed record in this case; and it was His Honor who asked, at that early stage of the case, "What do you mean by day and date?" The witness, who was Mr. Myerberg, answered: "At the

same time the downtown theatres would be playing, if we would be playing the picture."

[fol. 1600] Now, he could have stopped there, and completely have answered His Honor's question; but he saw fit to volunteer something further, and what he said was this:

"Exclusive—" and the Reporter has quoted "exclusive" in quotation-marks "—Exclusive, of course, would be exclusive of the City of Baltimore."

Now, I ask you to take Mr. Myerberg's testimony in that respect, and compare it with his denials, his contradictions, his shift of position back and forth, as expediency indicated to him he should do, when he said, "I never requested exclusive of the City of Baltimore. I only meant my zone."

Now, why should Loew's move away from its theatre, risk pictures costing up to eight million dollars, for the purpose of being allowed to have them shown in this Crest Theatre? I don't cast any aspersions on the Crest Theatre as such. The witnesses testified, witnesses who know more about that than I do, said, if the Crest Theatre would be downtown, it would be perfectly adequate to show first-run pictures. They just prefer to play their first-run pictures downtown, and they didn't say anything about his theatre. They do say something about his location, and its location is one of the most important factors in this case.

The quality of the management, the surrounding circumstances out there in the Crest Theatre, are of the utmost [fol. 1601] importance; and I want to show you, just in that regard, I want to ask you to look again at the Defendants' Exhibits 23-A, -B, -C and -D.

The first is an aerial photograph of the Crest Theatre and the Hill Top Shopping Center. It was obviously taken in the afternoon, because you can see the shadows bearing toward the east, and you can see on the parking lot three automobiles, which would seem to buttress the information that the matinee business there is not as good as contrasted with the 50 per cent or more matinee business in the downtown theatres.

You can also see on that parking lot—and I will show it to you more closely in a moment—a horse with a board, such as the highway department uses to block off a street.

It is thrown across the front of the parking lot. This picture was taken December 13, 1951, the aerial pictures were taken, I think I stated for the record, and it was in effect until June, 1951, and they show that parking lot, and they show that same street stop-sign; and it says, "No parking—Entrance," so that that contraption which has been on that parking lot for at least six months—I don't know whether it is there now or not—but I ask you to look at it and consider whether that is the quality of invitation that would inspire first-run or other high-class patronage toward the Crest Theatre, in its location.

[fol. 1602] The other picture shows the Hill Top shopping center from the north, and on the corner building are two signs, "For Rent," and "Welcome to the Crest Theatre." I suggest to you, with regard to those, the business aspects of that particular location.

He wants us to show our pictures there. Our people, in all sincerity, tell you they would like to show them in downtown theatres, and they very much prefer to show them in their own downtown theatres. Well, they do that because they can control our pictures. We have at least within our own control the risk of a valuable article, and we don't leave it to someone with whom we are not in business concert that is the reason that we are not required to take it. We prefer doing business in our own way, in the American manner; and Mr. Watkins has dealt most clearly and eloquently with this day-and-date business.

Needless to say, Loew's does not want to be under the absolute compulsion to play its pictures downtown at the Century, and day and date at the Crest, because by doing so, we will lose control of the playing time. We will tie ourselves up. We will have to play the picture as long as the Crest wishes to play it. If by chance we have a poor picture, and we want to get it out of the theatre, we couldn't do it. And a further thought is, in some instances, we would have to be controlled by what some other exhibitor [fol. 1603] wanted to do, and we want to go ahead and play our pictures whenever we want to.

There is a further objection that would be necessary there, and that would be, if we played it with him, we would have to play it with others. And, if Dr. Hawkins can be believed, and I think he can, there was no questioning

of him, if we played with the Crest Theatre, we would lose 16 per cent from that area, and we would lose from the Northwood area 16 per cent, and from the Edmondson area 16 per cent. That is 40 per cent of the business right there for three areas. What would be left of the downtown theatre? That motion picture house, worth a million dollars or more, if it compares to the Stanley—and it does—it would be closed up. We could put offices in there, but we couldn't show motion pictures in there,—just be sure of that.

It would be utter suicide if we entered into a zone arrangement as far as our own theatres are concerned; and the law says we can play our pictures wherever we want, and we won't do it otherwise, unless something compels us.

He also claimed that Loew's discriminated against him as a neighborhood house. Again, this has been dealt with on a little different angle.

We do own the Parkway, and we do play our pictures in the Parkway seven days ahead of the neighborhood houses, every neighborhood house. We played only two [fol. 1604] other pictures in this suit. That Mr. Myerberg eventually played, other than Metro pictures, so that was nothing.

We have the right to play the Parkway, and nothing in this case will instruct you any differently.

He said we imposed upon him unreasonable clearance. He got exactly the same as anybody else, and he says that we imposed upon him unreasonable rental charges.

So far as the Parkway is concerned, you will recall that the plaintiff settled on The Stratton Story as an illustration of how he had been damaged; and, yet, it is in this record, from Mr. Myerberg's own mouth, that the playing of The Stratton Story by the Parkway Theatre did in no way damage him at the Crest.

Now, if his prize exhibit, The Stratton Story, wasn't hurt, he chose it, we didn't, and he has failed to prove anything along that line in damage in that respect.

Now, as to unreasonable clearance, I have suggested to you that he got exactly the same fair treatment that all others did; and, in fact, Loew's preferred Mr. Myerberg's theatre and other theatres beyond what some of the distrib-

utors did. There is no uniformity there. And I call your attention to his testimony that we gave the Crest a sliding scale, just as promptly as could be done after the theatre started. Mr. Adams testified to that, uncontradictedly.

We gave him Saturday openings whenever he wanted [fol. 1605] them. We gave them to others, too.

He got the Saturday openings that we gave other exhibitors, and he has no complaint there; and that relates to some of the others that were supposed to be in conspiracy with us.

Now, I am down to the Avalon. There was a lot of correspondence and exhibits about what the Avalon should play, even with the Crest, and so forth. Mr. Adams, the branch manager from Washington, was unwilling at Mr. Garman's request to move the Avalon up to equal availability with the Uptown. New York thought it should be, and there was an honest difference of opinion. New York instructed him to put the Avalon in bidding, and, when bidding was instituted, and with the Crest the same thing was done.

Mr. Adams, who was here, said that not one picture ever played at the Avalon even with the Crest after the bidding was instituted, not one.

What they did was to compromise, like businessmen should. They went to Mr. Garman and said, "We won't move him up." Mr. Myerberg wanted to get this preference of run, and they split it into two; and the Avalon always followed after the Crest, if the Crest had won on bidding. That solved that problem. It does not amount to anything.

In this business, it is a fact, as Mr. Watkins pointed out to you, that no matter which way you turn, you will [fol. 1606] tread on somebody's toes.

Now, as to the category of the 2,500 pictures that Mr. Watkins referred to, there has not been proved in evidence anything to show that we charged anything unreasonable.

Now, if there is anything wrong with what was paid, it originated right with Mr. Myerberg, and is some suggestion as to his business acumen and the grossing possibilities of his theatre. I don't believe he enjoyed it when we offered in evidence the defendants' exhibit which listed the bids volunteered by Mr. Myerberg, setting the term, setting the time, setting the play date, setting the percentages; and

when he thought his theatre was so great, that he paid $2,000 against 50 per cent over $4,000 on the Dutchess of Idaho, and the whole picture grossed $2,513, so he took in that week $513 more than he paid for it, and there was no adjustment on bids. He admits that. We were not called upon to refund any of that money, but he went down the list, Three Little Words, $1,600 guarantee, and he grossed $1,967. Summer Stock, a fine picture, played five days Saturday opening, $1,500 against 50 per cent over $4,000. He grossed $294 more than he guaranteed; and on down the line, Toast of New Orleans, a Mario Lanza picture, with tremendous popularity; and yet, he grossed $1,184, and paid almost 50 per cent of it. All the way down, King Solomon's Mines, one of the most successful pictures—my kids saw [fol. 1607] it three or four times—$1,200; and that time he grossed $2,500; but on that run of pictures that he selected, himself, to put in, and was the successful bidder, he paid 67 per cent of his gross receipts in film rental.

I do not think that is the kind of theatre that we should be compelled to do business with, when we have our own theatre downtown.

The real issue in this case is competition. You can't get away from it. He admits competition when he applies for exclusive. He admits competition when he goes for day and date. The plaintiff offered you guesses, and the defendants offered you facts. We gave you Dr. Hawkins, with his charts, and the yellow area on the map over there. He showed you how many people, how much percentage of the downtown business came from this draw area. There cannot be any doubt about competition. They did not attack Dr. Hawkins. They could not have attacked him. He was absolutely independent, with no bias. You will see, when you have access to it—I won't bother to take the time now—but you will see from this map how it is compacted with houses, and that there are no open spaces on it. Why, you can see that triangle along here to the left, and over here the woods and open spaces within a half-mile of the Crest Theatre.

We also gave you the Century's survey, and Warner's put in their survey, and there were no questions about its [fol. 1608] accuracy. This was the competition in the Crest area. What is the zone of the Crest Theatre, looking at

the whole city, looking at the Century, how it draws from the whole city? There cannot be any doubt about where its draw is, and yet they say there is no competition.

We say there is competition, and we say there is no conspiracy.

Let me ask you this: if these methods of playing pictures, suggested by the plaintiff, these shifting practices, one day one way and one day another, don't you think it would have been profitable in this case—I am talking about the exhibitors in the industry in Baltimore, generally. We know from the plaintiff's own mouth that the other independent exhibitors downtown would not play the way he wants to play, and we have no right or power to compel them to play that way, but how about the neighborhoods? There was the suggestion, the direct statement in Mr. Rome's speech yesterday, that we should have brought in some of the exhibitors to prove that they would not play the way we suggested; but His Honor is going to tell you that the burden is on the plaintiff to establish its case here. We were not required to refute something which did not come into their case.

I point out to you the fact—and they won't deny it—that, sitting in this courtroom from time to time throughout the trial of this case, have been representatives, leading [fol. 1609] executives, of the largest neighborhood interests in this city, and they could have been called to the stand by the plaintiff on rebuttal, or on direct, at any moment. They could have said, "Mr. Nolte, will you take the stand?" Mr. Nolte is with the Durkee interests; or they could have called Mr. Garman, of the Uptown interests. And they could have said to the others—I have forgotten the names, but they could have told them to get on the stand and ask them if they would have played that way. "And don't you think that is a good way of doing business?" But did they call anyone of them? No; they did not dare.

They knew that what Mr. Norris said was true, that the rest of the industry won't play that way; and, if they won't play that way, even if we wanted to—and I am thinking of my own client; my client does not want to play that way, and we couldn't make them do it.

Now, where is any conspiracy? Do we conspire not to do something we cannot do? It is admitted that we have not

conspired with any other exhibitor downtown, or neighborhood, so that this group of defendants here is charged with conspiring to do something that, in fact, it cannot do. I suggest to you that this is just an absurd theory, that won't hold water.

Now, in just a few minutes I will be through.

Every time there was an opportunity, the slightest pause, [fol. 1610] the slightest chance, the slightest excuse, you heard from Mr. Myerberg this free-enterprise speech; and now he wants to do this because it is free enterprise.

You will recall my reading from the depositions to a certain extent in contradiction of his statement on the stand that he would be gravely concerned if any action on his part hurt anybody else in the City of Baltimore. And then I read from his deposition, and the direct question was asked: "Would you want that no matter what the effect would be on the downtown theatres?—" meaning all of them, not just Warner's or Loew's. And he said, "Certainly; it is fair enterprise. If somebody enters business and he gets hurt, that is free enterprise."

I suggest to you, and I am going to leave you with this thought, that real free enterprise in this country still permits a man to use his own property in his own way, to show his pictures in his own theatres, to sell his own products in his own stores; and I suggest that Mr. Myerberg's conception of free enterprise differs from all reason, all right of property, all law. I suggest to you, his idea of free enterprise is that he wants to get somebody else's enterprise free, because that is what he is trying to get in this case; and I suggest that to you: that if that were true, everyone of you in your own business is unsafe from an attack of that kind, that will deprive you of your own [fol. 1611] property, and your right to manage your own business in the way you see fit to do it.

Now, one more thing: the very first paper in this case, in this file of documents, the official papers in the case, is the bill of complaint. You will find that it was filed in the District Court of the United States for the Eastern District of Pennsylvania, at least the District Court in Philadelphia.

I do not challenge the plaintiff's right to file his case in Philadelphia, whatever. Whatever reasons he may have had, he had the right to file a suit there, whether it was

because he thought distance might lend enchantment to his theatre, and it was better for a Philadelphia jury to pass on this, or for whatever reason he had to do it, and I don't challenge it; but there happens to be a further rule that was invoked in this case, and it was invoked by the defendants, that where the convenience of the parties and the interests of justice require, then the case can be sent from the court in which it was filed to some other District Court; and that is what happened in this case. And it happened in this case over the vigorous opposition of the plaintiff, and at the request of the defendants, their request that the case be sent here to Baltimore to be tried, where they were perfectly willing to risk the disposition of this case to a Baltimore jury. And that is what I am quite willing to do. [fol. 1612] Thank you for your patience. I hope I have not over-tired you.

The Court: Do you wish to be heard, Mr. Raftery?

Mr. Raftery: Yes.

The Court: We will take a recess now for about ten minutes.

(Whereupon a short recess was taken, at the end of which the following occurred:)

[fol. 1613] The Court: Very well, Mr. Raftery.

ARGUMENTS ON BEHALF OF DEFENDANTS

Mr. Raftery: Members of the Jury, I do not want you to be frightened by all these papers. I am not going to talk that long. In fact, I am coming right down first of all as to Warners, the Stanley Theatre. I am going to adopt, one hundred per cent, Mr. Boyd's arguments on the Century Theatre, simply to say that the Stanley Theatre is, in the opinion of Warner Brothers witnesses, and generally conceded, to be the finest theatre in Baltimore, and whether Warners had it or Mr. Myerberg had it, or Mr. Rappaport had it, that would be the logical place for Warners to try to sell its pictures in the first instance. A theatre that cost a million and a half dollars, without land, two and a half million to replace, well located, on Howard Street, and if you were looking for a showcase I certainly believe a prudent distributor would select the Warner Stanley Theatre instead of the other, the Crest.

There is no proof of any kind or character in this record that either Warner Brothers Circuit Management or Warner Brothers Distributing Corporation in any way have conspired with anybody as regards Mr. Myerberg. On the contrary, he opened his house with a Warner Brothers picture on a Saturday. He had Saturdays all during this period. Everything he complains about is out of the case as far as Warners is concerned.

[fol. 1614] Now, I would like to come down to the case itself, and I am going to try to watch the clock and finish quickly.

Mr. Myerberg is not the plaintiff in this case. The plaintiff in this case is Theatre Enterprises, Incorporated, a Maryland Corporation, with no paid-in capital, and as witness Robinson, the accountant, testified, the only money, hard money, that was put into this company came from the Candy Company in Philadelphia, that got the concession to sell candy in the theatre, $15,000 of Berlo's money. Berlo Candy Company opened the bank account, started them in business, and as the balance sheet showed there was $611 left of Berlo's money at the end of the balance sheet period. Now, that is the plaintiff. Now, what is the plaintiff gambling in this action?

A plaintiff may be in an action, under the Sherman Act, to recover damages caused by a conspiracy or a monopoly directed to its business or property, and under the statute if it recovers $1,000, His Honor must multiply that by three. so they get $3,000 plus reasonable attorneys' fees for Mr. Rome. Now, that is the stake they are shooting at.

Now, what is defendants' position? If this Theatre Enterprises, with no paid-in capital, loses the case it loses nothing but the ordinary court costs, because our clients still have to pay the attorneys' fees, and there are no awards or expenses or anything such as plaintiff is shooting at here. [fol. 1615] Now, that is the type of action we are defending.

So, we come to Theatre Enterprises again. Originally this theatre was built by a company named Pem Construction Company, and that company got a $315,000 first mortgage from somebody, and that was placed on this theatre. After the stores were rented and Mr. Myerberg's Pem Construction Company had that income, as he testified, of $5,000 a month from the stores, what happened? I don't know how

it was done, but it is the nearest financial miracle that I have ever seen. The Pem Construction Company deeds the theatre portion of the premises to this plaintiff, the company with no paid-in capital, and that company assumes the liability of that first mortgage to the tune of $307,000. It was $315,000. And the mortgage company released the Pem Construction Company from the obligation of that mortgage. That is Mr. Myerberg's testimony.

So, now we have the shopping center divided into two parts: You have the stores, still Pem Construction Company, with the rent coming in, you have the theatre owned by Theatre Enterprises, with the mortgage of $305,000, the second mortgage, chattel mortgage, and I don't know what other mortgages on it. So, then, we have this lawsuit, and as I said before this company is shooting for big stakes. It wants to recover damages from these defendants, which will be multiplied by three by the Court, if any are given, [fol. 1616] plus attorneys' fees, plus reasonable expenses. Now, that is what the lawsuit is about.

Warners made a survey and showed that 19.8 per cent of their patronage came from this area. I will add that to Mr. Boyd's remarks, and I will proceed now to Mr. Grimes' testimony, because this is where the really ridiculous part of plaintiff's case comes into the picture.

Plaintiff put in exhibit in Exhibit 92, took "The Stratton Story," and grossed $2700-odd. Plaintiff, with his limited experience in the business, then says: "If the theatre had played it first-run admission prices with no increase of patronage".—Now, no proof was offered that he would have maintained the same number of people out there at the higher admissions as the low. Then he said he would not.

Now, we have the $2700 figure. He brings that up so his gross would be $6700. Then he says: "I would add 25 per cent to my patronage." So, he is up to $8400 a week and our yearly gross of $436,800 at the Crest Theatre. Now, that is the crystal ball method of computing his alleged damage in this case.

Now, in his testimony, he testified unequivocally that he knew nothing about how these damage figures were computed. He said they were computed by Mr. Rome. Mr. Rome tried to explain it to him and he didn't understand it. But here he takes Mr. Rome's figures and he comes up with a

[fol. 1617] round figure of about $205,000. That is his situation.

Mr. Grimes got on the stand, a man who is District Manager of all the Warner Theatres, and I asked him what his opinion was of that guesswork, and the answer was "it is ridiculous."

Now, at page 250 of the record, Mr. Myerberg injected into this case the Ambassador and Warner Theatres in Washington, because in the early stages of his case, when he got going on this day and date thing, when he sought exclusivity, he said: "Why, you people do it in Washington, you allow the Ambassador to play day and date and I should have that same privilege." So, Mr. Grimes took first the damage period, as he calls it, as the period of the lawsuit, and we put in evidence Exhibit 19. Now, during this period of the lawsuit the Warner Theatre in Washington, located downtown, grossed $634,000. The Ambassador Theatre, located in a very highly populated apartment-house and hotel area, but three miles from downtown, in the same period grossed $307,000. Now, the ratio there is 48.5, Ambassador against downtown.

If you take the gross of the Stanley Theatre—now, mind you, this man testified if he played day and date with either the Stanley or the Century, he said he would outgross them, and that is the figure he put in what I call the "crystal ball statement."

The actual gross of the Stanley for the 56 weeks was [fol. 1618] $406,000 plus. Take 48 per cent of that. Concede, without admitting, that the ratio of the Crest and the Stanley would be as good as the ratio of the Ambassador to the Warner in Washington, the gross would be $197,000 at the Crest Theatre.

Now, yesterday, in his summation, Mr. Rome did not mention that $430,000-odd theatre at all, nor did he mention the 30 per cent height he mentioned in the exhibit, and he mentioned a gross of $240,000. I didn't follow him on it, but nevertheless he seemed to be unwilling to go along with his original way of computing damage. But at any rate, if you take that constant figure you come out with a net loss, and using Mr. Myerberg's 35 per cent of the gross as film rental, you come out with the net loss of approximately $12,000.

Now, to make sure that our test was right, we took a six-year period of the same theatre and you come out with a $16,000 loss and you are one and one-half per cent definitely in ratio.

We submit that these are the only actual figures before the jury on the question of damages, and they are taken from two theatres that Mr. Myerberg himself injected into the lawsuit, and we say that these have at least some probative value, while we contend that these guessed figures have no probative value. And even if you were to find that everything he claims is true—the alleged conspiracy, and so forth—without admitting it, I say on these demonstrated [fol. 1619] figures he is not entitled to a penny in the first cause of action. Mr. Watkins, I believe, disposed of the second cause of action completely. It — just a tack-on that was stuck in here, and no effort was made to prove it.

Now, I want to say first a few words about this Paramount decree.

At no time in the Paramount case was it ever held that every distributor had no right to sell its pictures first-run exclusively downtown. The issue wasn't raised, the issue wasn't in it, and I assure you people, members of the jury, that the Paramount provisions of the decree that have gone in have no application to the facts here in Baltimore at all, because Baltimore wasn't in the case. Secondly, no decree was ever made that said you must license your pictures day and date to a neighborhood and the downtown theatre. Quite the contrary. The decree recognized the principle of run. It recognized the principle of clearance. It says that reasonable clearance is perfectly all right between theatres in substantial competition.

Now, we contend—and I am not going to argue it because it has been argued—the evidence is overwhelming on the subject of competition, and the decree is just another one of those things that everybody of experience knows, the Attorney General's office has been trying to correct or at least have other industries conform to their idea of doing [fol. 1620] business. You have the A&P stores, you have read about in the newspapers. They have been after the American Medical Association. You can hardly name a business that they haven't been trying to impose some of

these new ideas and new methods on how they think business should be conducted.

Mr. Rome says guilty, guilty. There was no guilt. It was a dispute between an industry on business methods and business practices generally. Now, unfortunately, he is going to argue, not having any evidence here in Baltimore of anything wrong, he has been wandering all over the country in an effort to find something wrong. Now, we say in rebuttal, and he is permitted to rebut, "We want them to come back to Baltimore, we want them to answer specifically each of the arguments advanced by Mr. Watkins and Mr. Boyd."

We want him to let you members of the jury know what this case is all about and what effect it has on Baltimore. I am tired of wandering and I am tired of listening to his meanderings, but nevertheless he has the right to rebuttal, and I hope he sticks to Baltimore.

Again—and I am going to take a very few minutes—I had a great many other matters that I hoped to speak about, but it is getting late, but I would like to briefly comment on this:

Yesterday Mr. Rome accused us of putting in spurious reasons, and one of them he said is the worst week in the [fol. 1621] year for theatres is the week before Christmas. And that is the time you have the biggest shopping than any part of the year. I only hope and pray, Mr. Rome, that the week before Christmas continues to be the worst theatre week of the year. That is the time that everybody is getting ready for Santa Claus in some form or other. I know in my own experience I have been up trimming the tree until 3:00 o'clock in the morning, and then suddenly someone will come up with: "We forgot to get Aunt Emma a present." The woman of the house is busy getting the turkey ready for Christmas dinner. There is much more to Christmas than the commercial idea, it is the spiritual, the week you are listening to carols, you are getting ready for the coming of the Messiah, and I say, Let's hope that week continues to be the worst week of the year, theatrically. I hope it is the best week in the year, spiritually.

Now, I referred to Mr. Myerberg's plan. I got that idea on page 13 of the opening. Mr. Myerberg's plan, quoting

from Mr. Rome, was that inasmuch as the Crest Theatre was located five and one-half miles from downtown, that his theatre, the Crest, could play a picture first-run either on an exclusive basis in the city of Baltimore, that is, that his theatre would play that picture alone first-run in the City of Baltimore, or he would be able to play it day and date first-run in the City of Baltimore.

Mr. Myerberg's plan, page 14: "That plan was once again [fol. 1622] broached to the companies in Washington." So, I use the term "Myerberg's plan," and I got it right from the opening statement in the case, and I forget whether it was Mr. Myerberg that testified or Mr. Rome, said: "Let's analyze what Mr. Myerberg's plan is." You know, we are living in a day of plans; we have the Marshall Plan, which was a give-away plan. Several people didn't like it, but on the whole the idea was based on the idea of "let's make what is left of the world a little safer and perhaps we can get a little help to defend the world against the forces that seek to destroy it. But it was also based on charity. It was a give-away plan. "Let's feed the starving children, let's clothe them, let's do this, let's do that."

Now, the Myerberg plan was exactly the opposite. I think I called it the "take away" plan. He wants to start first and exclusive, and his testimony is, I would like to take away from each of the theaters here listed, particularly the Hippodrome, the Keith, the New, Stanley and Century, the best pictures that each have, and show them exclusively at my Crest Theater. Now, that is Point 1. He said: "I will modify my plan. I will take away the clearance from every one of these theaters, that every one of these independents as well as the two theaters that are important in the defendant's set-up, and I will push my Crest up in a campaign [fol. 1623] with each of those theaters, not all the pictures, but the best pictures each of them play."

Now, that is No. 2 of the plan.

Then he said: "Well, I will take first-run out in the competitive area I have set up as my area," and he planted his theater right in between the Ambassador and another theater, and he said: "Garman has enjoyed first-run clearance in that neighborhood for many years with downtown theaters." So, his first part of the take-away was: "I will

take away from Garman because my theater is superior to Garman's, and I want clearance on every picture I put in and do not bid on, as pointed out by Mr. Watkins, from each theater."

Then he says: "On competitive bidding I will outbid them and take it away from them. The entire approach has been from the start, that I want to take away from some exhibitor in the City of Baltimore, something that exhibitor either has or has had for years or has had for a short time."

Now, that is his sole complaint, and he calls it free enterprise. Now, joining with Mr. Boyd, if that is free enterprise, then Lord help us.

I would also like to call your attention that that is significant in the extent that these folks have gone to try to win this lawsuit. During Mr. Zimmerman's examination, Mr. Rome asked him if he knew the Hippodrome Theater grossed $136,000 in a year and that the Crest Theater [fol. 1624] grossed $122,000 in a year, would his opinion of the Hippodrome be the same as it is valuable as a showcase, or whatever he used, for the RKO pictures. Not once in that question did the witness mention that the $136,000 had to do with percentage pictures, or anything else. He represented to that witness that it was $136,000. He then did the same thing to Mr. Galanty, testifying for Columbia. Mr. Galanty phoned the Hippodrome after he got off the stand and brought the books back to me, and I asked Mr. Rome to concede them and he absolutely refused to do it, and you will recall the next morning I had to ask His Honor to issue a subpoena and we sent the Marshal over and brought Mr. Rappaport's bookkeeper over here with the books of the grosses, and instead of being $136,000, one year it was in excess of $630,000 and in another year it was in excess of $500,000, and in fact the next two in excess of $500,000.

Now, those are the spurious things that have been in this lawsuit. The position of the plaintiff, the financial irre- [fol. 1625] sponsibility of the plaintiff, the carelessness to use the list, of counsel in his effort to establish his lawsuit, his complete unwillingness to stick to the City of Baltimore, and wander around all over the country, and the crystal ball guessing, speculative exhibit that has been handed to you for the purpose of computing damages. I say that any ver-

dict in this case, except a clean-cut verdict for all the defendants, would be a miscarriage of justice, and I feel confident that you folks who have labored here so long will render a true and just verdict on the evidence and not on any clever arguments or clever statements made by Mr. Rome.

Thank you.

The Court: How much more time do you want, Mr. Rome?

Mr. Rome: Sir, according to our calculations the defendants have had about two hours and twenty minutes total. I shall try to take, if Your Honor would permit me, at least up until 1:00 o'clock. I shall try to finish by that time, sir. Your Honor suggested earlier that I might have the same amount of time that defendants' counsel would have, and that would give me something less than that.

The Court: We will proceed now for about fifteen minutes and then take a break for lunch, about an hour and then resume.

Mr. Rome: Would Your Honor prefer to break now and reconvene later on, so my argument would not be interrupted?

[fol. 1626] The Court: Would you rather have it that way?

Mr. Rome: I would prefer it if Your Honor would grant it.

The Court: Very well. Members of the Jury, we will take a recess until 1:30.

(Thereupon, at 12:30 o'clock, p. m., a recess was taken until 1:30 o'clock, p. m.)

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[fol. 1627] Afternoon Session

(Whereupon, the Court met, pursuant to the taking of the recess, at 1:30 p. m.)

The Court: Mr. Rome, we are ready to proceed.

Mr. Rome: Thank you, sir.

Rebuttal Argument on Behalf of Plaintiff

Mr. Rome: Your Honor and members of the Jury, I should like to return just briefly at the outset in my remarks

to one of the last things that Mr. Raftery referred to here, and that has to do with the gross revenue received by the Hippodrome Theater during the season 1948-1949.

I should like to read the question which I asked of Mr. Zimmerman about which Mr. Raftery has complained. This question was as follows, members of the Jury: "According to the information furnished us by your company and the other companies in interrogatories, Mr. Zimmerman, it is shown that the Hippodrome Theater during the season 1948-1949 grossed $132,699. Now, in your opinion is a gross of $132,000 the kind of gross that you expect in every one of your showcase theaters?

"Answer: Very disappointing, but these grosses were down everywhere."

Now, members of the Jury, what I asked was according to the information furnished us by Mr. Zimmerman's own company in answers to interrogatories. You will recall, I [fol. 1628] am sure, that in the very beginning of the case, when I read those answers to the interrogatories, it was made clear that the information that had been furnished to us had to do only with the report made by the exhibitor to the distributor of the pictures on which there had been paid a percentage of the gross receipts and, secondly, it was only that revenue which was reported to the distributors.

Now, the information furnished to us in this case by these defendants, Mr. Raftery's clients, are as follows:

With regard to the Hippodrome Theater, Columbia said to us during the season 1948-1949 the gross revenue reported by the Hippodrome Theater was $109,329 from the licensing of 19 pictures in the Hippodrome Theater. And RKO reported that it had a report of a total amount of admissions of $23,371.72 from the Hippodrome Theater during the same period of time. Those are the answers to interrogatories furnished us showing actually that a total of 28 pictures played in the Hippodrome Theater and produced a total gross revenue of $132,699.

Now, that is the basis of the question which I put to Mr. Zimmerman, who is a lawyer, who knew perfectly well what RKO had done. I put a similar question to Mr. Galanty, who knew perfectly well what Columbia had done, and the

curious fact is on this chart which Mr. Raftery has produced here, it is shown that the Hippodrome Theater [fol. 1629] played only 28 pictures during the season 1948-1949. And, consequently, we develop in the information supplied by these defendants the fact that only $132,000 was grossed by the Hippodrome Theater despite whatever Mr. Raftery can do to try to throw a smoke screen over this situation. This information came from them. Their own charts support it. Only 28 pictures played in the Hippodrome Theater. When you take that out into the jury room you will find, members of the Jury, that that is so. Mr. Raftery stood here before you and made a remark what people will do to win a case.

Mr. Raftery, I would like you to know, sir, that I have not been at the bar as long as you have, but my honor and my integrity mean more to me than any case. And, members of the Jury, I stand on what I said. I stand on what I asked and the answer is exactly as I put it here, $132,000, because no matter how we deal with these figures, members of the Jury, it remains that only 28 pictures, by their own count, played. Now, I cannot explain the statement made here about a gross of some $600,000-odd. The information that came from these defendants themselves shows $132,000.

Now, throughout the arguments that you have listened to this morning I am sure you must have been struck by one thing, the language of power, the language of control, the language on the part of counsel of an absolute disregard for the rights of others, and even, indeed, for the ultimate [fol. 1630] decisions of the Supreme Court of the United States. First off, Mr. Watkins said that he found it an anomaly that the Crest Theater, which was considered by its owners to be the finest showcase in the State of Maryland, was only seeking a day and date run, not an exclusive run. That, members of the jury, is the language of power and control, because in their minds if you have the finest theater, if you have a theater, indeed, no one else shall enter into that field to compete against them. That has never been the view of the Plaintiff in this case. It is perfectly true the Plaintiff does consider the Crest Theater to be one of the finest showcases in the State of Maryland, and, indeed, anywhere. It is a fine theater, but that has never

meant, in the mind of the Plaintiff's operating head, that that theater was to have any exclusive right to a run to the exclusion of everyone else. That wasn't so with regard to first run and it wasn't so with regard to the subsequent run.

Now, also, there came out, it slipped out the way these things do, that in the view of counsel here the distributors will lose control of a picture, will lose control of playing time if there is not a common ownership of theaters. So that they shall have control. But they are not supposed to, under the law, to have that kind of control because they are required by the Paramount decrees, that the Judge has permitted in evidence here, to license their product picture [fol. 1631] by picture, theater by theater without discrimination in favor of an affiliated circuit of theaters or others. But these gentlemen say: "We would lose control if some other theater were to come in, if an independent theater were to come in."

And then Mr. Boyd stood up before you and said: "Well, now, if the Crest Theater gets it, it would have to play with others and that other theater would take up a certain amount of percentage and this theater would take up an additional amount of percentage, and the Crest Theater would take up an additional amount, so that we would lose 40 per cent of our patronage."

But what did Mr. Rodgers say when it came to that problem? What Mr. Boyd did was to cumulate the effect coming from a group of theaters, whereas, under the Paramount decree in this case Mr. Boyd's client and every other distributor defendant here must sell the exhibitor theater by theater without trying to lump them together, without trying to get some cumulative effect. Mr. Rodgers recognized that from the stand. He was asked as follows:

"Question: You recognize, though, Mr. Rodgers, that the obligation of Loew's Incorporated is to license its product theater by theater?

"Answer: Oh, my, yes; and we do.

"Question: And, consequently, the fact that some other [fol. 1632] theater other than the Crest, located outside of the downtown area, might come along and equally seek access to its product, has no real bearing or ultimate bear-

jng on the right to be accorded the Crest as such to have access to your pictures?

"Answer: None whatsoever . . ."

Now, how does that tie in with what Mr. Boyd attempted to suggest to you here? The language of power came out when Mr. Raftery referred to the Paramount case and the decrees. He said "that is just one of those things, you know, the Department of Justice trying to impose its new ideas, its new methods on industry and all kinds of industries."

But, members of the Jury, it was not only the Department of Justice that brought these companies to book, it was the Government of the United States that ultimately vindicated its view in the highest court of the land, one of the three arms of the Government has told these fine companies they have violated the law, they have a notorious proclivity for conduct which violated the anti-trust laws. They have had a subtle genius for, using the words of the court, "for conduct violative of the anti-trust laws," but in Mr. Raftery's mind that is just one of those things, and he has attempted to tell you it has no effect, no bearing on the issues in this case before you.

Why did His Honor permit the decrees to come into [fol. 1633] this case if it had no bearing on the issues before you?

Now, there has been another thing said here with regard to what the Plaintiff sought: Was it an exclusive run? Was it a day and date run? I should like to make perfectly clear, if I can, members of the Jury, the fact that what the Plaintiff sought was access to first-run pictures in the City of Baltimore, access to first-run pictures. Now, that is what has been denied, access to first run pictures. In the view of the Plaintiff the Crest Theater was sufficiently far away from downtown so as not to be in substantial competition with downtown, and, consequently, in the view of the Plaintiff it was capable of playing day and date with downtown. But every one of the distributors at one time or another advanced the argument that you are in substantial competition with downtown and, therefore, you cannot play day and date, it is out of the question.

And the Plaintiff, still wanting to get into business, still wanting to have access to first-run pictures, said:

"Well, I am even willing to meet you on that score. If I am in substantial competition, at least give me the right to compete for first run."

Now, that is all there is to it. The Plaintiff was seeking, in line with whatever position these distributors took with regard to first run, to meet them on that ground and say:

[fol. 1634] "At least give me the opportunity to compete, which I believe I am entitled to."

Now, there cannot possibly be any real doubt in the minds of this distributor as to whether or not the Crest Theater wanted exclusive or day and date, because in the final analysis it doesn't make a bit of difference, it doesn't make a bit of difference because none of these distributors were ready to accord the Crest Theater access to first run on either basis, and that is why we are here today, because on neither basis were the distributors willing to grant access to that product.

Now, moreover, I should like to point out to you that actually the decision made by these distributors has never turned on whether it was an exclusive first-run or a day and date first-run that was being sought. The decision turned on the fact of a national policy, and in two hours and 20 minutes of discussion not one of these gentlemen here, not one of them even referred to the fact of national policy, which has been testified to by the leading executives called by them on behalf of every one of these companies, never even mentioned it. They put up a lot of their smoke screens about the financial stability of the Theater Enterprises, Inc., and about what was in the shopping center, and so on, but in the final analysis, as they themselves said:

[fol. 1635] "No theater outside of the downtown area, no matter how fine it might be, no matter what it might offer, shall have the right to access to first-run pictures."

Now, one thing that Mr. Watkins said was this:

"That there is no controversy in this case about the fact if there is substantial competition then the downtown theaters have the right to clearance over the Crest."

Well, if ever there was something in controversy, members of the Jury, that is it, as the way Mr. Watkins attempts to describe it. Because, once again, there is no attack here on the idea of run and clearance as such. What we have sought always is access to product, access to first-run. Now, the fact that the Crest Theater is in substantial competition with downtown, to use their argument for a moment, does not mean that the Crest shall be denied access to first-run because by their own witnesses they have recognized the fact that if the Crest were downtown it would have access to first-run. Unquestionably there could be no dispute. If the Crest were downtown obviously it would be in substantial competition with the other downtown first-run theaters. But equally obvious, the Crest Theater would have the right of access to first-run pictures. All this problem of clearance in that context has to do with is the fact that the Crest Theater and some other theater would not play the same picture on the same date if they were in substantial [fol. 1636] competition. So, if the Crest were downtown it would not play a picture on the same date as the New Theater plays it, but unquestionably it would have access to the first run of pictures, and they themselves admit it. And, consequently, this whole idea of trying to say that if the Crest, located where it is, is in substantial competition with the downtown, then we have the right to have clearance. That simply is not so, except for the fact, which we have always recognized, that if the Crest Theater is in substantial competition it would not play the same pictures on the same date, but it would have the right of access to first-run.

Now, what about this matter of substantial competition? They have attempted to say that I glossed over it yesterday and did not follow it up. One can only touch so many things within an hour, but let us examine the problem of substantial competition. These gentlemen have attempted to produce it before you.

First off we have Professor Hawkins who comes in and testifies that he made a survey, as a result of which he concluded that 16-3/10 of the patrons of the downtown area came from the Crest Theater area. When you take these maps out and have an opportunity to examine them closely you will see that the area that Professor Hawkins colored

in is different, it is larger than the area Mr. Myerberg actually described and which is appearing on the map that [fol. 1637] we have produced here. But passing that, what did Professor Hawkins say? Professor Hawkins is an eminent expert, I am sure, on the problem of shopping centers, but by his own statement he is no expert on the motion picture business and knows little or nothing about theaters. And he was not able to tell us anything about theaters. Polls are notoriously fallible. He was showing a survey made for the purpose of this case. These distributors did not decide, back in 1948 and 1949, to deprive the Crest from access to first-run pictures on the basis of Professor Hawkins' survey. They did not know anything about it at that time and they did not care to know anything about it, because they had their policy which precluded the Crest, no matter what. But passing all that, what did Professor Hawkins do? He spread his survey over a period of time that caused him to cumulate, that inevitably caused him to accumulate the patronage that might have come from the area of the Crest, and again we go back to the mandate of the Paramount case, you must consider this picture by picture and theater by theater, because if you cumulate, if you wait long enough, presumably possibly 100 per cent of the people in the Crest Theater area would at some time or other patronize the downtown theaters and, obviously, that does not give you any criterion for substantial competition.

But what did His Honor say with regard to Professor [fol. 1638] Hawkins' analysis of shopping centers, and so on? Judge Coleman said:

"After all, as I see this case, it is not going to rest upon what kind of shopping center there is there. It is going to turn upon the population within a reasonable radius of this theater, and the people that live there, and move to and from there, and are likely to frequent this place, either on foot, bus, or in their own automobiles; and it seems to me that the store situation, while it is an attraction, is purely a secondary attraction, if you have sufficient density of population."

And it remains undisputed on this record that the population in the area of the Crest Theater, the area which Mr. Smeltzer himself, from Warner Brothers, said would be the

area of draw on first-run pictures is 125,000 people, an amount of population which their witnesses say is eminently sufficient, quite enough to support a first-run theater.

But then we have another survey, another poll made for the purpose of this case by a gentleman, Mr. Grimes, who comes in here and says:

"I am opposed to the idea of the Crest having access to first-run pictures because that is going to hurt Warner Brothers, and Warner Brothers does not want to be hurt."

[fol. 1639] What was the survey of Mr. Grimes? Again, his survey covered a period in time longer than one week, so that more than one picture played. He cumulated the result and his result was 19 per cent of the people who patronized the Stanley Theater came downtown. But not only did he cumulate it, but he was not even able to tell us what per cent signed the card, who had signed their names to the card, whether it was done by someone else. Polls made for the purposes of particular issues, as we have already shown with regard to national elections, come out very frequently with the kind of thing that is to be expected from them. But now there is Mr. Boyd's chart which he refers to as the "Blue Measles" chart. And that, members of the Jury, is the most curious of all, because after having gone to all the labor of putting all those blue dots on there, his witness did not even testify to any per cent with regard to the area of the Crest Theater. Why did they do that and not give you any percentage at all? Now, it just makes that meaningless and useless except for one thing. If you look at it now you will see that by far the greatest draw and the area of the greatest draw of the downtown theaters is right here in the downtown area, and I undertake to say to you, if you wish to take the time and the effort when you retire to the juryroom, to count the numbers of dots in that area and you will find that it does not come anywhere near [fol. 1640] establishing a figure comparable to that which Mr. Hawkins testified to, and probably to that which Mr. Grimes had to do with. But in the final analysis it remains true that it wasn't because of substantial competition, it was not because of a "blue measles" chart, made in January, 1952, that Loew's Incorporated, or any one of the

other companies decided, back in 1948 and 1949, to deny the access of first-run pictures to the Crest Theater.

Moreover, members of the Jury, these distributors are in a situation which is absolutely insoluble from their point of view. Because the Crest Theater on first subsequent run availability is made to play day and date with theaters a mile away or a mile and a half away, and that would be only justified on the ground they are not in substantial competition.

But these same people come along now and say theaters five and one-half miles away are in substantial competition. It simply cannot be. If a theater a mile and a half away is not in substantial competition, then, by the inevitable processes of their own reasoning, the downtown theaters cannot be in substantial competition with the Crest Theater, either.

Now, there has been a great deal sought to be made of the difficulties flowing from day and date on first-run, and as I have said to you, it has been suggested by Mr. Boyd [fol. 1641] that we lose control of a picture if that happens, and it is only by virtue of common ownership such a thing is possible.

But, actually, they have in the City of Baltimore the absolute, complete answer to their own argument on that score, because by their own statement, Mr. Raftery made it in his opening statement to you many days ago, in the City of Baltimore, a minimum of 20 theaters and sometimes it has ranged as high as 35 theaters, play day and date on the first subsequent run availability.

Now, while some of those theaters have a common ownership, there is no claim, of course, that all of those theaters are owned by common ownership, and yet they play day and date. Nobody has any difficulty about it, everybody knows how it is done and the mechanics of the industry are sufficiently clear to those gentlemen, so that it works out without any problem. Was that just a mirage, a smoke screen, in their attempt to distract you from what is the ultimate irreducible heart, the core of this case, the denial of first-run product or access to first-run product, not for any of these other things by way of afterthought, but because of years, for years stemming back way beyond the

time of the Paramount case, these companies had a national policy which limited the showing of first-run to picture houses downtown. Now, they have said, after Mr. [fol. 1642] Schanberger opposed it, after Mr. Rappaport opposed it, and so on, but there again it is to be expected those gentlemen would oppose the entry of a new theater into the field. But that fact would not prevent these distributors from granting access to first-run if the Crest Theater were downtown and the protest made by the exhibitor would not have any ultimate effect, and the fact those gentlemen were satisfactory customers would not have any effect, because you will recall the distributors recognized the fact that having a satisfactory customer is not enough to exclude them from bidding in the first-run field in their theater.

Now, moreover, they have attempted to say that we could have called these gentlemen to the stand. They were the people who raised this by way of defense. We have never raised any question about our willingness to play with those downtown houses. We have attempted to abide by what we consider to be the law, that these distributors will not license theaters. We did not say it because Mr. Rappaport opposed or that Mr. Schanberger opposed it. Strangely enough, Mr. Norris' elaborate survey of the possibilities of establishing such a playing policy in the City of Baltimore did not include the Mayfair Theater. The Mayfair Theater, members of the Jury, has had access to only 20 pictures on an average during this three-year period.

Now, these gentlemen have sought to take refuge behind [fol. 1643] the fact there are independent exhibitors in downtown Baltimore. We have only two first-run theaters. Therefore, how could there be any conspiracy? It slips out in another way. Mr. Raftery's fine, blue chart shows that the Century Theater had 39 pictures a year, and the Stanley Theater had 35 pictures a year. The independents never came close to getting that many pictures a year. And when you find it out you will see that the Mayfair, for instance, had only 20 pictures. If these companies were so eager, so solicitous, about the welfare of the independent exhibitor in Baltimore, they could have fixed it so these other independents would have had an equal opportunity to play the same number of pictures. But that very chart shows the favored

position and the fact that these companies still retain control, they are the ones who still favor their own theaters, and despite what Mr. Boyd and Mr. Raftery have attempted to say to you with regard to the right to play their own pictures in their own theaters, they still must be guided by the obligations upon them under the law, and if they play their own pictures in their own theaters as a result of a conspiracy with these other distributors to exclude from the competition in the first-run field anybody else who seeks to compete, then all that comes down to is the fact they still have violated the law. Because, if they still have conspired, [fol. 1644] I am sure His Honor will still tell you that they have violated the law.

Now, that chart, too, will demonstrate the fact that over the years in the City of Baltimore, not only during the three-year period of time, but actually, as you will recall from the witness stand, going back as much as 20 years in the City of Baltimore, there has been a rigidity of the distribution in pictures, always certain houses get certain product, and never did any distributor ever seek to license its products anywhere else.

Now, recently, in the last year or so, the last few months, since the Paramount case requiring them to license theater by theater and picture by picture, they are now coming along and saying: "We are making our product available to other people, so Metro pictures do not always go into the Century Theater and Fox pictures do not always go into the New Theater." And I ask you to keep that in mind, members of the Jury, when you consider this case, because what the Plaintiff is seeking here is injunctive relief as well as damages. The Plaintiff is seeking fair treatment in so far as the future is concerned, and since Loew's no longer licenses its product exclusively to the Century Theater, and since Warners will no longer license its product exclusively to the Stanley Theater, the Plaintiff asks to be protected with regard to its right of access to [fol. 1645] that product as well as every other product in the future.

These distributors have attempted to say, time after time, that their main interest is in revenue, but despite all their barrage of argument about the financial stability of the

Crest, its parking facilities and the fact that there was a wooden horse across the parking lot in the daytime, and so on, Mr. Rodgers still said that what he was interested in, what he judged by, was the ability of a theatre to pay and then, members of the Jury, Mr. Rodgers concluded, as did all of these companies, that the Crest Theater, the Plaintiff in this case, was unable to pay without further experiment.

They say: "Why should we experiment? What obligation is upon us to experiment?"

There results from this the fact that you cannot accept their reasons as bona fide reasons, as reasons advanced in good faith. If they come to you and say: "We are interested in revenue, we will give our pictures to the house that will pay the most money"—but they have been giving them to the Crest without even finding out whether the Crest could pay enough money to justify having the run."

That is another way of showing you, members of the Jury, these people have come along and put up the answers that they wanted only to hoodwink you.

Mr. Watkins became righteously angry about the fact I [fol. 1646] was having these people take the stand and committing perjury. What I am attempting to suggest to you, and what I am charging these gentlemen with committing is conspiracy. That is what they have committed. That is what the Supreme Court of the United States found them to have committed, conspiracy. Perfectly true, it was not in a criminal case, it was in an equity case, but they have committed conspiracy in order to exclude independents from having access to the first-run field, and I feel confident His Honor will so explain that to you when he comes to discuss the effect and impact of the Paramount case. So, if they committed conspiracy before, they are perfectly capable of coming in and committing conspiracy again, because the Courts have recognized there was a strong temptation on the part of people who for a period of 20 years continued a uniform conduct and uniform course of action, to continue with that course, and it came out here before from other counsel. They are still, despite the decree calling upon them to license theater by theater, talking about the cumulative effect of two, three or four theaters, so it is not to be wondered about if counsel makes

such an argument, that the top executives, who are the people who established these policies, not in the City of Washington, but the top officials in the City of New York, say every first-run product shall be played in this theater or that theater, and those are the people who continue to do [fol. 1647] the same thing year in and year out.

Now, Mr. Watkins made the suggestion that we are the people who started the uniformity, because we sent the same letter to each one of these companies, both Mr. Myerberg and myself. Now, that falls of its own weight, because Mr. Zimmerman, you will recall, on the witness stand, was asked by me whether there was any particular significance to the fact he had sent letters identically worded to two different people in the City of Wichita, Kansas. Of course, he said no, there was no significance to that, and neither was there any significance to the fact that Mr. Myerberg sent similar letters, and I sent similar letters to these distributors seeking access to first-run pictures.

Mr. Watkins has attempted to suggest to you that "we are damned if we do and damned if we don't, and if all of us grant first-run to the Crest Theater, then equally we can be charged with uniform conduct and found guilty of conspiracy." That, members of the Jury, is just arrant nonsense, because what the anti-trust laws provide against is unreasonable restraints of trade.

How can there be any restraint of trade if the Crest Theater is granted access to first-run pictures? Restraint of trade and the unreasonable restraint of trade only comes from the unfair conduct denying, the uniform conduct deny- [fol. 1648] ing access to first-run pictures. So there is nothing whatever in that.

Now, our theory of damage, members of the Jury, is necessarily only a reasonable approximation of what we claim the Plaintiff lost. That is the best that we can hope to do under the circumstances. And it is our understanding of the law, and we believe that His Honor will so advise you, that we are entitled to come before you with a reasonable approximation of damage. We are not required to pin it down with some mathematical accuracy, which is impossible simply from the necessities of the circumstances. But what we can do is to give you as quickly as we could a

reasonable basis for you to conclude what the Plaintiff would have made by way of income or a greater amount of income that it would have had at the box office with access to first-run pictures.

Now, we have not, as Mr. Raftery and these other gentlemen here have attempted to suggest to you, based our theory on only The Stratton Story. You will recall that Exhibit 96 lists other pictures playing at the Crest Theater which lend themselves equally to the same formula of damage. And, mind you, members of the Jury, I think that when you examine that exhibit, if you will be kind enough to do so, you will find that the Plaintiff has been liberal on the side of reasonableness and conservativeness in estimating damages, because there are pictures in there which brought into the Crest Theater much more per tenth of playing time than [fol. 1649] did The Stratton Story, and we concede that it would be unfair to use the highest grossing picture as it would be equally unfair for us to use the lowest grossing picture. What we did was to go down a middle road of reasonableness, and as an example took The Stratton Story, but if you will look at that exhibit and apply the same formula, which is a very simple one, you will find that the Crest Theater has been damaged to the extent of at least $205,000 of additional income it would have taken in.

Now, Mr. Raftery has spent some time, as did Mr. Grimes, in the course of the testimony in analogizing to the Ambassador Theater and the Warner Theater in Washington. Members of the Jury, it is perfectly true that we are the ones who brought in the Warner and the Ambassador Theaters. We brought that in in order to establish the fact that these distributor companies grant access to first-run where they choose to do it. They are the ones that control.

Not only did Warner play there day and date but so did the other companies. But they chose to use that as a ratio and tried to bring it over to Baltimore to try to show there is no damage. Let us examine that.

Talking about fair play, they came in and presented to you that ratio and did not take into consideration the differential in admission price. They never did give you the courtesy to tell about that until it came out on cross exami- [fol. 1650] nation. Obviously that is going to have a con-

siderable bearing on the Warner ratio and the Ambassador ratio.

In addition to that, and it comes out only by cross examination, the Ambassador Theater played only the product of three companies and it must appeal to your good, common sense that the theater which has access to the best pictures of eight companies is going to gross more money at the box office than a house playing product of three companies, not only the bad pictures but the good pictures, and over and beyond that, members of the Jury, if you look at that analysis that Mr. Raftery has made so much of, you will find that actually by their own statement here in front of you the Crest Theater would have grossed a minimum of $197,000 on the first-run.

Now, the Crest Theater, as you know, only took in $122,000 on the first subsequent run. And even by their own theory, which is certainly not in favor of us, which was designed to favor only them, if you take their own theory, there was $75,000 of additional gross revenue that the Crest Theater would have had had it been able to play first-run pictures.

I grant you from that amount there would have to be deducted the additional film rental the Crest Theater would have had to pay, but without that, by their own calculation, [fol. 1651] it means the damage to the Crest Theater was $51,000.

Now, where do we stand with regard to the problem of damage, because what we are entitled to have by way of damage is this reasonable approximation in accordance with your best judgment, of the additional income that the Crest Theater would have earned had access to first-run pictures been made available.

[fol. 1652] The operating expenses, I suggest to you, with the exception of advertising, would remain the same. Mr. Boyd has attempted to make some argument about $100 and $200 advertising. In the deposition read to you before, Mr. Myerberg said there would be a formula for advertising of 5 or 10 per cent of the gross. Offsetting the additional operating expenses, whatever they might be, is a fact that the Crest Theatre actually ran at a $12,000 loss, and we are entitled to recover for that; so that, if you offset that

$12,000 against the additional operating expenses that might come into the case, by their own reasoning, we will have a minimum damage of $51,000 on the first cause of action.

With regard to the second cause of action, I don't want to tire you, I think you have been tremendously patient. It remains a fact that Loew's owns the Parkway Theatre, and treats every subsequent-run theatre the same, holding it back of the Parkway. And, yet, they say all theatres in the City of Baltimore playing a sub-run have not been discriminated against. The mere fact that Loew's owns the Parkway is not enough if, by virtue of this conspiracy existing between Loew's on the one hand, and all the other companies on the other hand, they have decided and determined that Loew's shall have a preferential position here in the City of Baltimore, seven days after downtown, in return for similar preferential treatment elsewhere [fol. 1653] throughout the country.

Mr. Raftery keeps wanting the case to come back to Baltimore. He doesn't want it to get out of Baltimore, because, members of the jury, it is only when you are able to see this picture nation-wide that you can see the local manifestation of the conspiracy that we allege here in Baltimore. If you look at Baltimore, itself, it may be difficult to see it; but when you place it against the background of notorious proclivity for conduct violative of the antitrust laws, and when you place it against the background of their theatre holdings all over the country, and the fact that vast sums of money pass among them each year, stemming from the cross-licensing, then you have the purpose, the heart and the motive of the whole situation.

Now, the Crest Theatre—and Mr. Watkins and Mr. Boyd attempted to make much of it—the Crest Theatre asked 21-days clearance if it had access to first-run. If the Crest Theatre were to have access to first-run, it would have 21-day clearance over theatres with which it was in substantial competition, that played on the later availability; but the Crest Theatre has always been willing and has always recognized the fact that every other theatre which is equal or comparable, that wants to come into the first-run field in the City of Baltimore, should have equal opportunity.

[fol. 1654] Mr. Raftery talks about the take-away policy, taking away, but nothing was taken away from Mr. Garman. The Crest Theatre has always been willing to meet the competition of any other theatre, whether it be Mr. Garman or not, on first-run. We say, if Mr. Garman wants first-run, he should have it as well as we should, as well as every other fine theatre in the City of Baltimore. We haven't taken anything away, but you recall the clearance forms of Metro showed that something was granted to Mr. Garman that he did not have before, in that the Avalon Theatre and the Pimlico Theatre, two lesser houses, were moved up, and nothing will be taken away from the downtown theatres that the law says should not be taken away. And by that, I mean only that a newcomer in this country has a right to enter into competition in the motion picture industry, just as he has to in any other industry.

They have made mention of the fact in this case that it was filed in Philadelphia. It is perfectly true, this case was originally filed in Philadelphia; but I do think Mr. Boyd should in all fairness point out to you the fact that when this case was transferred down here from Philadelphia the Court in its opinion ordering the transfer said there is very grave doubt that the case could ever have been brought originally in the City of Baltimore, because of the intricate details of jurisdiction. So that the curiosity [fol. 1655] of the law was, even though we could not start here originally, the Court in Philadelphia recognized that under a statute of Congress, it could be transferred here; and when it was transferred here, we came here, and never sought to appeal that order transferring it down here. And I should have supposed that ordinary fairness would have led Mr. Boyd to point that out to you, in discussing the problem at all.

So, I come back to the fact that there is a policy, and this Paramount case, which Mr. Raftery attempts to shunt aside, and Mr. Boyd said he wanted to get that out of the way at the outset—I suppose these gentlemen would want to get the Paramount case out of the way at the outset, because that is, as Mr. Boyd said, the Bible of the motion picture industry, and it has documented and given chapter and verse for what can only be described as the notorious proclivity on the part of these companies over a period

of years, particularly with regard to access to first-run pictures, because it was found as a fact that in the 92 larger cities of the country, of which the City of Baltimore is one, these companies had a monopoly of the first-run exhibition field, and that they used that monopoly to exclude from the first-run exhibition field any would-be independent who had the temerity and the enterprise to try to compete. And so, members of the jury, I say to you, the national [fol. 1656] conspiracy which has been found and adjudicated by the Courts had a local manifestation here in Baltimore, and had enormous effect on this plaintiff, to such a point that the plaintiff was unable to get access to pictures, and suffered damage which, in our opinion, is at least $205,000.

I ask you to bring in a verdict for the plaintiff in that amount.

The Court: It occurs to me that the jury probably wants to see, if they have access to all of the exhibits, they want to see, when they retire for their deliberations, these charts that might be put in the jury room now; and we will take a recess of 5 or 10 minutes while that is being done.

Mr. Boyd: Counsel will be glad to help do it, sir.

The Court: I don't know that that is necessary. They can be, if they can be taken out of the courtroom now, I don't think it will disturb the jury.

Members of the Jury, you may retire now for 5 or 10 minutes, and they can be put in the hall; so, before the jury retires, they can be moved into your room.

(At the conclusion of the short recess, the Court charged the Jury, as follows:)

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[fol. 1656A] Reporters' Certificate to foregoing transcript omitted in printing.

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[fol. 1657] CHARGE TO THE JURY

The Court: Mr. Foreman and Members of the Jury, it now becomes the duty of the Court to instruct you on the law of this case. As you have learned from your experience in other cases, I think, you, as the jury, are the sole judges

of the facts, and anything which the Court may say in the course of these instructions about the facts, or any inferences which it may draw or may appear to draw, also any remarks with respect to the facts which the Court may have made or any inferences which it may have drawn or may have appeared to draw in the course of the trial,—none of that is in any sense binding upon you. It is for you, and you solely, to determine the issues of fact, as you may find them, after applying the rules of law which the Court will give you, and which must govern you in the case. The rules and principles of law which the Court will give you are binding upon you.

This has been a somewhat protracted, and perhaps it has seemed a somewhat tedious case. Of course, all of us, at some time or another take delight in seeing a motion picture. So, perhaps it makes the minds a little more disturbed if we talk so much about motion pictures but do not have any display of them.

I think it is appropriate for the Court to say to you at the very outset,—because it should assist you in your application of the law to the facts as you may find them—that [fol. 1658] there are really only three basic questions that you have to decide in this case, and they are the following,—this being, under the Anti-Trust laws of the United States, a charge of conspiracy by the defendants against the plaintiff. The first and most basic question is: has there been such a conspiracy? In a few moments I shall define conspiracy to you, and, of course, go into more detail by way of illustration of the principles of law as applied to the facts of the case, or some of them, at least. But that first and simply stated question, which you must bear in mind at the very outset, is: has there been a conspiracy against the plaintiff in the operation of its Crest Theatre?

If you should find, after applying the principles of law, which I will give you in a moment, to the evidence as you find it, that there has been no conspiracy, then, that ends the case. So, there is only one question, then.

If, on the other hand, you should find that there has been a conspiracy, then you still have two questions to consider: (1) Even assuming that there has been a conspiracy, has it been the proximate cause of actual, and not merely speculative, damages to the plaintiff within the period here

in suit, which is from February, 1949, until March, 1950? If you answer that second question that there has been actual, and not merely speculative, damages that plaintiff [fol. 1659] has proved as the proximate result of the conspiracy, the third and last question is: what is the amount of that damage that you find from the evidence?

Those are the three broad, basic, fundamental questions that underlie the case. They are not difficult, technical questions, as I trust you will see from the more detailed instructions that I will now give you in connection with explaining the law as you shall apply it to the facts. I shall not, in the course of these instructions, attempt to give you in any detail at all a narration of the facts. I may refer to certain parts of the testimony, certain of the facts that have been asserted by either side, or by both sides, which you may think are of minor importance, and they may be facts which, in your deliberations, you may think do not have as much weight as some other facts. I shall not in any way attempt to cover the testimony in the case, first, for the reason just explained, that, in any event, it would not be of any control upon you and you would not be required to adopt anything that the Court might say about the facts, or any inferences that the Court might draw, and, secondly, that being true, I think it would be tedious and unnecessarily wearisome to you for the Court to do so. You will have access to the transcript of the testimony, which has already been written up, if you want [fol. 1660] to refresh your recollection on it after you retire to your room. You will also have access to all of the exhibits, which you may peruse again as and when you may see fit to do so.

To be somewhat more specific with respect to these principles that must control you in considering these basic questions which you have for decision,—three at most,—I instruct you that this action is brought under the Anti-Trust laws of the United States, known as the Clayton Act and the Sherman Act, and is brought by plaintiff, a Maryland corporation, to recover damages, from eight defendant companies, under two causes of action, which plaintiff claims to have suffered during the period from February 26, 1949, the date of the opening of its, the Crest, theatre, up to March 20, 1950, the date of the filing of this suit, which was

originally brought in Philadelphia but was transferred to this jurisdiction on defendants' motion, for convenience of the parties, such being permitted since the suit might have been brought originally in this Court.

The suit is based upon two causes of action, $250,000 damages being claimed under the first cause of action, and $52,000 under the second cause of action. The more precise grounds of these two causes of actions or claims I will explain to you in a moment.

[fol. 1661] Plaintiff also asks for a permanent injunction prohibiting such of the defendants as are engaged in the business of distributing motion pictures from imposing clearances on pictures in favor of theatres in downtown Baltimore over plaintiff's Crest Theatre, located in the northern part of the city, near the intersection of Reisterstown Road and Rogers Avenue.

I instruct you that the term "clearance", in the motion picture industry, means the period of time stipulated in license agreements, between distributors and exhibitors, which must elapse between showings or runs of the same picture within a particular area or in specified theatres. Plaintiff's complaint, that is, what the plaintiff claims here in his bill of complaint, alleges that the following seven defendants distribute motion pictures for exhibition in theatres in Baltimore City, namely, Paramount, Loew's, RKO, Fox, Universal, United Artists and Columbia; that the eighth defendant, Warner, operates the Stanley Theatre in downtown Baltimore, and that defendant Loew's operates the Century and Valencia Theatres, also in downtown Baltimore, and that, in addition to these theatres in the downtown section of the city operating first run, there are five other downtown theatres, namely, Keiths, New, Mayfair, Town, and Hippodrome, operated by persons or com-

[fol. 1662] panies other than parties to this present suit.

Plaintiff is the operator of the Crest Theatre, as I have already said, located in the outer section or the northerly section of Baltimore, at or near the intersection of Reisterstown Road and Rogers Avenue. Plaintiff claims that this theatre is properly located and adequately equipped for exhibition of first-class motion pictures on first run; that it has attempted to obtain first run pictures for exhibition at the Crest, but that the defendants have failed and refused

to license any pictures to it on first run, and that since February, 1949, it has been operated on first so-called neighborhood run,—that is, approximately 21 days after first run downtown Baltimore showing,—day and date with other suburban as well as neighborhood theatres, and that it has been discriminated against in licensing first neighborhood runs with respect to film rental.

As you have heard many times stated in the course of the testimony, these two expressions are very common in the motion picture industry,—"first run" and "day and date". "First run" means just what it says in a few words. It is the first time the particular picture is shown. "Day and date" relates to a contemporaneous showing at the same time with one or more other showings somewhere else.

[fol. 1663] This suit was originally brought against ten companies, but two of them, Warner Bros. Pictures and Warner Bros. Circuit Management, are no longer involved in this proceeding. I mention that only parenthetically. You will see their names in the original pleadings. All eight defendants now involved in this case deny all of the allegations in plaintiff's complaint which in any way charges any wrong-doing on the part of any of the defendants.

As you have heard from the testimony, the Crest Theatre is located about six and a half or seven and a half miles from the downtown theatres in Baltimore. However, in the immediate area of the Crest, at the time its construction began, there were a number of well-established neighborhood theatres, all of which plaintiff claims are in direct competition with its theatre, specifically, the Uptown, Avalon, Ambassador, Pikes, Forest, Gwynn, and Pimlico. When the Crest was completed, its builders leased it to Theatre Enterprises, Inc., which is the complaining company in the present case, that is, leased it on a month-to-month tenancy, which continued until some time in January, 1951, when the theatre was sold to the present plaintiff for approximately $413,000.

Plaintiff contends, as you have seen, that the defendant distributors in the present case could have licensed pictures to play first run at the Crest on 21 days clearance [fol. 1664] over all of the theatres above mentioned, that the pictures, while playing at the Crest, could play first run

in one of the seven downtown theatres above mentioned, and in many other theatres located in Baltimore City that are not situated in the immediate area of the Crest, specifically, theatres like the Senator, Belvedere, Northwood, Edmondson Village, Towson, and Linden, with similar clearance licenses to each of the theatres. The justification claimed by the plaintiff for this is that the Crest is not in competition with theatres in downtown Baltimore.

So much by way of a brief statement of the undisputed background and situation in the case, and then a statement of the claims made by the plaintiff.

Now, members of the jury, I instruct you that the Anti-Trust laws, under which this suit is brought, provide that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, is illegal, and they authorize any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust laws to bring suit for three-fold damages. The corporations which are defendants in this case are persons within the meaning of these Acts of Congress. All three phases of the motion picture business involved in this case, namely, first, production, second, distribution, and, third, exhibition, constitute [fol. 1665] a part of interstate commerce within the meaning of these Acts of Congress.

I further instruct you that, in spite of the broad language of the law as I have given it to you in brief form, these Anti-Trust laws, while forbidding monopolies in restraint of trade, have not been construed as forbidding every restraint of trade, but only those restraints that are unreasonable concerning all articles or commodities in interstate commerce.

We have now reached the point, therefore, when it is necessary to consider what is a conspiracy within the meaning of these Anti-Trust laws?

I instruct you that a conspiracy is an agreement, express or implied, between two or more persons to do an illegal act, or to do a legal act in an illegal manner. It is a combination by two or more persons to accomplish an unlawful purpose by joint or concerted action. An unlawful conspiracy may be, and often is, formed without simultaneous action or agreement on the part of the conspirators.

There are two kinds of evidence, therefore, that you have in cases of this kind and which you have in this case, namely, direct and circumstantial evidence. Direct evidence if evidence which is believed proves the existence of the fact in issue, without any inference or presumption. Circumstan-
[fol. 1666] tial evidence is evidence which, without going directly to prove the existence of the fact, gives rise to a logical inference that such fact does exist. Both kinds of evidence may be of equal probative value; and, in arriving at your verdict, you are to consider all of the evidence, both direct and circumstantial.

The mere fact that plaintiff has seen fit to join a number of parties as defendants, I instruct you, does not, of course, mean that all or any of them are liable to the plaintiff unless their liability is proved according to the rules of law on the facts as I am now giving you those rules of law.

Plaintiff's claim must be judged separately as to each defendant, and the position of each defendant must be judged on its own merits. This is especially true wherever the facts to sustain the nature of the charge made or offense asserted differ with regard to one defendant from those regarding all or some of the remaining defendants. You will recall from the testimony that that is the situation with respect to one or more of the defendants in the present case. I shall allude to that a little more specifically later on.

Each defendant, therefore, is entitled to individual consideration of the evidence, as applied to it, to determine
[fol. 1667] whether that particular defendant participated in any combination or conspiracy. No defendant is to be prejudiced in your minds merely because it has been named by the plaintiff, along with others, as a defendant in this case.

I further instruct you that it follows from what has just been said that you may, on the evidence, find a verdict in favor of one or more defendants, even though you may also, on the evidence, find against one or more of the other defendants.

The plaintiff in this case, I instruct you, as in other civil cases of this kind, has the burden of proving the essential elements which entitle it to recover. And in this case the plaintiff, as to each of the alleged causes of action, has the burden of establishing that a conspiracy existed among

these defendants, or some of them, to violate the Anti-Trust laws and so suppress independent competition, and, further, that the plaintiff was damaged by such a conspiracy. Those elements the plaintiff has the burden of establishing by a fair preponderance of what you may find to be the credible evidence. In other words, members of the jury, in this case, as in all ordinary suits between individuals or corporations, if A sues B, the law says that A must sustain the burden of proving what he claims; and that burden must be sustained to the jury's satisfaction by the weight of [fol. 1668] the credible evidence as the jury finds it.

Parenthetically, I might contrast the situations which you have learned from your experience in criminal trials. In criminal cases, the burden of proving the guilt of the accused rests upon the Government, and, in order to convict, that burden must be sustained to the jury's satisfaction beyond a reasonable doubt. In civil suits of this kind the burden necessary to be sustained by the moving or claiming party is met if it is supported by what the jury finds to be the weight of the credible evidence.

I instruct you that plaintiff's first cause of action—I have explained already that there are two separate grounds for plaintiff's suit, called causes of action—relates to alleged loss of what we may abbreviate as first run business. Before plaintiff can recover on this first ground or cause of action, I instruct you that it must establish to your satisfaction, by the weight of the credible evidence, first, an agreement, combination, or conspiracy to unreasonably limit the licensing of first run pictures to certain exhibitors, to the exclusion of plaintiff and the Crest Theatre; second, that, as a direct and proximate result of so doing, the plaintiff has been injured in its business; and, third, that the damages to its business are capable of reasonable ascertainment from the evidence in the case, and are not merely [fol. 1669] speculative or conjectural damages. If the evidence fails to establish to your satisfaction any one of these elements, I instruct you that, then, your verdict must be for the defendants on this first ground or cause of action. If the evidence as to any one of these essential elements is so evenly balanced that you cannot determine upon which side the preponderance or the greater weight thereof lies,

then I instruct you that your verdict must be for the defendants on this first cause of action.

Now, turning to the second cause of action, I instruct you that in order for plaintiff to recover on it, which relates to alleged loss of what we will abbreviate as the second run business, plaintiff must establish, first, an agreement, combination, or conspiracy on the part of the defendants to restrain trade in the licensing of pictures to the Crest Theatre by unreasonably discriminating against that theatre; (2) that, as a direct and proximate result of so doing, the plaintiff has been injured in the business of that theatre; and (3) that the damages to that business are capable of reasonable ascertainment from the evidence in the case, and are not merely speculative or conjectural.

As you have heard from the testimony, plaintiff asserts that the Crest Theatre has been unreasonably discriminated against on three grounds, in connection with this second [fol. 1670] claim or cause of action: first, that on first neighborhood runs, Crest was charged more than other neighborhood theatres, that is, the license charges per picture have been higher. The defendants, as you have heard, deny that there was any such difference charged. Secondly, plaintiff asserts that at least one of the defendant companies discriminates against Crest by giving to Loew's own Parkway Theatre seven-day runs of its own pictures prior to letting the Crest show the pictures. Defendant Loew's admits this, but has introduced evidence to the effect that it treats all other neighborhood houses in exactly the same way that it treats Crest in this respect, and also relies upon the right,—which I instruct you is its legal right—to show its own pictures in its own theatres exclusively, as and when it sees fit. In other words, members of the jury, on this latter point, to clarify it, I instruct you that if a man has a theatre of his own and he has pictures of his own, he can show those as and when he feels like it, in his own theatre, just like if you have a grocery store, or any other kind of a store, and if you grow crops or raise anything, you can sell it in your own place. But if, in addition to doing that, you sell some of your products to others, then, of course, you begin to enter the field wherein it may give rise to charges of discrimination. The third assertion of plaintiff in connection with this second cause of action, based

[fol. 1671] upon subsequent run business, is that Crest should be given clearance over other neighborhood houses. Defendants admit that all of the defendants do not give exactly the same clearance to Crest as to all other neighborhood houses; but defendants claim that such variations as they have testified to as being made, are reasonably justified and are not prejudicial to Crest, and that there is no conspiracy in any of this, as indicated, they claim, by lack of, rather than the existence of uniformity of action.

If the evidence fails to establish to your satisfaction, by the weight of the credible testimony, any one of these elements that I have just referred to, then your verdict must be for the defendants on this second cause of action. If the evidence as to any one of these essential elements is so evenly balanced that you cannot determine upon which side the preponderance or greater weight thereon lies, then, I instruct you,—just as in connection with the first cause of action—your verdict must be for the defendants on this second cause of action. And since, as the result of the explanation just given you, the plaintiff asserts these two separate causes of action, you must consider the evidence separately as to each and determine whether or not the plaintiff has sustained the burden of proof, as I have [fol. 1672] explained it to you, with respect to each cause of action.

If, from all the evidence, you believe that the defendants acted independently and without any illegal concerted action, then whatever harm may have been visited upon plaintiff is merely one of the hazards implicit in our competitive system, and your verdict must be for the defendants.

I further instruct you, members of the jury, that proof of conspiracy requires more than mere suspicion or conjecture. There must be direct proof of conspiracy, as I have defined it to you, or circumstantial evidence sufficiently strong as to give rise to an inference of conspiracy. The burden of proof, as I have explained to you, rests upon the plaintiff. If there was no common purpose and no uniformity of conduct between any one defendant and any of the other defendants, you may consider those facts in determining whether that defendant entered into any combination or conspiracy with any of the other defendants.

It is not enough that there has been created in your minds some doubt or suspicion as to the conduct of the defendants; the plaintiff must produce proof of such a nature as carries a conviction to your minds, such as would influence you in the conduct of your own business or daily affairs. The character of the proof must be such as you would be willing [fol. 1673] to act upon and base a judgment upon in the disposal of important matters.

The similarity of the business practices of certain of the defendants does not necessarily lead to the conclusion that they were in a conspiracy. If you find that such similarity results from nothing more than a common business solution of identical problems in a competitive industry, the similarity of conduct would not require the conclusion that a conspiracy actually existed. Each of the defendants has a right to license its pictures by licensing successive runs thereof and to grant reasonable clearance between each of the successive runs. Clearance is granted to protect the right of the licensee in the run granted; and a reasonable clearance is not a violation, I instruct you, of the Anti-Trust laws. It is only an unreasonable provision that is a violation. But where the clearance granted is unreasonable, in either time or extent, or where it is granted as a part of an arbitrary system of clearances, or where it is granted for the purpose of suppressing competition, the granting of such a clearance becomes a violation of the Sherman Act, which is one of the Anti-Trust Acts on which, as I have explained, this case is based.

Without regard to the period of clearance, the licensing of pictures for exhibition on different successive days is considered by this industry, as you have heard testified [fol. 1674] here, essential in the distribution of motion pictures, and either a license for successive days or one providing for clearance permits the public to see the pictures in later exhibiting theatres at lower admission prices, so that each class of the public may have the opportunity of seeing motion pictures for progressively reduced admission prices.

I may refer at this point to what the testimony has disclosed in relation to some of the costs: that the cost of each black-and-white print of each motion picture varies from $150 to $300, depending upon the length of the picture,

while the cost of the technicolor prints varies from $600 to $1,200, depending upon the length of the picture; that many of the bookings in the lower admission theatres are for less than the cost of the print. So, the exhibitions would be confined to the higher admission price theatres unless a method of successive runs, with reasonable clearances for the protection of the earlier runs, be used in the industry.

I further instruct you that each distributor, acting individually, has the right to grant or withhold clearance as between theatres which are in substantial competition. Plaintiff asserts the Crest Theatre is not in competition at all with downtown Baltimore theatres. Defendant asserts, however, that these theatres are in very substantial com- [fol. 1675] petition with the Crest and other neighborhood theatres.

In considering whether the defendants acted independently in granting or withholding clearances in licensing pictures for exhibition at the Crest and in its competitive area, you are to consider the manner in which each company did the licensing. If you find from the evidence that there is no proof of any conspiracy, as I have defined it to you,—if you also find that the defendants did not license in the same manner,—you should find for the defendants.

No theatre, I instruct you, has the absolute right, as a matter of law, to demand from a motion picture producer or distributor the right to priority in runs. It is the right of each distributor, acting independently, to select its customers. Therefore, the plaintiff has no absolute right to demand exhibition rights for first run of any of the pictures of any of the defendants. So, plaintiff has no absolute right to obtain a license to exhibit any motion picture distributed by any defendant on first run in the City of Baltimore.

If you find from the evidence that each of the defendants, in licensing its pictures for first run exhibition in Baltimore, endeavored, entirely independently, to select that customer which would ultimately yield it the greatest revenue, having [fol. 1676] due regard to its past business relations with the customer, its skill and character of management, the size and character of its equipment, and the drawing power of the theatre, then you can find for the defendants on the

first cause of action, that is, the one with respect to this claim of right to first run preference, or at least day and date with downtown.

I instruct you that the location of a motion picture theatre is one of the important factors to be considered, along with many other factors, in determining its suitability for exhibiting pictures on a first or an early run, some of the other factors being the seating capacity, the admission prices charged the patrons, the facilities which it provides for the comfort and convenience of the patrons, and the size and character of the neighborhood from which the particular theatre draws the major portion of its patronage, or is likely to draw it.

As you have heard from the testimony, Loew's, one of the defendants, had a stock interest in a corporation operating the Century, the Valencia and the Parkway theatres. During all of the time here in controversy, Loew's had a right, as a distributor, to prefer its own theatres, as I have explained, as customers in licensing its own pictures. The fact that Loew's did license its pictures for first run exhibition in its own theatres, rather than for first run exhibition [fol. 1677] in the Crest Theatre, is not, in and of itself, proof of any conspiracy or any illegal action by Loew's.

You are further instructed that Loew's had the right to license its own pictures in its own Parkway Theatre fourteen days after first run downtown and ahead of other theatres, and its action in so doing was not, in and of itself, proof of any conspiracy or any illegal action by Loew's.

Turning to Warner Bros., it is in the testimony that Warner Bros. Circuit Management Corporation, which is one of the companies that was dismissed from the case, owns and operates the Stanley Theatre. Warner Bros., and its affiliate, Warner Bros. Distributing Corporation, during all of the time in controversy here, had a right to prefer its own theatre as a customer in licensing its own pictures for exhibition in the Stanley. The fact that Warner Bros. did license its pictures for first run exhibition in its own Stanley Theatre, rather than for first run exhibition in the Crest Theatre, is not, in and of itself, proof of any conspiracy or any illegal action by Warner.

The defendants Columbia and Universal are engaged in the business of producing and distributing motion pictures,

as you have heard from the testimony. These defendants do not engage in the business of exhibiting pictures.

[fol. 1678] Defendants Paramount and RKO are engaged in the business of producing and distributing motion pictures. Since about December, 1949, Paramount has not been engaged in the business of exhibiting motion pictures, and since about December, 1950, RKO has not been engaged in that business.

Defendant United Artists is engaged only in the business of distributing motion pictures produced by other parties. It does not engage in the business of exhibiting pictures.

The plaintiff urges, in support of the charge of conspiracy, that, as a result of concerted action, the defendants refused to sell the plaintiff first run pictures. If any defendant so refused, pursuant to its own business judgment, and if such defendant was acting independently and not in a combination or a conspiracy, such defendant was within its rights in so refusing. In other words, the preference of one exhibitor over another is not, in and of itself, a combination in unreasonable restraint of trade. It is natural for a distributor not to be prone to substitute unknown customers for proven ones.

As I have instructed you, members of the jury, in order to establish a right to recover, plaintiff in the present case must show, (1) a conspiracy in restraint of trade that is unreasonable, as I have defined it to you, in relation to the [fol. 1679] motion picture business; (2) injury directly caused to its business by such unreasonable restraint.

The law further provides, I instruct you, that if any of the acts prohibited by the Anti-Trust laws which are alleged to have damaged the plaintiff have previously been established against these same defendants by a decree obtained by the United States Government, in either a criminal or a civil, that is, an equity proceeding, under these Anti-Trust laws, then the plaintiff may, in aid of its present case, rely upon such judgment or decree previously obtained by the Government, in proving the existence of the prohibited acts to the extent that the law provides that such previously obtained judgment or decree is prima facie evidence against the defendants in a suit of the present nature brought by the plaintiff against them,—that is prima facie evidence, not

conclusive evidence, as to all matters involved in the present case that were decided by the previous decree.

I instruct you that in the previous equity suits between the Government and these same defendants, which have been referred to as the Paramount case,—you will recall I allowed the decree in that Paramount case to be introduced in evidence by the plaintiff,—I instruct you that in that case, which was a suit between the Government and [fol. 1680] the same defendants, which was decided and covered by the decrees in that case, these same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become prima facie evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only prima facie evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibitions from the plaintiff, or have conspired to restrict plaintiff to clearances which are unreasonable.

If you find that the plaintiff has sustained this burden of proving a conspiracy as just defined, then, I instruct you that, by virtue of the terms of the decrees in the pre- [fol. 1681] vious equity suit, which form part of the evidence in this case, the burden of proving the reasonableness of the failure to give the plaintiff first run exclusively or day and date, that is, questions of clearance, as well as the failure to give it any other clearance such as would be reasonable, rests not upon the plaintiff but upon the defendants.

I will just summarize that again. I told you earlier that

the burden of proof in this case, just like in all civil suits, generally speaking, rests upon the moving party; and if A sues B, the law says that A must prove his claim in order to recover. That is true in this case, as I have explained. But, by reason of the fact that what we may call the broad issues involved in this case were involved in the Paramount case, there is a statutory provision which allows those issues, insofar as they may have a bearing upon the issues in a particular case like this, to become prima facie evidence; and, if you find, as a result of your examination of those decrees, that, as respects clearances, these defendants, or any of them, have given unreasonable clearances, it is not necessary for you to find that the plaintiff has proved that, but the burden of showing that they are not unreasonable shifts over to the defendants.

I might explain that a little more in A-B-C language in [fol. 1682] this way: a court order, which is called a decree for the purposes of this kind of a case, is obtained against certain parties,—let us say in a trademark case—that they can only use a certain label or words in a certain way, and the party that was originally aggrieved thinks that label has not been followed out, but that a label in violation of the court's order has been used; so the parties can be brought into court; and then the burden is on that party who has used the new label to show that he is within the order of the court and is not in contempt of it. That, I think, explains somewhat the only really technical point of law that exists in this case.

I instruct you, members of the jury, that if you find from the evidence that the plaintiff was not acting in good faith in submitting offers for the right to exhibit pictures on first run in the Crest Theatre, then the rejection of such offers is no evidence of unlawful conduct on defendants' part. If the plaintiff was acting in good faith in submitting these offers, you should consider the financial condition of the plaintiff, the gross receipts of the Crest, and the ability of the plaintiff to pay the film rental offered.

Even if you should find from the evidence that the defendants combined and conspired in unreasonable restraint of the plaintiff, as I have defined combination or conspiracy [fol. 1683] and unreasonable restraint, if you also find that the plaintiff was injured in its Crest Theatre business as

a direct and proximate result of such illegal act, nevertheless, the plaintiff's right to recover must be limited to actual damages, that is, damages that you find have been sustained in the period alleged by the plaintiff, namely, from February, 1949, to March, 1950, in an amount which can be determined with reasonable certainty from the evidence, and only from the evidence. The plaintiff is not entitled to damages which are merely speculative, remote or uncertain.

If, after applying these rules which I have given you to the weight of the credible evidence as you may find it, you should find that the plaintiff has been damaged actually, then the rule you must apply in measuring such damages is the amount of additional gross income which you find plaintiff would have realized from the operation of the Crest Theatre during the period here in question, had the defendants not combined or conspired unreasonably to restrict plaintiff in obtaining defendants' pictures, less such additional reasonable operating costs that you may find plaintiff would have incurred in showing the additional or different runs of pictures.

Lastly, I instruct you that the amount of your verdict, if you should find a verdict for the plaintiff, should be [fol. 1684] limited to plaintiff's actual damage, in the sense that it should be based, and must be based, upon the extent to which plaintiff's business has been damaged, as above explained. You do not first find the amount of actual damage and then treble it, and then report the trebled amount as your verdict. That would be wrong, because, as a matter of law, under the statute, your verdict in a suit of this kind, if there is a verdict for the plaintiff, is trebled not by the jury but by the Court. I refer to that treble feature in closing lest you may not heretofore have fully understood its application to this case. It is a matter for the Court to apply, and not the jury.

Now, members of the jury, in closing, you may refresh your recollection from the figures, as well as from all other physical exhibits that have been introduced in this case relative to the alleged losses by the plaintiff, and the testimony which has been introduced by the defendants, on the other hand, purporting to indicate that there has not been any such loss.

Just as I have refrained from going into any of the real details of the testimony with respect to conspiracy and other features of the case, I shall not detain you by attempting to analyze these schedules of alleged losses.

I think I have covered all of the essential principles of law that are involved in the case, and I trust I have made [fol. 1685] sufficient allusion to some of the facts in order to illustrate the application of those principles of law to the facts as you may find them. Therefore, I will not go into them any further.

You will have access in your jury room, as has been explained, to all of the exhibits, also the transcript, the official writing-up of every word of the testimony, which is indexed, if you care to examine it.

The Baliff will now be sworn, unless counsel want to make any statements with respect to any exceptions to the charge.

Mr. Rome: We would like to, Your Honor.

The Court: Are they lengthy?

Mr. Rome: To some extent, yes, sir.

The Court: Have you any to make, Mr. Watkins?

Mr. Watkins: Yes, Your Honor. There is one on which I think we will all agree; but the other one I think should be made out of the presence of the jury.

You referred to the claim for damages in the first cause of action as $250,000. The figures were transposed. The claim is $205,000.

The Court: You are correct about that. It is $205,000.

If you have some exceptions to make, I will hear you out of the presence of the jury.

[fol. 1686] Meanwhile, members of the jury, you may retire to the jury room. If there be any additions or corrections to be made, you will be asked to come back.

(The Jury then retired to consider its verdict.)

[fol. 1687] The Court: Mr. Rome, you might give me, just in outline, if you can, what you object to; and I will rule on it. Then, if you want to elaborate on it, if I do not grant the exception, you may do so by dictating it more at your leisure to the Court Reporter.

Mr. Rome: The first thing, sir, is with regard to your statement concerning the fact that the suit was originally brought in Philadelphia, and your statement to the Jury that it might originally have been brought in this Court.

The Court: I understand so. That is what I understand is the basis of the Court's opinion. That has nothing to do with the merits of the case, anyway.

Mr. Rome: We think it might be prejudicial to the plaintiff.

The Court: I do not see how it is possible. Let me have the opinion, Mr. Clerk.

I will say this to all counsel, that I am not disposed to spend another afternoon going over a lot of little things which you would like to have in the charge. I will announce now that I am not disposed to put anything more into the charge, unless I can be convinced beyond a reasonable doubt that I have made an error. If I have omitted something that I did not think was necessary, I shall not put it in.

[fol. 1688] Mr. Rome: In that opinion, sir, it is stated there is grave doubt whether the suit could have been originally brought here.

The Court: I am prepared to stand on the statement that, apparently, it could have been brought. It seems to me to have fitted in within the statute which is quoted by Judge Grim that, "for the convenience of the parties, and in the interest of justice, the District Court may transfer any civil action to any other District or Division where it might have been brought." And he allowed it to be so transferred, presumably for the reasons that are in the statute.

I think it comes with ill grace for you to make any point of that now. You did not stress that. You stated in your argument, I think, that you did not make any point of that.

We will not spend any more time on that.

Mr. Rome: May I say just one word about that, sir? I do not want Your Honor to think that I do something in ill grace. The fact that Judge Grim points out there——

The Court: What has that to do with the case? I might

properly not say anything about it. But you mentioned it, and I did not want to leave the Jury up in the air about the Philadelphia case.

[fol. 1689] Mr. Rome: I mentioned it only because Mr. Boyd brought it up at the tail-end of the case; and I think it prejudices the plaintiff.

The Court: I can't, for the life of me, see how it can be prejudicial to anyone. The Jury does not have anything to do with the jurisdiction. They sit on the case as it comes to them. That is the law.

Mr. Rome: May I have an exception?

The Court: Oh, yes. You may have exceptions to all of them.

Mr. Rome: You made reference to the fact that seven of the defendants so distribute. Actually, there are eight distributing companies. Warner Bros. Pictures Distributing Corporation is a defendant, and is one of the companies.

The Court: I don't think that makes any difference, if I made that slight error. I brought them all in under the same general ground of conspiracy, whether they are producers, exhibitors, or distributors. One of them is segregated. That is what I tried to point out. If I have not quite correctly interpreted the facts, that is not binding upon the defendants, anyway.

Motion overruled.

Mr. Rome: May I have an exception?

The Court: Yes.

[fol. 1690] Mr. Rome: You said Warner Bros. Circuit Management Corporation is no longer in the case.

The Court: That is what I was told. I have it here that Warner Bros. Circuit Management Corporation is out of the case.

Mr. Rome: Excuse me, sir; but I believe there is an error with regard to that. It was Warner Bros. Pictures, Inc., which was not served, and is out of the case. Warner Bros. Circuit Management Corporation is very much in the case.

The Court: Do you admit that I made a mistake in the name?

Mr. Watkins: Yes, Your Honor.

Mr. Raftery: The only thing is that we want to be sure that, if we admit, as we have to do, your instructions as

to Warner's right to license its own theatres has the same bearing and effect.

The Court: No; I will not add a thing to what I have said, except, if I have made a mistake. And I thought I was very careful, when the parties gave the name, to mark out the right ones. If I marked out the wrong ones, I shall tell the Jury that I used the words "Warner Bros. Circuit Management" as being out of the case, but it ought to be "Warner Bros. Pictures Inc."

Mr. Rome: Yes, Your Honor.

[fol. 1691] Mr. Raftery: It is not on the Reporter's copy. It is on the record, I believe, as "Warner Bros."

The Court: They were never served; that is, Warner Bros. Pictures was never served?

Mr. Raftery: That is right.

The Court: Then, the statement was made that another Warner Bros. was out of the case. I know somebody made the statement.

Mr. Raftery: I think Mr. Watkins, in his argument, made at the close of the plaintiff's case, said, in effect, that Warner Bros. Circuit Management Corporation, so far as the evidence is concerned, is out of the case. There has been no proof, because they do not distribute any pictures.

The Court: Are you agreed, that is, are both sides agreed that where I said there were eight in the case, I should have said there are nine?

Mr. Raftery: That is right, Your Honor. Your Honor stated, in ruling on the instructions——

The Court: Well, wait until I finish with Mr. Rome.

Mr. Rome: I would like to except to those portions of your remarks to the Jury which had to do with the legal right of Loew's Incorporated and Warner Bros. Distributing Corporation to put their own pictures in their own theatres.

The Court: Motion overruled.

[fol. 1692] Mr. Rome: May I have an exception, if Your Honor please?

Your Honor also said the Crest had sought clearances over other neighborhood houses. Actually, sir, that situation came up only with regard to not having to play day and date——

The Court: That is a factual question. If I misinterpreted the evidence, I will not change that.

Motion overruled.

Mr. Rome: And Your Honor will allow me an exception?

Your Honor also said that similarity of action does not necessarily lead to the conclusion of conspiracy; and you said, also, that if there was a common solution to common problems on the part of these distributors, there would be no conspiracy.

The Court: That is what I understand to be the law; and I so instructed the Jury.

Mr. Rome: I would like an exception to that, if Your Honor please.

The Court: Very well.

Mr. Rome: Would Your Honor be kind enough to hear me for just a moment?

The Court: No. We have been all over this. Everything in the charge was discussed almost into the night, ad [fol. 1692-A] nauseam, almost I think you might say.

Mr. Rome: Your Honor, without attempting to burden you further with remarks, I would like to except to that portion of the charge in which you made the statement to the Jury that the Crest claimed that it was not in competition at all with the downtown theatres. That has never been the contention made by the plaintiff, sir.

The Court: Well, not in substantial competition?

Mr. Rome: That is correct, sir.

The Court: You want me to say "not in substantial competition"?

Mr. Rome: That is correct, sir.

The Court: Very well, I will do that.

Mr. Rome: Your Honor also said, with regard to the distributors having the right to disprove the charge of past relationships existing between themselves and some other exhibitors, that they had been found in the past to have used the satisfactory customer method——

The Court: Motion overruled. Every one of these points, like the last one, was thoroughly argued, and I told you what I was going to do in the charge.

Mr. Rome: And may I have an exception?

The Court: Yes.

Mr. Rome: Your Honor also said that, with regard to the right of Warner and Loew's putting their own pictures [fol. 1693] in their own theatres, that that *that* is not, in and of itself, proof of conspiracy. But I would request to charge Your Honor that it may be proof of conspiracy, along with the other facts.

The Court: I did not say it might not be. That is why I put in "in and of itself".

Mr. Rome: May I have an exception?

I would also like to except to that portion of the charge with regard to Warner and Loew's, since, in no event, did Your Honor make any reference whatever to the fact that even though these distributors might have some right to put their own pictures into their own theatres, there would be the element of day and date and the prohibition in the Paramount decree, on the part of these distributors in granting clearances to theatres not in substantial competition.

The Court: Motion overruled.

Mr. Rome: And Your Honor will grant me an exception?

We also request, with regard to your statement to the Jury, concerning the fact that the factual situation in Baltimore was not raised in the Paramount case, that the Jury be advised that there was no necessity on the part of the Government to prove the factual details with regard to that situation but that, on the contrary, the Government [fol. 1694] need not do that, and the Jury might still conclude that the evidence in the Paramount case is to be prima facie evidence.

The Court: Motion overruled.

Mr. Rome: An exception, if Your Honor please.

Your Honor also spoke with regard to the fact that the Jury should consider the impact of the Paramount case solely on the basis of the decree that had been offered and received in evidence.

The Court: The decree, as I explained it to them. That is all they had before them.

Mr. Rome: That leads to certain other exceptions that I would ask for with regard to specific requests for instructions contained in our requests submitted to you, which

we believed should be given to the Jury with respect to specific aspects of the Paramount case.

The Court: Motion overruled.

Mr. Rome: An exception, if Your Honor please.

We request an instruction to the Jury with regard to the fact that they can reach their own measure of damages, regardless of what the plaintiff may have introduced by way of damage formulae, so long as it is a reasonable approximation of the loss suffered by the plaintiff.

The Court: I did not say they could reach their own if they did not hew to the testimony. They do not have to [fol. 1695] adopt the figures given by the plaintiff, or by the defendant, or by anybody; but they can't pull it out of the air.

Motion overruled.

Mr. Rome: That is my point, sir, that they need not adopt the plaintiff's figures.

The Court: I think I made it amply clear.

Motion overruled.

Mr. Rome: An exception, if Your Honor please.

I would also request a further instruction to the Jury with regard to the fact that there need not be any mathematical exactness with regard to the measure of damages, so long as there is a reasonable basis of approximation.

The Court: I think I said practically that.

Motion overruled.

Mr. Rome: An exception, if Your Honor please.

I would also request an instruction to the Jury regarding the adverse inference to be taken from the fact that the defendants might not have called responsible executives of the various companies whose testimony was available on the subject.

The Court: Motion overruled.

Mr. Rome: An exception, if Your Honor please.

With regard to the rest, sir, they have to do with our [fol. 1696] specific written requests; and, since I understand Your Honor is intending to overrule our requests for them, may I at least repeat them or give copies of them to the Reporter so that they may appear in the record?

The Court: Very well.

Mr. Rome: And Your Honor will grant me an exception?

The Court: Oh, yes. Bring it up later on.

Mr. Rome: These are the exceptions that I refer to.

The Plaintiff excepts to that portion of the charge in which the Court told the Jury that plaintiff's claim had to be judged separately against each Defendant, and that each defendant was entitled to individual consideration since the Court has ruled in the Paramount case that these defendants were to be treated collectively.

Plaintiff excepts to that portion of the charge of the Court which stated that the distributors have a right to license their pictures for successive runs as that permits a system of progressively reduced admission prices, thus enabling the public to have access to the pictures at the reduced admission prices. The grounds of exception is that this statement, standing alone and without relating it to the claim of the plaintiff, namely, that if they were accorded access to first run films it would not in any way eliminate [fol. 1697] the system of successive runs and progressively reduced admission price to the public, is not a fair and accurate statement of the issue. Furthermore, this right on the part of the distributors must be stated in relation to their legal obligations with respect to the plaintiff and any others similarly situated.

The Plaintiff excepts to the charge of the Court dealing with the subject of locations of theatres being one of the impor-ant factors in considering whether or not it is entitled to have access to pictures on first run, and that other factors are to be considered such as seating, age, admission prices, comfort, convenience of patrons, size and character of neighborhood of patronage from which it is expected to draw. The reason for this exception is that these factors are important primarily in respect to a demand for a first run exclusive in the City and are not the determining factors with respect to a demand or request for first run day and date with a theatre or theatres located in the downtown area.

The Plaintiff excepts to the charge of the Court in which it attempts to state what the plaintiff's claim was, where the Court said substantially the following: "That the plain-

tiff could have played pictures in its Crest Theatre on first run with clearance in favor of all the theatres in this immediate area, and the same thing could be done in a number [fol. 1698] of other areas. Plaintiff says that other theatres in its immediate area would also be entitled to the same right." This does not correctly state the plaintiff's position because it stated that it wants the opportunity for first run in its area, recognizing at the same time, however, that other theatres in its immediate area which are adequate and suitable for first run would have a like opportunity, and that the distributors could either institute competitive bidding or competitive negotiation, and whichever theatre in its area was the winner that theatre, whether it be the Crest or some other theatre, would then be entitled to clearance against all of the other theatres in its immediate area and with which it is in substantial competition.

Plaintiff excepts to that portion of the Court's charge to the Jury in which he likened the distribution of motion pictures to the operation of a grocery store or any other commercial enterprise, the reason being that the defendants in the present case produce and distribute by far the greatest number of desirable feature motion pictures, without which it is impossible for an exhibitor to operate a first run theatre successfully.

The Plaintiff excepts to that portion of the Court's charge on which it was stated that if the defendants simply reached a common solution for common problems that there would [fol. 1699] then be no conspiracy, since even a common solution to common problems if extended so as to result in a nationwide policy may, in itself, be violative of the anti-trust laws.

The plaintiff excepts to that portion of the Court's charge to the Jury in which it spoke of possible bad faith on the part of the plaintiff in submitting offers for pictures and spoke further concerning certain criteria which the defendants may apply in considering those offers, the reason being that there is no legally sufficient evidence in the record from which the Jury could find or infer bad faith on the part of the plaintiff.

The Plaintiff excepts to the refusal of the Court to charge the Jury in accordance with plaintiff's requested

instructions numbered 9, 10, 11, 12, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 30, 31, 33, 38, 39, 42, 44, 47, 48, 49, 52, 54, 55, 60, 61, 63, 64, 65, 66, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 93, 94, 95.

Plaintiff excepts to the charge of the Court on the grounds that it selected various contentions of the defendants for discussion almost exclusively, without giving the correlated contentions of the plaintiff in respect to the individual detailed subject matters discussed by the Court, thereby laying undue emphasis on the defendants' conten-
[fol. 1700] tions.

The Plaintiff excepts to the Court's charge to the Jury because it did not fairly state the issues in the case nor did it direct the Jury's attention to the real issues in the case in a fair and impartial manner.

The Court: Do you want to say something, Mr. Watkins?

EXCEPTIONS TO CHARGE BY DEFENDANTS

Mr. Watkins: I want to except to Your Honor's failure to grant the request for an instructed verdict.

The Court: You did that at the close of the plaintiff's case, and at the close.

Mr. Watkins: The others consist of a series of objections in connection with the Paramount case. I will just dictate that to the Reporter afterwards, if Your Honor thinks that would be better.

The Court: What, in outline, are they? Just give me a general summary.

Mr. Watkins: The general summary is that Your Honor indicated to the Jury that they might find that the Paramount decree is prima facie evidence with respect to all matters involved in the present case, recited in the previous decision. It is my contention that the matters before the Jury in this case were not decided in the previous case. You left to the Jury to decide what matters were. My objection is to the failure of Your Honor to specify to them
[fol. 1701] exactly what matters were involved in the Paramount case.

The Court: I couldn't tell them, and I don't think I am required to tell them. I don't think anybody knows, unless they read the testimony, everything that was decided. I

said that in the Paramount case it was found, previous to the opening of the Crest Theatre, that these defendants had conspired together in unreasonable restraining of trade in violation of the antitrust laws—these same laws involved here—in restricting to themselves first runs and in establishing certain clearances in numerous places throughout the United States.

I think that is just about as specific as a trial court, in a case of this kind, could possibly go. I couldn't take the Jury all over the United States. The decrees are all that are required to be put in or all that may be put in, plus a reasonable explanation of what the decrees were intended to cover.

Now, this is about the third time that I have been over this, I guess, or really the fifth. When I went over this very statement that I have read, and read in my instructions, this morning, as I recall it, nobody made any objection to this on this ground. You had ample opportunity to do it. Nobody made any objection on this ground. Of course, I know you were objecting all along to letting those decrees in at all; but this is the first time I have heard [fol. 1702] coming from the defendants the thought that if the decrees were going in, this was not a sufficient outline of the decrees and the effect to be given to them.

Objection overruled.

Mr. Watkins: I except to that portion of the charge in which Your Honor instructed the Jury that the decrees were prima facie evidence in the present case of what the defendants had done in Baltimore, the ground being this, that the decrees themselves do not disclose that the defendants, in Baltimore, had done anything.

The Court: I did not say that they disclose what they had done in Baltimore.

Mr. Watkins: Then, my note is in error.

The Court: Here, I think, is almost the exact language that I gave. I will begin again and go over the part I just gave.

"I instruct you that in the previous equity suits between the Government and the same defendants, which was decided and covered by the decrees in that case, these same defendants had, at a time previous to the opening of the

Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States."

[fol. 1703] Now, I am quite sure the following was given practically verbatim: Thus, these proven facts, I instruct you, become prima facie evidence in the present case,—the proof of facts which I have just stated. But I had not said a word about Baltimore—"which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only prima facie evidence" in support of that claim.

Mr. Watkins: I seem to have it reversed.

I except to that portion of the charge Your Honor just read, on the ground that what the defendants may have done in Baltimore was not comprised within the Paramount case.

I except to the portion of your charge in which you instructed the Jury that if they found violations with respect to clearance, then the burden of proof of reasonableness of clearances rests upon the defendants. I am simply preserving my exception.

Of Course Your Honor understood, I am sure, that those exceptions were taken on behalf of all defendants.

The Court: Oh, yes! Of course, there is bound to be some confusion. You had originally, as I understood it, three [fol. 1704] Warner Bros. Companies. Is that right?

Mr. Watkins: Yes.

The Court: Only one of them has gone out? Is that right?

Mr. Watkins: Yes, Your Honor; that is correct.

The Court: Warner Bros. Pictures, because never served?

Mr. Watkins: That is correct.

The Court: Therefore, when I said that two had gone out, it ought to be only one had gone out?

Mr. Watkins: Yes, Your Honor.

The Court: And the other thing which I will tell the Jury, raised by Mr. Rome— I suppose the Jury knows it, anyway; but I will tell them that the claim of the plaintiff is not that

the Crest is in no competition with the downtown theatres, but that it is not in substantial competition.

Ask the Jury to come back.

[fol. 1705] FURTHER INSTRUCTIONS TO THE JURY

(After the return of the Jury to the courtroom, at the direction of the Court, the following occurred:)

The Court: Members of the Jury, counsel have called my attention to the fact that I made two erroneous statements as to facts. I am not sure that they would in any sense mislead you, but, lest they might, I will now correct them.

I think I stated that two of the defendants had been omitted from the suit, or the trial here. That was in error. There has been only one; and that is Warner Bros. Pictures. It is a little confusing, because there are three sets of Warner Bros., or three Warner Bros. Companies. The only company that has been omitted from this list of ten defendants is Warner Bros. Pictures, and it was omitted because service was never had upon them. So, where I said eight defendants, it ought to have been nine.

Then, members of the Jury, my attention has been called to the fact that I was not accurate in saying that the plaintiff company claims it is in no competition with the downtown theatres. What I understand plaintiff really says, or the claim it makes, is that the Crest is not in any substantial competition with downtown theatres.

You may now retire to your deliberations.

[fol. 1706] (After the Jury had returned to the courtroom for the purpose of rendering its verdict, the following occurred:)

The Clerk: Members of the Jury, have you agreed on your verdict?

The Jurors: We have.

The Clerk: Who shall say for you?

The Jurors: Our Foreman.

The Clerk: For whom do you find upon the issues joined, the Plaintiff or the Defendants?

VERDICT

The Foreman: We reach a verdict in favor of the defendants, as to all of the defendants.

The Clerk: As to all of the defendants?

The Foreman: Yes, sir.

The Clerk: Members of the Jury, harken to your verdict as the Court has recorded it: Your Foreman saith that you find for all defendants upon the issues joined. And so say you all?

The Jurors: We do.

The Clerk: Verdict recorded.

The Court: Have counsel any remarks?

Mr. Watkins: No, Your Honor.

(Whereupon, at 5:15 o'clock p. m., the Court adjourned.)

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[fol. 1706a] Reporters' Certificate to foregoing transcript omitted in printing.

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[fol. 1706b] PLAINTIFFS EXHIBIT No. 3

No. 5303 Civil

May 8, 1952

Metro Goldwyn Mayer Corp.
1009 New Jersey Avenue N. W.
Washington, D. C.

Attention: Mr. Adams

GENTLEMEN:

On October 7, 1948, I had an occasion to talk to you at your offices and explain in considerable detail about the new theatre with which I am connected. So that you may have all this information readily accessible for both yourself and for the other officials of your company, I am taking this opportunity to formally present all the facts.

It is expected that on November 15, 1948, this theatre,

located at 5521-29 Reisterstown Road, Baltimore, Maryland will be completed and ready to exhibit motion pictures. Advantageously located from a population and transportation viewpoint, the theatre has all the conveniences necessary to insure first-run motion picture success.

This theatre can truly be said to be the most modern and exquisite theatre in Baltimore. Its architectural design and interior decoration, quality of equipment, and comforts to patrons make it a unique and different theatre for this area. Having approximately sixteen hundred luxurious seats on the first floor, in addition to superb private accommodations for another hundred in the loges, this theatre undoubtedly offers the finest showcase for films in the State of Maryland.

Free to patrons of the theatre is a specially built parking area, accommodating about 400 cars. In addition, there is ample space available on uncrowded streets directly adjacent to the theatre for the parking of automobiles.

This magnificent motion picture theatre, designed and planned to exhibit first-run pictures in Baltimore, presents itself to your company as an outlet for your highest quality first-run product. To open the theatre, the finest picture available from your company, a first-run film which has received more than the usual pre-exhibition publicity—preferably one which is waited for by the movie-going public with anticipation; one already causing excitement and creating discussion—is required. The splendor of the theatre [fol. 1707] must be complemented by the quality of a top-notch production. A world premiere is desirable.

Plans are being formulated to make the opening of the theatre one of the greatest affairs of this year in the industry. Radio and television broadcasts and personal appearances of all political, local and society leaders are to be arranged.

It is hoped that your company can furnish the final element to complete what promises to be one of the most important and exciting premiers in the history of the motion picture industry in Baltimore—personal appearances of some of your leading actors and actresses. As you so well know, the glamour these Hollywood personalities add can provide the final touch necessary to crown the brilliant opening of the newest first-run film outlet in this area.

I am at the present time in a position to tender my bid herewith for your first-run pictures — Baltimore, which will be available for exhibition at this theatre. I am prepared to offer you any reasonable guarantee against a percentage of the gross. I can further offer the highest type of exploitation and management, both of which will at all times be under the supervision of the most experienced theatrical people, and which will insure your company greater returns than you have heretofore enjoyed in this area. I am in a highly favorable position to offer these advantageous terms because this theatre's fixed charges are relatively negligible in comparison with those expenses which must be met by other first-run theatres in this city. The maximum playing time for your pictures shown in this theatre is assured because our policy is to thoroughly exhaust each picture's potentialities without indiscriminate "pulling" to make room for any accumulated backlog of other company's pictures waiting to be exhibited before your pictures have completed their proper run.

I agree to set a minimum gross figure that would control the completion of each picture's engagement. This policy will guarantee you the fullest playing time possible in Baltimore and will substantially increase your prior earnings for similar showings in this area.

It would be greatly appreciated if this matter would be given your prompt attention so that the final plans necessary for the grand opening can be formulated.

With kindest personal regards, I am,

Very truly yours, Harry Myerberg, President.

[fol. 1708] PLAINTIFFS EXHIBIT No. 6

No. 5303 Civil

May 8, 1952

RKO RADIO PICTURES INC.

203 Eye Street, N. W., Washington 1, D. C.

October 15, 1948

Mr. Wm. Zimmerman
New York
N. Y

*Subject: Hilltop Theatre, Baltimore, Md.*

Dear Bill:

Theatre Enterprises. Inc. of Baltimore, Md., headed by Harry Myerberg, will soon be ready to open their new Hilltop Theatre, located at 5521-29 Reisterstown Rd., Baltimore, Md.

This is a neighborhood location 1 2/10 mile from the Uptown Theatre, Baltimore. Mr. Myerberg made an appointment with me for Monday of this week to discuss product, and I expected him to ask for first neighborhood run, either day and date with the Uptown Theatre or perhaps against the Uptown Theatre. Instead, he wanted first run Baltimore, Md. I did everything to discourage such an idea because we have in our first run account in Baltimore one of the finest most cooperative accounts I have ever seen, and who in the course of a year pays us a lot of film rental.

I then went to Baltimore to make a survey of this theatre. No doubt but what it will be a very beautiful house when completed approximately 45 to 60 days from now. I think that it will compare very favorably with I. M. Rappaport's new Towne Theatre, Baltimore. Of course, it is a suburban house.

Mr. Myerberg upon returning to Baltimore wrote me a letter and I have acknowledged receipt of it. This file is herewith enclosed and is self-explanatory.

[fol. 1709] It, therefore, will be necessary for you to instruct me what to do about it. I certainly don't want competitive bidding in this situation because I don't believe a neighborhood theatre can compare with a downtown house in the city the size of Baltimore.

Form B is also hereto attached.

Sincerely yours, J. B. Brecheen, Branch Manager.

Enclosures

JBB/hp

cc: R. J. Folliard

[fol. 1710] B—Exchange, Washington, D. C.; Requesting Theatre, Hilltop; City, Baltimore; Population, 859,100; State, Md.

1. Run or availability requested—1st run.

2. Is any picture(s) asked for already licensed on the run requested—No!

3. Is there any picture(s) asked for not yet licensed on the run requested which you intend to license to an RKO Theatre —?. If so, name the picture(s).

* Location Exhibitor Seating Cap. ** Current Adm Price Policy

4. Requesting Theatre: Hilltop * Suburban Harry Myerberg 1700 Not established.

5. Competing Theatre(s) operating on the run or availability requested: Town downtown I. M. Rappaport 1515 65¢ including U. S. Tax. Hippodrome downtown I. M. Rappaport 2250 70¢ including U. S. Tax.

6. RKO clearance that the prior run has over the run requested. 21 days.

7. RKO clearance that the requested run has over the next subsequent run. None.

8. Distance between the theatres listed under (4) or (5). approximately 5 miles.

9. Mailing address of all exhibitors (or agent) involved. I. M. Rappaport, Fayette and Eutaw Sts., Baltimore, Md.

Harry Myerberg, Theatre Enterprises, Inc., 302 Park Ave., Baltimore, Md.

10. Additional information if necessary

11. Picture(s) requested not listed under (2) or (3) and all other pictures presently available for exhibition in this situation.

1. ——— ———
2. ——— ———
3. ——— ———
4. ——— ———
5. ——— ———
6. ——— ———
7. ——— ———
8. ——— ———

* Hilltop located at 5521-29 Reisterstown Rd., Baltimore, Md.

* downtown, suburban, or name of town

** evening adult admission price

(If more space is required, use reverse side and specify number referred to)

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[fol. 1711] No. 5303 Civil

PLAINTIFFS EXHIBIT No. 7

May 8, 1952

October 20, 1948

Mr. Fred Meyers
Home Office

Dear Mr. Meyers:

I am attaching hereto copy of letter received from Mr. Harry Myerburg requesting product (first run Baltimore) for a Theatre at present under construction and temporarily referred to as the Hilltop Theatre.

I have seen this Theatre and it is all that the gentleman claims from the standpoint of appointments, capacity, etc., it is located eight miles from downtown Baltimore and

a mile and a half from the Garman Circuit's Uptown Theatre.

Your suggestions as to procedure are solicited.

Very truly yours, H. J. Martin, Branch Manager.

HJM: lm
Att-
cc: Messrs. J. J. Scully, A. J. O'Keefe, W. A. Scully, E. T. Gomersall.

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[fol. 1712] THEATRE ENTERPRISES, INC.

October 12, 1948

302 Park Avenue
Baltimore 1, Md.
Telephone, Vernon 2900

Universal-International Film Corp.
913 New Jersey Avenue, N. W.
Washington, D. C.

Attention: Mr. H. Martin

Gentlemen:

On October 11, 1948, I had an occasion to talk to you at your offices and explain in considerable detail about the new theatre with which I am connected. So that you may have all this information readily accessible for both yourself and for the other officials of your company, I am taking this opportunity to formally present all the facts.

It is expected that on November 15, 1948, this theatre, located at 5521-29 Reisterstown Road, Baltimore, Maryland will be completed and ready to exhibit motion pictures. Advantageously located from a population and transportation viewpoint, the theatre has all the conveniences necessary to insure first-run motion picture success.

This theatre can truly be said to be the most modern and exquisite theatre in Baltimore. Its architectural design and interior decoration, quality of equipment, and comforts to patrons, make it a unique and different theatre for this

area. Having approximately sixteen hundred luxurious seats on the first floor, in addition to superb private accommodations for another hundred in the loges, this theatre undoubtedly offers the finest showcase for films in the State of Maryland.

Free to patrons of the theatre is a specially built parking area, accommodating about 400 cars. In addition, there is ample space available on uncrowded streets directly adjacent to the theatre for the parking of automobiles.

This magnificent motion picture theatre, designed and planned to exhibit first-run pictures in Baltimore, presents itself to your company as an outlet for your highest quality first-run product. To open the theatre, the finest picture available from your company, a first-run film which has received more than the usual pre-exhibition publicity—preferably one which is waited for by the movie-going public with anticipation; one already causing excitement and creating [fol. 1713] discussion—is required. The Splendor of the theatre must be complemented by the quality of a top-notch production. A world premier is desirable.

Plans are being formulated to make the opening of the threatre one of the greatest affairs of this year in the industry. Radio and Television broadcasts and personal appearances of all political, local and society leaders are to be arranged.

It is hoped that your company can furnish the final element to complete what promises to be one of the most important and exciting premiers in the history of the motion picture industry in Baltimore—personal appearances of some of your leading actors and actresses. As you so well know, the glamour these Hollywood personalities add can provide the final touch necessary to crown the brilliant opening of the newest first-run outlet in this area.

I am the present time in a position to tender my bid herewith for your first-run pictures Baltimore, which will be available for exhibition at this theatre. I am prepared to offer you any reasonable guarantee against a percentage of the gross. I can further offer the highest type of exploitation and management, both of which will at all times be under the supervision of the most experienced theatrical people, and which will insure your company greater returns

than you have heretofore enjoyed in this area. I am in a highly favorable position to offer these advantageous terms because this theatre's fixed charges are relatively negligible in comparison with those expenses which must be met by other first-run theatres in this city. The maximum playing time for your pictures shown in this theatre is assured because our policy is to thoroughly exhaust each picture's potentialities without indiscriminate "Pulling" to make room for any accumulated backlog of other company's pictures waiting to be exhibited before your pictures have completed their proper run.

I agree to set a minimum gross figure that would control the completion of each picture's engagement. This policy will guarantee you the fullest playing time possible in Baltimore and will substantially increase your prior earnings for similar showings in this area.

[fol. 1714] It would be greatly appreciated if this matter would be given your prompt attention so that the final plans necessary for the grand opening can be formulated.

With kindest personal regards, I am

Very truly yours, Harry Myerburg.

HM:rej.

---

[fol. 1715] Form 3811—Rev. 1-4-40

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1. United Artists.

*(Signature or name of addressee)*

2. B. Hayre.

*(Signature of addressee's agent—Agent should enter addressee's name on line ONE above)*

Date of delivery: November 9, 1948.

U. S. Government Printing Office 16—12421

[fol. 1716] No. 5303 Civil

PLAINTIFF'S EXHIBIT No. 8

May 12, 1952

November 8, 1948

United Artist
924 New Jersey Ave., N. W.
Washington 1, D. C.

Att: Mr. J. Price

Gentlemen:

On October 12, 1948, we wrote you a letter setting forth particulars regarding our Crest Theatre located at 5425-27 Reisterstown Road, Baltimore, Maryland.

We have phoned you several times regarding an answer but as yet we have not received a reply setting forth your company's position in the matter.

We have delayed the opening of our Crest Theatre from the date outlined in our letter of October 12, 1948, until December 27, 1948.

It is imperative that we receive an immediate answer so that we can arrange for pictures. Any delay in negotiating for pictures would cause us great financial loss since it would be necessary to postpone the opening of the Crest.

Very truly yours, Theatre Enterprises, Inc., by Harry D. Myerberg.

HDM:rej
Registered Mail—Return Receipt

[fol. 1717] Mr. Jerry Price
United Artists Film Corp.
924 New Jersey Avenue N. W.
Washington, D. C.

November 15

IT IS IMPERATIVE THAT I HAVE AN IMMEDIATE ANSWER TO MY REGISTERED LETTER OF NOVEMBER 8TH.

Theatre Enterprises, by Harry D. Myerberg.

[fol. 1718]

Theatre Enterprises, Inc.
302 Park Avenue
Baltimore 1, Md.
Telephone, Vernon 2900

November 26, 1948

United Artists Film Corp.
924 New Jersey Avenue, N. W.
Washington, D. C.

Attention: Mr. Jerry Price

Dear Mr. Price:

On October 12, 1948, pursuant to your request of October 5, 1948, we wrote you a letter in which we set forth particulars regarding our Crest Theatre located #5425 Reisterstown Road, Baltimore, Maryland. On November 8, 1948, we sent you a registered letter requesting an answer to the above communication. On November 15, 1948, we sent you a wire. These communications together with numerous long distance phone calls have not been answered.

We are therefore, forced by your company's complete disregard to our communications over this long period of time to take the position that your company United Artists Film Corporation, refuses to permit our Crest Theatre the right to competitively bid on pictures first run City of Baltimore.

Unless, we hear from you by return mail, we will take the above to be the definite policy of your company, United Artists Film Corporation.

Very truly yours, Theatre Enterprises, Inc. By: Harry D. Myerberg.

HDM/ast
cc——

Mr. Mark Silver, Asst. Sales Manager, Mr. Edward M. Schnitzer, Eastern Div. Sales Manager.

Registered Mail
Return Receipt Requested.

[fol. 1719] Form 3811—Rev. 1-4-40

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1. United Artists

*(Signature or name of addressee)*

2. Jane Harrell

*(Signature of addressee's agent—Agent should enter addressee's name on line ONE above)*

Date of delivery 11/29/48.

[fol. 1720] Form 3811—Rev. 1-4-40

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1. United Artists Corp.

*(Signature or name of addressee)*

2. —— —— (Signature illegible)

*(Signature of addressee's agent—Agent should enter addressee's name on line ONE above)*

Date of delivery 11/29, 1948.

[fol. 1721] Form 3811—Rev. 1-4-40

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1. United Artists Corp.

*(Signature or name of addressee)*

2. —— —— (Signature illegible)

*(Signature of addressee's agent—Agent should enter addressee's name on line ONE above)*

Date of delivery 11/29, 1948.

[fol. 1722] November 26, 1948.

United Artists Film Corp.
924 New Jersey Avenue N. W.
Washington, D. C.

ATTENTION: Mr. Jerry Price

Dear Mr. Price:

On October 12, 1948, pursuant to your request of October 5, 1948, we wrote you a letter in which we set forth particulars regarding our Crest Theatre located #5425 Reisterstown Road, Baltimore, Maryland. On November 8, 1948, we sent you a registered letter requesting an answer to the above communication. On November 15, 1948, we sent you a wire. These communications together with numerous long distance phone calls have not been answered.

We are therefore, forced by your company's complete disregard to our communications over this long period of time to take the position that your company United Artists Film Corporation, refuses to permit our Crest Theatre the right to competi-vely bid on pictures first run City of Baltimore.

Unless, we hear from you by return mail, we will take the above to be the definite policy of your company, United Artists Film Corporation.

Very truly yours, Theatre Enterprises, Inc. By: Harry D. Myerberg.

HDM/ast
cc—
Mr. Mark Silver, Asst. Sales Manager; Mr. Edward M. Schnitzer, Eastern Div. Sales Manager.

Registered Mail
Return Receipt Requested.
Copy sent to Mr. Theodore Sherbow

[fol. 1723] Law Offices

Gray, Anderson, Schaffer & Rome
2100 Girard Trust Company Building
Broad Street and South Penn Square
Philadelphia 2, Pa.
RIttenhouse 6-1900

William A. Gray
Francis Thomas Anderson
Lester J. Schaffer
Edwin P. Rome
Walter Stein
Francis X. Hope, Jr.
David Ralston Stief

United Artists Corp., November 2nd, 1949.
729 7th Avenue
New York City, New York.

Gentlemen:

We have been retained by Theatre Enterprises, Inc., of Baltimore, Maryland, which operates the Crest Theatre at Reiserstown Road and Rogers Avenue, Baltimore. As a result of our study we have become fully acquainted with the efforts that have been made during the past year to obtain access for that theatre to your first run pictures, and also with the failure of those efforts.

It occurs to us that, without at least experimenting with the exhibition of your pictures in the Crest on first run, it is not possible to say fairly and with justification that such a policy would be unprofitable for you. On the contrary, it would seem that the extraordinary growth of the area near the theatre, with its increasing population and expanding business enterprises, coupled with the unique facilities offered by the Crest itself actually present an incomparable outlet for your product and hence a source of revenue far superior to any presently available to you in Baltimore. We are confident that experience would soon prove this to be true.

We are aware that first run theatres are more usually in the so-called downtown shopping districts but we suggest that there is nothing inherent in the industry or in the law that precludes a theatre not so located from access to

first run product so long as other determining factors are duplicated. Thus, when a theatre is of adequate size, unquestionably suitably equipped and properly managed, in a thriving community from which it can draw on a large population, when it can charge the same admission price and pay comparable and potentially even greater film rentals, it is our belief that such a theatre is entitled to access to first run pictures. Certainly it is reasonable to request an opportunity to demonstrate whether or not this contention will be borne out by experience. In this fashion what has become a longstanding and troublesome difference of view could be readily resolved to the satisfaction of all. [fol. 1724] We urge you most earnestly to consider this suggestion in a favorable light. To experiment in this way cannot possibly react to your detriment since our client stands ready to bid competitively for your product and, indeed, to offer any reasonable guarantee you deem appropriate. On the other hand, if we are correct your company will have another outlet in the City of Baltimore, and one which is generally conceded to be the finest and most modern theatre in the State.

Your reply at an early date will be appreciated.

Yours very truly, for Gray, Anderson, Schaffer & Rome.

EPR/G

[fol. 1725] November 23, 1949.

United Artists Corp.,
729 7th Avenue,
New York City, N. Y.

Gentlemen:

Reference is made to our letter of November 2 concerning the Crest Theatre, in Baltimore, Maryland. As yet we have not received a reply to our letter and it would be much appreciated if you would give this matter your early attention.

Yours very truly, for Gray, Anderson, Schaffer & Rome.

EPR/MMM

[fol. 1726] No. 5303 Civil

PLAINTIFFS EXHIBIT No. 30

May 12, 1952

December 20, 1949.

Columbia Pictures, Inc.
729 7th Avenue
New York City, New York.

Gentlemen:

We wish to call to your attention our letter of November 1, 1949 regarding the Crest theatre in Baltimore, Maryland.

We have not yet had a reply to this letter but it is our hope that during this time the proposal that the Crest be given access to first-run pictures in Baltimore has been receiving favorable consideration. In other cities of the country such as Washington, Roanoke, Kansas City, Denver and Los Angeles, theatres located outside the so-called business sections are exhibiting pictures on first-run. This is, we believe, an inevitable consequence of the spreading growth of cities, the distance from suburban areas to down-town, the complicated and expensive parking problems down-town, and the fact that suburban areas are frequently themselves cities within metropolitan boundaries. Baltimore is an excellent example of this very development and consequently offers a magnificent revenue producing opportunity.

In this connection, and as further evidence of the conviction held by our client that the Crest is entirely suitable for first-run exhibition, we are authorized to submit to you a bid for the exclusive first-run exhibition in Baltimore at regular first-run admission prices of your picture Jolson Sings Again. Our client is willing to pay a $10,500. guarantee against 40% of the gross for this picture and will post the guarantee in the form of a certified check if that is deemed desirable.

It is firmly believed that this bid as well as the actual play-off of the picture, if the bid is accepted, will conclusively demonstrate what a fine outlet the Crest is for the exhibition of your pictures on first-run in Baltimore. Will

you please give this matter your early consideration and advise us of your decision?

Yours very truly, for Gray, Anderson, Schaffer & Rome.

EPR/G

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[fol. 1727] [Stamp:] No. 5303 Civil Docket.

PLAINTIFF'S EXHIBIT No. 62—May 12, 1952

November 2nd, 1949

RKO Radio Pictures Inc.
1270 Ave. of the Americas
Rockefeller Center
New York 20, NewYork

Gentlemen:

We have been retained by Theatre Enterprises, Inc. of Baltimore, Maryland, which operates the Crest Theatre at Reiserstown Road and Rogers Avenue, Baltimore. As a result of our study we have become fully acquainted with the efforts that have been made during the past year to obtain access for that theatre to your first run pictures, and also with the failure of those efforts.

It occurs to us that, without at least experimenting with the exhibition of your pictures in the Crest on first run, it is not possible to say fairly and with justification that such a policy would be unprofitable for you. On the contrary, it would seem that the extraordinary growth of the area near the theatre, with its increasing population and expanding business enterprises, coupled with the unique facilities offered by the Crest itself actually present an incomparable outlet for your product and hence a source of revenue far superior to any presently available to you in Baltimore. We are confident that experience would soon prove this to be true.

We are aware that first run theatres are more usually in the so-called downtown shopping districts but we suggest that there is nothing inherent in the industry or in the law that precludes a theatre not so located from access to first-

run product so long as other determining factors are duplicated. Thus, when a theatre is of adequate size, unquestionably suitably equipped and properly managed, in a thriving community from which it can draw on a large population, when it can charge the same admission price and pay comparable and potentially even greater film rentals, it is our belief that such a theatre is entitled to access to first run pictures. Certainly it is reasonable to request an opportunity to demonstrate whether or not this contention will be borne out by experience. In this fashion what has become a longstanding and troublesome difference of view could be readily resolved to the satisfaction of all.

[fol. 1728] We urge you most earnestly to consider this suggestion in a favorable light. To experiment in this way cannot possibly react to your detriment since our client stands ready to bid competitively for your product and, indeed, to offer any reasonable guarantee you deem appropriate. On the other hand, if we are correct your company will have another outlet in the City of Baltimore, and one which is generally conceded to be the finest and most modern theatre in the State.

Your reply at an early date will be appreciated.

Yours very truly, for Gray, Anderson, Schaffer & Rome.

EPR/G

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[fol. 1729] [Stamp:] No. 5303 Civil Docket

PLAINTIFF'S EXHIBIT No. 66—May 12, 1952

December 13, 1948

Mr. Harry R. Hamburg
Kansas City Branch Office

Re: Tower Theatre
Wichita, Kansas

DEAR HARRY:

I discussed with Mr. Smith by telephone on December 8, 1948, the request for an opportunity to negotiate for a day and date first run against the Fox Boulevard Theatre which

was contained in Mr. Hunt's letter of December 4, 1948, a copy of which was received by us here in New York.

Both Mr. Smith and myself have reached the conclusion that because we have licensed this run in the past from time to time in the Fox Boulevard Theatre, we could be accused of discriminating in favor of Fox, if we do not offer a comparable theatre the same opportunity.

I am enclosing herewith draft of a letter which I suggest be sent over your signature to Mr. Hunt and in which you will list such pictures as have not already been licensed for exhibition first run in Wichita and which have been trade-shown.

You will send a similar letter to Fox Midwest leaving out the introductory matter in the draft of the letter to Mr. Hunt and merely state that a request has been received from the operator of the Tower Theatre to negotiate competitively for this run and that we are offering them an oportunity to submit offers in respect to the same pictures.

You will also, of course, want to indicate in the letter which you send to both exhibitors the final date which you will set for the receipt of offers in respect to any of the pictures which they may desire to exhibit. You will affix this date also on a self-addressed, envelope to be enclosed with each letter and the answers will be retained after their receipt until the date given as the final date, at which time they will be opened and considered.

Kindest personal regards. Very truly yours, Richard P. Morgan.

rpm:fh
cc-Messrs. G. A. Smith, H. Wirthwein

[fol. 1730] P. S.: Since dictating this letter several days ago, a rereading of it indicates to me that the first paragraph on page 2 of the draft of the letter to Mr. Hunt should, of course, be left out on the copy which you send to Fox Midwest. As a matter of fact, the paragraph is probably misplaced and should be the concluding paragraph in the letter.

If you have any questions in regard to the procedure in handling this matter, I suggest you call me.

[fol. 1731] DRAFT

December 13, 1948

Mr. Herman H. Hunt
Vogue Theatre Building
8459 Vine Street
Cincinnati, 15, Ohio

Re: Tower Theatre
Wichita, Kansas

Dear Mr. Hunt:

This will acknowledge receipt of your letter dated December 4, 1948, which was in reply to my letter of December 2, 1948.

We have again considered the facts set forth in your letter of December 2, 1948, as well as those set forth in your present letter and have reached the conclusion that we will be willing to permit you to negotiate competitively with the operator of the Fox Boulevard Theatre for a run day and date with first run in downtown Wichita.

You realize, of course, that we are going to extend this privilege to you upon an experimental basis and that we reserve to ourselves the right to re-appraise the situation after we have secured the play-off of a sufficient number of pictures in the Tower Theatre on this availability in order for us to determine its grossing possibilities as compared with those which have been established on our pictures in the Fox Boulevard Theatre.

The following pictures have been trade-shown and we solicit your offer on any one or more of them:

_____

_____

_____

Each one of these pictures will be offered for exhibition first run in one theatre in downtown Wichita as well as between your theatre and the Fox Boulevard Theatre for a day and date run with the downtown run. We cannot, of course, give you the play dates of these pictures first run since they will not be booked until such time as it is de-

termined whether any of them will be licensed for exhibition first run in the Tower Theatre or the Boulevard Theatre. We have, however, listed the approximate date of availability following the title of each one of these pictures. At the present time we are granting in connection with the first run exhibition of our pictures in Wichita a clearance of 45 days over second run in Wichita and this clearance will be granted in respect to the exhibition of the above mentioned pictures.

[fol. 1732] We will also continue to extend to you, if you should desire to take advantage of it, an opportunity to negotiate competitively for the second run exhibition of any of our pictures as they become available. It would be appreciated if you will advise us whether or not you desire to take advantage of this offer.

The last date for the submission of offers for the first run day and date exhibition of any of the pictures listed in this letter is ———— and appears upon the face of the self-addressed envelope enclosed herewith.

We are also submitting the same list of pictures to Fox Midwest and soliciting their offers in respect to the exhibition of any one of those pictures in the Boulevard Theatre and the same time limit is given with respect to any offer which they should desire to submit.

After we have received the offers, we will consider them at the same time and advise both yourself and Fox Midwest in regard to which offer we will accept in respect to each individual picture.

Very truly yours, Harry R. Hamburg, Branch Manager.

LOEW'S INC.
Form 12775-1084-3-50-M

Date Prepared 5/31/50 Branch Washington, D. C.

Theatre PUBLIX Cap. 1141 City & State BALTIMORE, MD. Pop. 859,100

Exhibitor SUBURBAN AMUSE.& DEV. CO. Ind. ( ) Circuit (X) Single (X) Policy Double ( ) Changes Per Wk. 4 Admission Price 27

Present Run, Availability, Clearance: Sub run in Baltimore, Md. 21 days after 1st run Baltimore, Md., and/or 7 days after Parkway, or as available. Clearance: 14 days ahead of Pikesville, Md. 7 days ahead of Avalon, Baltimore, Md.

Number M-G-M features offered past 12 months: 5 Number licensed: 5 If new theatre, date opened or expected to open:

If theatre not licensed, pending prohibition:

If theatre ever involved in arbitration, litigation, etc. specify:

PRESENT OBJECTIVES: Special 8 Top | 2nd | 3rd | 4th

| Bal No. | Production | Date Available | Dates Played | Days of Wk. | TERMS | Gross (Dollars only) | Rental (Dollars only) | If Checked Indicates Adjustment |
|---|---|---|---|---|---|---|---|---|
| 917 | [redacted] | | | | | | | |
| 918 | CAUGHT | 6/26/49 | 6/28-29/49 | TW | 25% | 299. | 74. | No. |
| 924 | BIG JACK | 7/3/49 | 7/3-4/49 | SM | 11153p98 | 282. | 70. | No. |
| 9 | INTRUDER IN DUST | 4/23/50 | 4/25-26/50 | TW | 25% | 211. | 52. | No. |
| 15 | JOHNNY EAGER | 1/29/50 | 1/29-30/50 | SM | 25% | 368. | 92. | No. |
| 13 | Ambush | | | | | | | |
| 16 | Battleground | | | | | | | |
| 18 | Key To City | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | Average Rental | 72 | |
| 911 | 3 Godfathers | | | | | | | |
| 3 | Doctor and Girl | | | | | | | |
| 4 | Red Danube | | | | | | | |
| 6 | Forsyte Woman | | | | | | | |
| 10 | Challenge To Lassie | | | | | | | |
| 14 | E. Side W. Side | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | Average Rental | | |

U.S.D.C. CIVIL DOCKET
No. 71
PLAINTIFFS EXHIBIT No.
MAY 13 1957

1144

LOEW'S INC.
Form 1279-10M-3-50-M

Date Prepared 5/31/50 Branch Washington, D. C.

Theatre PIMLICO Cap. 1141 City & State BALTIMORE, MD. Pop. 859,100

Exhibitor SUBURBAN AMUSE. & DEV. CO. Circuit ( ) Ind. ( ) Single (X) Policy Double ( ) Changes Per Wk. 1 Adm. Price .27

Present Run, Availability, Clearance: Sub run in Baltimore, Md. 7 days after (1st run in zone, Uptown or Pimlico, or Avalon* or as available. - Clearance: None.

Number M-G-M features offered past 12 months 4 Number licensed 4 If new theatre, date opened or expected to open:

If theatre not licensed, guessing possibilities:

If theatre ever involved in arbitration, litigation, etc. specify:

| | 2nd | 3rd | 4th |
|---|---|---|---|
| [redacted] | | | |

| Circle No. | Production | Date Available | Dates Played | Days of Wk. | TERMS | Gross (Dollars only) | Rental (Dollars only) | If Checked Indicate |
|---|---|---|---|---|---|---|---|---|
| 923 | GREAT SINNER [redacted] | 10/17/49 | 10/18-19/49 | TW | U138Sp8S | 221. | 55. | No. |
| 928 | WIZARD OF OZ [redacted] | 6/17/49 | 9/8-10/49 | TFS | U138Sp8S | 580. | 145. | No. |
| 8 | TENSION [redacted] | 2/1/50 | 1/31-2/1/50 | TW | U138Sp8S | 233. | 58. | No. |
| 907 | SAN FRANCISCO [redacted] | 2/2/49 | 5/22-23/49 | SM | 50.00 | | 50. | |
| 12 | Malaya | | | | | | | |
| 13 | Ambush | | | | | | | |
| 16 | Battleground | | | | | | | |
| 18 | Key To City | | | | | | | |

Average Rental 77

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 911 | 3 Godfathers | | | | | | | |
| 5 | Doctor and Girl | | | | | | | |
| 4 | Red Danube | | | | | | | |
| 6 | Forsyte Women | | | | | | | |
| 10 | Challenge To Lassie | | | | | | | |
| 14 | E. Side W. Side | | | | | | | |

Average Rental

STATE DOT EXHIBIT 72
PLAINTIFF'S EXHIBIT 203
MAY 19 1952

LOEW'S INC.
Form 12798-15M-8-48

Date Prepared 10/18/48 Branch WASHINGTON D.C.

Theatre UPTOWN Cap. 1098 City & State BALTIMORE, MD. Pop. 859.1

Exhibitor UPTOWN AMUSE.CORP. Ind. ( ) Circuit (X) Single ( ) Policy Double ( ) Changes Per Wk. Adm. Prices 40-40

Present Run, Availability, Clearance: Sub run. 21 days after 1st run Balto, Md. and/or 7 days after Parkway. 14 days ahead of Pikesville, Md. 14 days ahead of Avalon.

Number M-G-M features offered past 12 months: 29 Number licensed 29 If new theatre, date opened or expected to open:

If theatre not licensed, grossing possibilities:

If theatre ever involved in arbitration, litigation, etc. specify:

| PRESENT OBJECTIVES | Special & Top | 2nd | 3rd | 4th |
|---|---|---|---|---|
| | SS | SS | SS | 275. |

| Rel No. | Production | Date Available | Dates Played | Days of Wk. | TERMS | Gross (Dollars only) | Rental (Dollars only) | If Checked Indicate |
|---|---|---|---|---|---|---|---|---|
| 710 | Clouds Roll By | 2/23/7 | 2/25-6/7 | SMTW | U250 | 2370. | 888. | |
| 717 | Yearling | 7/6/7 | 7/6-9/7 | SMTW | U250 | 2329. | 971. | |
| 727 | Fiesta | 8/17/7 | 8/17-20/7 | SMTW | " | 2912. | 1237. | |
| 728 | Hucksters | 9/21/7 | 9/21-4/7 | SMTW | " | 1999. | 649. | |
| 811 | Green Dolphin St. | 1/18/8 | 1/18-21/8 | SMTW | " | 2553. | 1021. | |
| 813 | Cass Timberlane | 3/28/8 | 3/28-31/8 | SMTW | " | 2417. | 967. | |
| 817 | Three Daring Daughters | 4/11/8 | 4/11-4/8 | SMTW | " | 2302. | 863. | |
| 819 | Bride Goes Wild | 5/30/8 | 6/3-5/8 | TFS | U250 | 1699. | 679. | |
| 824 | State Of The Union | 6/27/8 | 6/27-30/8 | SMTW | " | 2043. | 664. | |
| 826 | Homecoming | 7/18/8 | 7/18-21/8 | SMTW | " | 2106. | 737. | |
| 829 | Easter Parade | 8/22/8 | 8/22-5/8 | SMT | U250 | 2501. | 1040. | |
| | | | | | | Average Rental | 883. | |
| 729 | Romance Roxy Ridge | 9/28/8 | 9/28-10/1/7 | SMT | U250 | 1876. | 562. | |
| 804 | Song Of Love | 2/1/8 | 2/1-4/8 | SMTW | U250 | 1655. | 455. | |
| 805 | Merton Of Movies | 2/25/8 | 2/25-7/8 | SMT | U250 | 1495. | 411. | |
| 808 | This Time For Keeps | 11/30/7 | 11/30-12/3/7 | SMTW | " | 2320. | 870. | |
| 809 | Killer Mc Coy | 2/15/8 | 2/19-21/8 | TFS | U250 | 1559. | 584. | |
| 810 | Good News | 2/22/8 | 2/22-5/8 | SMTW | U250 | 2712. | 1155. | |
| 815 | High Wall | 4/18/8 | 4/22-4/8 | TFS | " | 1191. | 327. | |
| 820 | B.F.'s Daughter | 7/25/8 | 7/25-8/8 | SMTW | " | 2204. | 771. | |
| | | | | | | Average Rental | 641. | |

1146

LOEW'S, INC.
Form 1178E-10M-3-50-M

Date Prepared MAY 31, 1950 Branch WASH., D.C.

(BEFORE CREST OPENING)

Theatre UPTOWN Cap. 1098 City & State BALTO., MD. Pop 859,100

Exhibitor UPTOWN AMUSEMENT CORP. Ind. ( ) Circuit (X) Policy Double ( ) Single (X) Changes Per Wk. 2 Adm. Price 40/40

Present Run, Availability, Clearance: Sub run. 21 days after 1st run Balto.,Md.,and/or 7 days after Parkway. 14 days ahead of Pikesville, Md. 7 days ahead of Avalon, Baltimore, Md.

Number M-G-M features offered past 12 months: _____ Number licensed: _____ If new theatre, date opened or expected to open: _____

If theatre not licensed, grossing possibilities: _____

If theatre ever involved in arbitration, litigation, etc. specify: _____

PRESENT [redacted] Duals

| | Primary | Secondary | 3rd | 4th |
|---|---|---|---|---|
| [redacted] | 35 | 35 | | |

| Rel No. | Production | Date Available | Dates Played | Days of Wk. | TERMS | Gross (Dollars only) | Rental (Dollars only) | If Changed (Indicate) |
|---|---|---|---|---|---|---|---|---|
| 911 | 3 GODFATHERS | 2/27/49 | 2/27-3/2/9 | SMTW.. | U250 | 1304 | 326 | nc |
| 910 | WORDS AND MUSIC | 2/20/49 | 2/20-23/9 | SMTW | " | 2508 | 878 | nc |
| 906 | 3 MUSKETEERS | 1/23/49 | 1/23-6/9 | SMTW | " | 2094 | 680 | nc |
| 903 | JULIA MISBEHAVES | 1/2/49 | 1/2-5/9 | SMTW | " | 1930 | 579 | nc |
| 829 | EASTER PARADE | 8/22/48 | 8/22-5/8 | SMTW | " | 2601 | 1040 | nc |
| 828 | ON AN ISLAND WITH YOU | 8/8/48 | 8/8-11/8 | SMTW | " | 2751 | 1172 | nc |
| 826 | HOMECOMING | 7/18/48 | 7/18-21/8 | SMTW | " | 2106 | 737 | nc |
| 18 | Key To City | | | | | | | |

IN CIVIL DOCKET NO. [redacted]
PLAINTIFF'S EXHIBIT NO. 74
MAY 13 1952

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | | | | | Average Rental | 773 | |
| 909 | HILLS OF HOME | 1/30/49 | 1/30-2/2/9 | SMTW | U250 | 1348 | 337 | nc |
| 902 | SOUTHERN YANKEE | 11/7/48 | 11/11-3/8 | TFS | " | 1693 | 677 | nc |
| 901 | [redacted]-Y LINER | 11/28/48 | 11/28-12/1/ | SMTW | " | 2342 | 878 | nc |
| 825 | THE PIRATE | 9/26/48 | 9/26-9/8 | SMTW | " | 1799 | 494 | nc |
| 821 | SUMMER HOLIDAY | 7/4/48 | 7/4-7/8 | SMTW | " | 2042 | 561 | nc |
| 14 | E. Side W. Side | | | | | | | |
| | | | | | | Average Rental | 989 | |

LOEW'S INC.
Form 12798-10M-3-50-M

Date Prepared MAY 31, 1950 Branch WASH., D.C.

(AFTER CREST OPENING)

Theatre UPTOWN Cap. 1098 City & State BALTO., MD. Pop. 859,100

Exhibitor UPTOWN AMUSEMENT CORP. Circuit ( ) Ind. (X) Single ( ) Double ( ) Policy Changes Per Wk. 2 Adm. Price 40/40

Present Run, Availability, Clearance: Sub run. 21 days after 1st runBalto.,Md., and/or 7 days after Parkway. 14 days ahead of Pikesville, Md. 14 days ahead of Avalon, Balto., Md.

Number M-G-M features offered past 12 months 29 Number licensed 29 If new theatre, date opened or expected to open:

If theatre not licensed, grossing possibilities:

If theatre ever involved in arbitration, litigation, etc. specify:

PRESENT [redacted] Guide | [redacted] Primary 33 | [redacted] Secondary 88 | 3rd | 4th

| Rel No. | Production | Date Available | Dates Played | Days of Wk. | TERMS | Gross (Dollars only) | Rental (Dollars only) | If Checked Indicate |
|---|---|---|---|---|---|---|---|---|
| 927 | Neptune's Daughter | 8/14/49 | 8/14-7/9 | SMTW | U250-88 | 2140 | 749 | ne |
| 932 | Good Old Summer Time | 9/18/49 | 9/18-21/9 | SMTW | " | 1569 | 392 | ne |
| 7 | Adam's Rib | 1/15/50 | 1/15-8/50 | SMTW | " | 3522 | 880 | ne |
| 11 | On The Town | 2/19/50 | 2/19-22/50 | SMTW | " | 1666 | 416 | ne |
| 12 | Malaya | 3/12/50 | 3/12-5/50 | SMTW | " | 1122 | 280 | ne |
| 13 | Ambush | 2/12/50 | 2/12-5/50 | SMTW | " | 1500 | 375 | ne |
| 16 | Battleground | 3/19/50 | 3/19-22/50 | SMTW | " | 2047 | 665 | ne |
| 18 | Key To City | 4/16/50 | 4/16-9/50 | SMTW | " | 1230 | 307 | ne |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | Average Rental | 445 | |
| 911 | 3 Godfathers | | SEE RUN-DOWN MARKED "BEFORE CREST OPENING" | | | | | |
| 3 | Doctor and Girl | 11/20/49 | 11/21-6/9 | TFS | U250-88 | 1280 | 320 | ne |
| 4 | Red Danube | 12/4/49 | 12/8-10/9 | TFS | " | 947 | 235 | ne |
| 6 | Forsyte Woman | 1/1/50 | 1/5-7/50 | TFS | " | 1153 | 317 | ne |
| 10 | Challenge To Lassie | 1/29/50 | 2/2-4/50 | TFS | " | 832 | 208 | ne |
| 14 | E. Side W. Side | 4/23/50 | 4/27-9/50 | TFS | " | 1132 | 311 | ne |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | Average Rental | 278 | |

LOEW'S, INC.
Form 12796-10M-7-50-M

Date Prepared 5/31/50 Branch Washington, D. C.

Theatre CREST Cap 1650 City & State BALTIMORE, MD. Pop 859,100

Exhibitor THEATRES ENT. INC. Ind. (X) Circuit ( ) Policy Single (X) Double ( ) Changes Per Wk. 3 Adm. Price 46

Present Run, Availability, Clearance: Sub run in Baltimore, Md. 21 days after 1st run, Baltimore, Md., And/or 7 days after Parkway, or as available. Clearance: None.

Number M-G-M features offered last 12 months 35 Number licensed 28 If new theatre, date opened or expected to open

If theatre not licensed, grossing possibilities

If theatre ever involved in arbitration, litigation, etc. specify

Guide | Primary SS | Secondary SS | 3rd | 4th

| Ref. No. | Production | Date Available | Dates Played | Days of Wk. | TERMS | Gross (Dollars only) | Rental (Dollars only) | If Checked Indicate |
|---|---|---|---|---|---|---|---|---|
| 927 | Neptune's Daughter | 8/14/49 | 8/13-16/49 | SSMT | 35% | 2521. | 882. | No. |
| 932 | Good Old Summer Time | 9/18/49 | 9/17-19/49 | SSM | 35% | 1413. | 494. | No. |
| 7 | Adam's Rib | 1/15/50 | 1/14-17/50 | SSMT | U200SpSS | 1611. | 451. | No. |
| 11 | On The Town | 2/19/50 | 2/18-20/50 | SSM | U200SpSS | 1341. | 362. | No. |
| 12 | Malaya | 3/12/50 | 3/11-14/50 | SSMT | U200SpSS | 1145. | 286. | No. |
| 13 | Ambush | 2/12/50 | 2/15-17/50 | WTF | U200SpSS | 468. | 117. | No. |
| 16 | Battleground | 3/19/50 | 3/22-25/50 | WTFS | U200SpSS | 1049. | 262. | No. |
| 18 | Key To City | 4/16/50 | 4/16-17/50 | SM | U200SpSS | 554. | 138. | No. |

No. 2158 CIVIL DOCKET
PLAINTIFF'S EXHIBIT No. 76
MAY 13 1952

Average Rental 374

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 911 | 3 Godfathers | 2/27/49 | 3/2-4/49 | WTF | 30% | 666. | 199. | No. |
| 3 | Doctor and Girl | 11/20/49 | 11/19-21/49 | SSM | U200SpSS | 1453. | 421. | No. |
| 4 | Red Danube | | | | | | | |
| 6 | Forsyte Woman | 1/1/50 | 12/31-1/1/50 | SS | U200SpSS | 843. | 210. | No. |
| 10 | Challenge To Lassie | | | | | | | |
| 14 | E. Side W. Side | 4/23/50 | 4/25-26/50 | TW | U200Sp3S | 537. | 166. | No. |

Average Rental 249

[fol. 1739] [Stamp:] No. 5303 Civil Docket

PLAINTIFF'S EXHIBIT No. 82—MAY 13, 1952

Ars Gratia Artis
METRO-GOLDWYN-MAYER
PICTURES

Distributed by

LOEW'S INCORPORATED
1009 New Jersey Ave., N. W.
Washington 1, D. C.

June 22, 1951

Mr. Harry Myerberg
Theatre Enterprises, Inc.
302 Park Avenue
Baltimore, Maryland

Re: Crest Theatre—Baltimore, Maryland

Gentlemen:

We, hereby, offer you the opportunity of bidding competitively for any of the following pictures, with availability and clearance as stated below:

Pictures: GO FOR BROKE
Availability: 21 days after 1st run Baltimore, Md., and/or 7 days after Parkway, or as available.
Clearance: 14 days ahead of Pikesville, Md.; 7 days ahead of Uptown and Pimlico Theatres.

All bids must be in writing, be received in this office not later than June 29, 1951 and state:

(1) the name of the theatre
(2) the number of days and days of the week on which the picture will be exhibited
(3) definite and specific terms for each picture bid upon
(4) your assurance that any picture awarded to you will be played within a reasonable time after availability.

Enclosed is a self-addressed envelope for your use in sending bids on the pictures above named. For your protection, please use only this envelope, or one similarly marked, when

sending us a bid on any of these pictures. Please do not use this envelope for any purpose other than sending us bids on the pictures named, as this may result in delay in answering other correspondence.

It is understood no bid shall be deemed to have been accepted by us until our regular form of license agreement shall have been executed by you and accepted in the usual manner. We reserve the right to reject any bid.

Sincerely, J. Adams, Branch Manager.

JAAdams/cm
Enc.

No agreement or order will be binding on this corporation unless in writing and signed by an officer.

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[fol. 1740] No. 5303 Civil. Docket

PLAINTIFFS EXHIBIT No. 92

May 13, 1952

COMPUTATION OF DAMAGES BASED ON PROJECTING THE GROSS ADMISSIONS OF "THE STRATTON STORY"

| | |
|---|---|
| Actual gross admissions from "The Stratton Story" at subsequent run admission prices | $2709.81 |
| Gross admissions if played at first-run admission prices with no increase of patronage | 4726.35 |
| This equals per tenth of playing time | 675.00 |
| or a weekly gross of | 6750.00 |
| Allowing 25% increase of patronage on first-run would give a weekly gross of | 8400.00 |
| Or a yearly gross of | 436,800.00 |
| Deducting 35%, or $152,880.00, for film rental, leaves yearly net admissions of | 283,920.00 |
| Deducting the actual net admissions of the Crest $76,937.00 from this figure causes the damage, by this method of computation, to be | 204,814.00 |

[fol. 1741] No. 5303 Civil Docket

PLAINTIFFS EXHIBIT No. 93

May 13, 1952

COMPUTATION OF DAMAGE IF THE CREST THEATRE WERE TO BE FILLED TEN TIMES WEEKLY

The number of seats multiplied by the admission price equals the gross receipts per show 1600x.54—$864.00 per show.

The gross receipts per show multiplied by ten equals the gross per week 864x10—$8640.00 per week.

The gross per week multiplied by the weeks in the year equals the gross per year 8640x52—$449,280.00 per year.

An average film rental of 35%, or $157,248.00, would be paid on this yearly gross of $449,280.00, leaving a net of $292,032.00.

The Crest actually had a gross of $122,796.00 on which it paid a film rental of $45,859.00 leaving a net of $76,937.00.

The difference between the Crest's actual net admissions of $76,937.00 and what its net admissions would cause the damage, as computed by this method, to be $215,095.00.

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[fol. 1742] No. 5303

PLAINTIFF'S EXHIBIT No. 95

May 15, 1952

May 2, 1950

Mr. Glenn Norris
20th Century Fox Film Corp.
932 New Jersey Ave., N. W.
Washington 13, D. C.

Dear Mr. Norris:

Pursuant to our recent conversation I wish to advise you formerly that it is agreeable to use to bid competitively for the 20th Century Fox Product on the first neighborhood run in Baltimore, with the understanding that if we are

successful in obtaining your pictures the Crest Theatre will have clearance over the Uptown, Pimlico, and Avalon Theatres.

As perhaps you already know this proposed system is the same as that which is already in effect in connection with R. K. O. Products. So that there will be no mis-understanding about our position, I wish to add that we are accepting the situation entirely without prejudice to the right of the Crest Theatre to have access to first run products in the City of Baltimore. Because of our inability to obtain such products, which is now the subject of litigation in the Federal Court in Philadelphia, we have been compelled to exhibit pictures on a subsequent run for reasons that are already familiar to you. Our present willingness, therefore, to enter the competitive bidding situation, is not to be construed in anyway as an abandonment or a retreat from the position we have taken in our pending suit.

It would be appreciated if action on this matter could be taken at an early date, so that we might enter a bid for "Cheaper by the Dozen" when it becomes available for first neighborhood run in the City of Baltimore.

Very truly yours, Theatre Enterprises, Inc., by Harry D. Myerberg.

HDM:ma

[fol. 1743] Spyros P. Skouras, President

TWENTIETH CENTURY FOX FILM CORPORATION

Head Office 444 West 56th Street, New York 19, N. Y.
Branches in all Principal Cities of the World
932 New Jersey Avenue, N.W.
Washington 13, D. C.
Telephone District 8420-1-2

May 4, 1950.

Mr. Harry D. Myerberg
Theatre Enterprises, Inc.
302 Park Avenue
Baltimore 1, Maryland

Dear Mr. Myerberg:

This will acknowledge your letter of May 7th advising that it is agreeable with you to bid competitively for first run in your zone against the Uptown, Pimlico and Avalon Theatres.

It is my understanding that you are refusing to play any pictures which are sold on an equal availability with your Crest Theatre to the Pimlico and Avalon Theatres, and during our telephone conversation yesterday you told me that you considered the Uptown Theatre to be competitive with the Crest and wanted to negotiate for a first run in the zone ahead of the Uptown, Pimlico and Avalon Theatres.

Please understand that we are not asking you to establish a system of competitive bidding in this zone. We are trying to make our pictures available in a manner satisfactory to all theatres involved.

[fol. 1744] Regarding your reference to Cheaper by the Dozen this picture has already been licensed to the Uptown Theatre on an availability subject to 21 days clearance after first run Baltimore, therefore, we cannot offer this picture for competitive negotiation.

Very truly yours, Twentieth Century Fox Film Corporation, C. G. Norris, Branch Manager.

CGN/mc.

# RECORD

# P. 1154-1174

# 1A-35A

[fol. 1745] May 9, 1950

20th Century Fox Film Corporation
932 New Jersey Avenue, N. W.
Washington 13, D. C.

Attention: Mr. C. G. Norris

Dear Mr. Norris:

I have your letter of May 4th, in response to mine of May 2nd, but I am compelled to write again because I cannot understand your reply.

Your letter does not make clear whether or not Fox is intending to invite the Crest Theatre to bid competitively for the first neighborhood run against the Uptown, Pimlico and Avalon Theatres with clearance over those theatres in the event we are successful on the bidding. You will recall of course that this was the subject matter of my letter of the 2nd. You state "Please understand that we are not asking you to establish a system of competitive bidding in this zone.", but obviously this is a matter of your decision since you are the distributor of the pictures and I have no power to establish such a system. I may add however that the tenor of our last conversation was such that I took it to be an invitation to notify you formally that I was willing to enter the competitive bidding situation for the Crest with the clearance indicated.

It has been my consistent position that the Pimlico Theatre has never played pictures in the first break-week for many many years until recently after the opening of the Crest. I disagree fundamentally with the policy that would give the Pimlico the opportunity to play on the same availability with or even ahead of the Crest. If Fox is now going to make its pictures available to the Pimlico in this fashion, then I repeat my willingness to bid competitively for the Crest with clearance to be given it over the Uptown, Avalon and Pimlico if we are successful in obtaining the picture. As I mentioned in my last letter this is the system that has now been adopted by RKO.

I would appreciate it if you would be good enough to

clarify your letter of May 4th and to give me your decision on this matter.

Yours very truly, —— ——.

[fol. 1746] Copy of Telegram sent 5/16/50.

Mr. Norris
20th Century Fox Film Corp.
932 New Jersey Ave., N. W.
Washington 13, D. C.

Have not received answer to our letter of May 9th. Appreciate immediate reply.

Theatre Enterprises, Inc.
Harry D. Myerberg

[fol. 1747] June 28, 1950

Mr. Glen Norris
20th Century Fox Film Corp.
932 New Jersey Avenue N. W.
Washington 13, D. C.

Dear Mr. Norris:

On May 9th, 1950, I wrote you requesting an answer on competitive bidding for the first neighborhood run with the Uptown, Pimlico and Avalon Theatres with clearance over these theatres in the event we are successful in the bidding. You will recall, of course, that this was a subject matter, and request of my letter of May 2nd. Not receiving a reply on the above, I wired you on May 16th, 1950, again requesting an answer.

Since this date I have repeatedly phoned, at great expense, requesting an answer to the above. To this date, we have not received same.

Your immediate answer to the above, without further delay, is again requested.

Very truly yours,
Theatre Enterprises, Inc.
By: Harry D. Myerberg

HDM:gmh

[fol. 1748] Western Union

BRA 232 PD-Washington DC 3 326 P

Harry Myerberg,
Theatre Enterprises, Inc.
305 Park Ave.

Have tried unsuccessfully reach you by phone several times during last few days, tell you we feel our best interests will be served by continuing present structure. Availabilities Crest, Uptown, Avalon zone.

C. G. Norris,
Branch Manager,
Twentieth Century Fox Film Corp.

No record of attempted calls, as claimed by Norris.

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[fol. 1749] No. 5303 Civil Docket

PLAINTIFF'S EXHIBIT No. 96—May 15, 1952

*House of Strangers* grossed $1405.00 on 3 units of playing time or $468.00 per tenth.
*Lady Gambles* grossed $1306.00 on 3 units of playing time or $435.00 per tenth.
*Neptune's Daughter* grossed $2521.00 on 7 units of playing time or $360.00 per tenth.
*Stratton Story* grossed $2709.00 on 7 units of playing time or $387.00 per tenth.
*Ten Tall Men* grossed $2300.00 on 7 units of playing time or $366.00 per tenth.
*David and Bathsheba* grossed $3912.00 on 10 units of playing time or $391.00 per tenth.
*Detective Story* grossed $2293.00 on 6 units of playing time or $382.00 per tenth.

[fol. 1750] No. 5303 Civil Docket

PLAINTIFFS EXHIBIT No. 97

May 27, 1952

FINAL DECREE AS TO RKO DATED November 8, 1948

"A. The defendants, Radio-Keith-Orpheum Corporation and RKO Radio Pictures, Inc., their officers, agents, servants and employees are each hereby enjoined:

* * * * * * *

"2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term 'clearances' as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

"3. From granting any clearance between theatres not in substantial competition.

"4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.

* * * * * * *

"A. Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of RKO Radio Pictures, Inc., during the period required for the completion of the reorganization of the RKO defendants, which shall in any event occur within one year of the entry of this judgment, to license or in any way to provide for the exhibition of any or all of the motion pictures which it may distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which Radio-Keith-Orpheum Corporation has or may acquire pursuant to the terms of this decree a proprietary interest of ninety-five percent or more either directly or through subsidiaries.

"B. From and after the effective date of the reorganization of the RKO defendants, the provisions of the preceding paragraph shall terminate and be of no effect; and from and after such date all licenses of motion pictures distributed by the New Picture Company or RKO Radio Pictures, Inc. for exhibition in any theatre, regardless of its owner or operator, shall be in all respects subject to the terms of this decree."

---

[fol. 1751] THE DECREE OF MARCH 3RD, 1949, AS TO THE PARAMOUNT DEFENDANTS

"A. The Paramount defendants, their officers, agents, servants and employees are each hereby enjoined:

• • • • • • •

"2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term 'clearances' as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

"3. From granting any clearance between theatres not in substantial competition.

"4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this judgment, the burden shall be upon the distributor to sustain the legality thereof.

• • • • • • •

"8. From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.

• • • • • • •

"A. Nothing contained in this judgment shall be construed to limit, in any way whatsoever, the right of the Paramount defendants, during the period required for the completion of the reorganization of the Paramount defendants, which shall in any event occur within one year of the entry of this judgment, to license or in any way to provide for the exhibition of any or all of the motion pictures which it may distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which Paramount Pictures Inc. has or may acquire pursuant to the terms of this judgment a proprietary interest of ninety-five per cent or more either directly or through subsidiaries.

"B. From and after the effective date of the reorganization of the Paramount defendants, the provision of the preceding paragraph shall terminate and be of no effect; and from and after such date all licenses of motion pictures distributed by the New Picture Company or Paramount Pictures Inc. for exhibition in any theatre, regardless of its owner or operator, shall be in all respects subject to the terms of this judgment."

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[fol. 1752] FINAL DECREE AS TO COLUMBIA, UNIVERSAL AND UNITED ARTISTS DATED FEBRUARY 8TH, 1950

"The defendants, Columbia Pictures Corporation, Columbia Pictures of Louisiana, Inc., Universal Corporation, Universal Film Exchanges, Inc., Big U Film Exchange, Inc., and United Artists Corporation, and the successors of each of them, and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty percent, are hereby enjoined:

• • • • • • •

"2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term 'clearances' as used herein meaning the period of time stipulated in license contracts which must elapse between

runs of the same feature within a particular area or in specified theatres.

"3. From granting any clearance between theatres not in substantial competition.

"4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.

* * * * * * *

"8. From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others."

---

[fol. 1753] FINAL DECREE AS TO LOEW'S, WARNER AND FOX OF FEBRUARY 8TH, 1950

"Each of the defendant distributors, Loew's, Incorporated; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.); Twentieth Century-Fox Film Corporation, and the successors of each of them, (including but not limited to companies resulting from divorcement), and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:

* * * * * * *

"2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term 'clearances' as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres.

"3. From granting any clearance between theatres not in substantial competition.

"4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof.

* * * * * * *

"8. From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.

* * * * * * *

"Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for the completion of the plan of reorganization provided for in Section IV, to license, or in any way to provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or through subsidiaries."

[fol. 1754] No. 5303 Civil Docket

May 21, 1952

DEFENDANT'S EXHIBIT No. 16

Stanley Theatre
Baltimore, Md.

Feature: Room For One More Attendance: 9050

* Zone numbers compiled between Jan. 25, & Jan. 29, 1952.

| Zone No. | Amount | Zone No. | Amount |
|---|---|---|---|
| 1 | 38 | 17 | 22 |
| 2 | 25 | 18 | 41 |
| 3 | 3 | 19 | 0 |
| 4 | 9 | 20 | 2 |
| 5 | 9 | 21 | 4 |
| 6 | 5 | 22 | 1 |
| 7 | 12 | 23 | 19 |
| 8 | 12 | 24 | 12 |
| 9 | 4 | 25 | 6 |
| 10 | 21 | 26 | 2 |
| 11 | 5 | 27 | 6 |
| 12 | 20 | 28 | 8 |
| 13 | 14 | 29 | 21 |
| 14 | 12 | 30 | 22 |
| 15 | 95 | 31 | 10 |
| 16 | 30 | Out of Town | 33 |

Total Amount 523

Total Amount in Crest District 120

Feature: Room For One More
Attendance: 10179

Zone numbers compiled between
Jan. 30, & Feb. 3.

Feature: Sailor Beware
Attendance: 22780

Compiled between
Feb. 8, & Feb. 10.

| Zone No. | Amount | Zone No. | Amount | Zone No. | Amount | Zone No. | Amount |
|---|---|---|---|---|---|---|---|
| 1 | 44 | 17 | 43 | 1 | 51 | 17 | 59 |
| 2 | 37 | 18 | 99 | 2 | 42 | 18 | 67 |
| 3 | 0 | 19 | 2 | 3 | 4 | 19 | 6 |
| 4 | 27 | 20 | 2 | 4 | 24 | 20 | 2 |
| 5 | 25 | 21 | 5 | 5 | 15 | 21 | 13 |
| 6 | 18 | 22 | 11 | 6 | 13 | 22 | 9 |
| 7 | 29 | 23 | 28 | 7 | 16 | 23 | 47 |
| 8 | 13 | 24 | 23 | 8 | 7 | 24 | 57 |
| 9 | 13 | 25 | 26 | 9 | 7 | 25 | 17 |
| 10 | 11 | 26 | 2 | 10 | 4 | 26 | 12 |
| 11 | 11 | 27 | 14 | 11 | 13 | 27 | 17 |
| 12 | 39 | 28 | 11 | 12 | 18 | 28 | 9 |
| 13 | 24 | 29 | 36 | 13 | 37 | 29 | 32 |
| 14 | 17 | 30 | 32 | 14 | 13 | 30 | 55 |
| 15 | 193 | 31 | 12 | 15 | 210 | 31 | 24 |
| 16 | 55 | Out of Town | 100 | 16 | 43 | Out of Town | 88 |

Total amount 1001

Total amount 1031

Total amount in Crest District 207

Total amount in Crest District 237

* There was a Transit Strike on those five days.

[fol. 1755]

The percentage of the total number of cards in each zone to the total number of cards in all the zones together.

| Zone No. | No. | % | Zone No. | No. | % |
|---|---|---|---|---|---|
| 1 | 133 | 5.2 | 17 | 124 | 4.9 |
| 2 | 104 | 4.1 | 18 | 207 | 8.1 |
| 3 | 7 | 0.3 | 19 | 8 | 0.3 |
| 4 | 60 | 2.3 | 20 | 6 | 0.2 |
| 5 | 49 | 1.9 | 21 | 22 | 0.9 |
| 6 | 36 | 1.4 | 22 | 21 | 0.8 |
| 7 | 57 | 2.2 | 23 | 94 | 3.7 |
| 8 | 32 | 1.3 | 24 | 92 | 3.6 |
| 9 | 24 | 0.9 | 25 | 49 | 1.9 |
| 10 | 36 | 1.4 | 26 | 16 | 0.6 |
| 11 | 29 | 1.1 | 27 | 37 | 1.4 |
| 12 | 77 | 3.0 | 28 | 28 | 1.1 |
| 13 | 75 | 2.9 | 29 | 89 | 3.5 |
| 14 | 42 | 1.6 | 30 | 109 | 4.3 |
| 15 | 498 | 19.5 | 31 | 46 | 1.8 |
| 16 | 127 | 5.0 | Out of Town | 221 | 8.6 |

The percentage of the total number of cards in the Crest District to the total number of cards in all the zones together.

Crest District 564 Percentage 22% Total in all zones 2555

[fol. 1756] May 21, 1952

No. 5303 Civil Docket

DEFENDANT'S EXHIBIT No. 18

Statement of Grosses—Warner and Ambassador Theatres, Washington, D. C.
Period—2/15/49 thru 3/22/50

| Date | Picture | Days | Distributor | Gross Warner | Gross Ambassador |
|---|---|---|---|---|---|
| 2/15-21/1949 | Shockproof | 7 | Columbia | $12,427.74 | $5,147.63 |
| 2/22-3/3 | Whispering Smith | 10 | Paramount | 19,188.82 | 8,866.33 |
| 3/4-10 | Walked by Night | 7 | Eagle Lion | 10,976.58 | 4,969.51 |
| 3/11-17 | Flaxy Martin* *Jack Caron on Stage | 7 | Warner | 27,883.66 | 2,664.00 |
| 3/18-24 | South St. Louis | 7 | Warner | 13,003.77 | 6,174.99 |
| 3/25-30 | Red Pony | 6 | Republic | 8,025.42 | 4,312.51 |
| 3/31-4/7 | Kiss in Dark | 8 | Warner | 12,551.18 | 6,362.41 |
| 4/8-15 | Man from Colorado | 8 | Columbia | 10,793.63 | 5,470.79 |
| 4/16-22 | My Dream Is Yours | 7 | Warner | 13,585.13 | 5,666.37 |
| 4/23-29 | Knock on Any Door | 7 | Columbia | 13,650.81 | 6,364.46 |
| 4/30-5/11 | Flamingo Road | 12 | Warner | 23,659.57 | 11,700.62 |
| 5/12-18 | Alias Nick Beal | 7 | Paramount | 8,548.61 | 4,370.29 |
| 5/19-25 | We Were Strangers | 7 | Columbia | 14,602.99 | 6,825.98 |
| 5/26-6/1 | Younger Brothers | 7 | Warner | 9,372.53 | 4,179.36 |
| 6/2-8 | Night Unto Night | 7 | Warner | 8,099.17 | 4,053.53 |
| 6/9-15 | Undercover Man | 7 | Columbia | 8,573.14 | 5,134.94 |
| 6/15-22 | Colorado Territory | 7 | Warner | 9,130.57 | 4,901.20 |
| 6/23-29 | Bride of Vengeance | 7 | Paramount | 8,586.06 | 5,423.10 |
| 6/30-7/6 | The Fountainhead | 7 | Warner | 13,780.37 | 7,906.85 |
| 7/7-13 | Sorrowful Jones | 7 | Paramount | 18,733.01 | 10,468.55 |
| 7/14-20 | Sorrowful Jones | 7 | Paramount | 13,001.20 | 5,689.74 |
| 7/21-27 | Girl From Jones Beach | 7 | Warner | 12,573.39 | 7,296.69 |
| 7/28-8/3 | Look for Silver Lining | 7 | Warner | 13,986.63 | 7,958.69 |
| 8/4-10 | Look for Silver Lining | 7 | Warner | 7,716.93 | 3,747.06 |
| 8/11-17 | Lust for Gold | 7 | Columbia | 9,239.82 | 5,661.17 |
| 8/18-24 | It's a Great Feeling | 7 | Warner | 14,092.37 | 6,543.10 |
| 8/25-31 | Anna Lucasta | 7 | Columbia | 11,923.81 | 6,294.40 |
| 9/1-7 | White Heat | 7 | Warner | 14,526.47 | 6,060.24 |
| 9/8-14 | Rope of Sand | 7 | Paramount | 15,911.62 | 7,941.45 |
| 9/15-21 | Fighting Kentuckian | 7 | Republic | 14,058.78 | 6,050.17 |
| 9/22-28 | Task Force | 7 | Warner | 16,758.99 | 7,787.58 |
| 9/29-10/3 | Task Force | 7 | Warner | 10,650.53 | 4,482.05 |
| 10/6-13 | Under Capricorn | 8 | Warner | 13,334.76 | 6,375.62 |
| 10/14-20 | Tokyo Joe | 7 | Columbia | 12,173.16 | 5,526.35 |
| [fol. 1757] | | | | | |
| 10/21-27/49 | Mr. Soft Touch* *High Button Shoes on Stage | 7 | Columbia | 18,900.22 | 3,649.05 |
| 10/28-11/7 | Beyond the Forest | 11 | Warner | 17,066.25 | 8,320.21 |
| 11/8-16 | Story Sea Biscuit | 9 | Warner | 11,406.34 | 4,441.43 |
| 11/17-23 | Miss Grant Takes Rich. | 7 | Columbia | 12,114.54 | 5,739.20 |
| 11/24-30 | Always Leave 'em Laugh. | 7 | Warner | 10,624.06 | 5,131.69 |
| 12/1-7 | Red Hot & Blue | 7 | Paramount | 8,467.05 | 3,374.31 |
| 12/8-16 | And Baby Makes Three | 9 | Columbia | 7,088.06 | 2,998.05 |
| 12/17-22 | Hatchet Man and Farewell to Arms | 7 | Warner | 5,508.94 | 2,817.86 |
| 12/23-30 | Lady Takes Sailor | 8 | Warner | 8,250.45 | 3,806.94 |
| 12/31-1/6/1950 | Inspector General | 7 | Warner | 13,637.95 | 8,718.09 |
| 1/7-13 | The Great Lover | 7 | Paramount | 15,102.37 | 7,360.58 |
| 1/14-23 | Hasty Heart | 10 | Warner | 14,478.80 | 7,813.45 |
| 1/24-2/7 | Sands of Iwo Jima | 15 | Republic | 33,998.79 | 13,772.75 |
| 2/8-15 | Montana | 8 | Warner | 12,280.67 | 5,876.93 |
| 2/16-21 | The Sundowners | 6 | Eagle Lion | 9,115.24 | 3,904.32 |
| 2/22-3/1 | Chain Lightning | 8 | Warner | 11,273.15 | 4,831.10 |
| 3/2-8 | Thelma Jordon | 7 | Paramount | 7,681.57 | 4,099.09 |
| 3/9-15 | Young Man With Horn | 7 | Warner | 10,328.89 | 4,734.73 |
| 3/16-22 | Dear Wife | 7 | Paramount | 8,000.14 | 4,331.35 |

[fol. 1758] No. 5303 Civil Docket

DEFENDANT'S EXHIBIT No. 19

May 21, 1952

COMPUTATION OF NET LOSS OF CREST THEATRE, BALTIMORE *

| | | |
|---|---|---|
| Gross at Stanley Theatre, Baltimore during claimed damage period, February 25, 1949 to March 23, 1950 (56 weeks) | $406,308.24 | |
| Ratio of gross of Ambassador Theatre, Washington to gross of Warner Theatre, Washington (see note) | 48.5% | |
| Gross applicable to Crest Theatre, Baltimore | | $197,059.50 |
| Less expenses: | | |
| Film rental—35% of $197,059.50 | $ 68,970.83 | |
| Operating expenses 56 weeks at $2500 | 140,000.00 | 208,970.83 |
| Net loss during claimed damage period | | $ 11,911.33 |

* Based on comparative grosses at Warner and Ambassador Theatres, Washington, playing same pictures day and date during claimed damage period.

Note: During claimed damage period Warner Theatre, Washington, grossed $634,660.82 while Ambassador Theatre, Washington, grossed $307,805.81 or 48.5% of the Warner Theatre figure. Applying this ratio to the Stanley and Crest Theatres in Baltimore would result in a gross of $197,059.50 for the Crest Theatre. After allowing for film rental and operating expenses a net loss of $11,911.33 would be realized under this formula.

[fol. 1759] May 21, 1952

No. 5303 Civil Docket

DEFENDANT'S EXHIBIT No 20

Statement of Grosses—Earle and Ambassador Theatres, Washington, D. C.
Period—12/25/45 thru 12/30/46

| Date | Picture | Days | Distributor | Gross Warner | Gross Ambassador |
|---|---|---|---|---|---|
| 12/25-31/45 | San Antonio | 7 | Warner | $25,835.87 | $9,199.26 |
| 1/1-9/46 | San Antonio | 9 | Warner | 20,423.27 | 6,858.21 |
| 1/10-16 | Lost Week End | 7 | Paramount | 29,455.77 | 12,244.81 |
| 10/17-23 | Lost Week End | 7 | Paramount | 18,062.80 | 7,264.98 |
| 1/24-30 | Kiss and Tell | 7 | Columbia | 21,962.66 | 9,057.87 |
| 1/31-2/6 | Kiss and Tell | 7 | Columbia | 15,052.62 | 5,777.54 |
| 2/7-13 | My Reputation | 7 | Warner | 22,446.91 | 10,405.66 |
| 2/14-20 | My Reputation | 7 | Warner | 13,667.26 | 5,889.99 |
| 2/21-27 | Three Strangers | 7 | Warner | 19,090.26 | 10,106.88 |
| 2/28-3/6 | Stork Club | 7 | Paramount | 25,145.88 | 10,619.24 |
| 3/7-13 | Stork Club | 7 | Paramount | 13,707.46 | 6,098.39 |
| 3/14-20 | Cinderella Jones | 7 | Warner | 13,534.76 | 6,252.20 |
| 3/21-27 | Saratoga Trunk | 7 | Warner | 29,896.94 | 12,139.27 |
| 3/28-4/3 | Saratoga Trunk | 7 | Warner | 23,086.43 | 9,974.26 |
| 4/4-10 | Saratoga Trunk | 7 | Warner | 17,436.26 | 7,192.95 |
| 4/11-17 | Miss Susie Slagle | 7 | Paramount | 14,045.30 | 7,516.75 |
| 4/18-28 | Bandit Sherwood Forest | 11 | Columbia | 35,061.16 | 14,158.02 |
| 4/29-5/5 | Road to Utopia | 7 | Paramount | 28,713.72 | 14,159.49 |
| 5/6-12 | Road to Utopia | 7 | Paramount | 16,407.75 | 7,981.99 |
| 5/13-15 | Road to Utopia | 3 | Paramount | 3,892.17 | 1,954.91 |
| 5/16-22 | Devotion | 7 | Warner | 20,287.23 | 10,112.91 |
| 5/23-29 | His Kind of Man | 7 | Warner | 15,509.28 | 7,064.01 |
| 5/30-6/5 | One More Tomorrow | 7 | Warner | 18,343.83 | 10,010.40 |
| 6/10-16 | Gilda | 7 | Columbia | 24,833.00 | 10,982.92 |
| 6/17-23 | Gilda | 7 | Columbia | 14,789.34 | 6,904.20 |
| 6/24-7/3 | Bride Wore Boots | 10 | Paramount | 20,283.63 | 9,840.50 |
| 7/4-10 | Jane Get Married | 7 | Warner | 13,949.75 | 6,580.24 |
| 7/11-17 | To Each His Own | 7 | Paramount | 17,092.36 | 9,351.70 |
| 7/18-24 | To Each His Own | 7 | Paramount | 12,064.60 | 5,467.87 |
| 7/25-31 | Stolen Life | 7 | Warner | 24,762.86 | 11,387.11 |
| 8/1-7 | Stolen Life | 7 | Warner | 14,912.45 | 6,348.22 |
| 8/8-14 | Night and Day | 7 | Warner | 30,553.35 | 11,622.64 |
| 8/15-21 | Night and Day | 7 | Warner | 18,508.58 | 7,904.76 |
| [fol. 1760] | | | | | |
| 8/22-28/1946 | Night and Day | 7 | Warner | 15,534.78 | 5,732.86 |
| 8/29-9/4 | Big Sleep | 7 | Warner | 26,331.23 | 10,932.44 |
| 9/5-11 | Big Sleep | 7 | Warner | 17,276.01 | 6,422.73 |
| 9/12-18 | Of Human Bondage | 7 | Warner | 19,298.43 | 7,711.41 |
| 9/19-25 | Renegades | 7 | Columbia | 15,306.11 | 6,668.02 |
| 9/26-10/2 | Two Guys from Milwaukee | 7 | Warner | 20,214.20 | 9,630.88 |
| 10/3-9 | Two Guys from Milwaukee | 7 | Warner | 11,541.25 | 5,453.38 |
| 10/10-16 | Cloak & Dagger | 7 | Warner | 22,782.65 | 10,679.94 |
| 10/17-23 | Cloak & Dagger | 7 | Warner | 12,428.83 | 6,364.62 |
| 10/24-30 | Strange Love M. Ivers | 7 | Paramount | 19,621.82 | 9,757.91 |
| 10/31-11/6 | Nobody Lives Forever | 7 | Warner | 15,842.76 | 8,620.67 |
| 11/7-13 | Deception | 7 | Warner | 22,205.10 | 11,624.14 |
| 11/14-20 | Deception | 7 | Warner | 11,282.21 | 5,354.57 |
| 11/21-27 | Dark Mirror | 7 | Universal | 19,125.45 | 10,264.01 |
| 11/28-12/4 | Never Say Goodbye | 7 | Warner | 13,789.57 | 7,444.13 |
| 12/5-11 | The Verdict | 7 | Warner | 16,605.13 | 8,303.60 |
| 12/12-18 | Nocturne | 7 | RKO | 11,316.91 | 5,780.72 |
| 12/19-30 | Till End of Time | 12 | RKO | 20,570.27 | 10,045.14 |
| Total Gross for 54 pictures in Year | | | | 963,888.22 | 435,311.32 |

Ambassador's gross for year 45.16% of downtown Earle Theatre.

[fol. 1761]

Statement of Grosses—Earle and Ambassador Theatres, Washington, D. C.
Period 12/31/46 thru 12/30/47

| Date | Picture | Days | Distributor | Gross Warner | Gross Ambassador |
|---|---|---|---|---|---|
| 12/31/46–1/6/47 | Time Place & Girl | 7 | Warner | $22,691.83 | $10,789.78 |
| 1/7–15 | Time Place & Girl | 9 | Warner | 18,958.62 | 6,317.75 |
| 1/16–22 | Blue Skies | 7 | Paramount | 30,308.14 | 13,457.62 |
| 1/23–29 | Blue Skies | 7 | Paramount | 20,250.45 | 10,326.67 |
| 1/30–2/5 | Man I Love | 7 | Warner | 13,822.30 | 7,202.09 |
| 2/6–12 | Humoresque | 7 | Warner | 20,091.45 | 9,752.26 |
| 2/13–19 | Humoresque | 7 | Warner | 12,283.09 | 5,701.42 |
| 2/20–26 | Jolson Story | 7 | Columbia | 27,476.05 | 11,953.92 |
| 2/27–3/5 | Jolson Story | 7 | Columbia | 18,720.70 | 8,037.91 |
| 3/6–12 | Nora Prentiss | 7 | Warner | 16,565.97 | 9,030.27 |
| 3/13–19 | Nora Prentiss | 7 | Warner | 10,028.60 | 4,790.37 |
| 3/20–26 | That Way With Women | 7 | Warner | 10,003.66 | 5,229.39 |
| 3/27–4/2 | Johnny O'Clock | 7 | Columbia | 14,289.97 | 7,620.73 |
| 4/3–9 | Pursued | 7 | Columbia | 20,824.97 | 9,534.31 |
| 4/10–16 | Pursued | 7 | Columbia | 11,301.46 | 5,048.22 |
| 4/17–23 | Dead Reckoning | 7 | Columbia | 18,720.51 | 8,494.86 |
| 4/24–30 | Love and Learn | 7 | Warner | 12,828.31 | 5,673.93 |
| 5/1–7 | Sea Wolf \ Combination Sea Hawk / | 7 | Warner | 17,003.41 | 6,816.75 |
| 5/8–14 | Stallion Road | 7 | Warner | 13,315.50 | 7,121.49 |
| 5/15–21 | Suddenly It's Spring | 7 | Paramount | 13,999.30 | 8,356.78 |
| 5/22–28 | Calcutta | 7 | Paramount | 15,733.36 | 8,345.29 |
| 5/29–6/4 | Two Mrs. Carrolls | 7 | Warner | 16,053.08 | 8,857.48 |
| 6/5–11 | Two Mrs. Carrolls | 7 | Warner | 9,278.11 | 4,119.10 |
| 6/12–18 | Cheyenne | 7 | Warner | 17,275.75 | 8,177.68 |
| 6/19–25 | Dear Ruth | 7 | Paramount | 17,085.63 | 9,243.73 |
| 6/26–29 | That's My Man | 4 | Republic | 4,380.19 | 3,167.03 |
| 6/30–7/9 | The Unfaithful | 10 | Warner | 16,779.73 | 8,550.17 |
| 7/10–16 | Great Expectations | 7 | Universal | 18,069.53 | 11,198.65 |
| 7/17–23 | Perils of Pauline | 7 | Paramount | 18,920.82 | 8,884.94 |
| 7/24–30 | Possessed | 7 | Warner | 13,987.40 | 8,170.30 |
| 7/31–8/6 | Dishonored Lady | 7 | United Artists | 10,175.24 | 6,242.23 |
| 8/7–13 | Cry Wolf | 7 | Warner | 15,116.82 | 7,645.86 |
| 8/14–20 | Welcome Stranger | 7 | Paramount | 31,470.07 | 13,716.10 |
| 8/21–27 | Welcome Stranger | 7 | Paramount | 17,660.19 | 8,820.86 |
| [fol. 1762] | | | | | |
| 8/28–9/3/1947 | Deep Valley | 7 | Warner | 12,510.67 | 6,542.98 |
| 9/4–10/ | Carnegie Hall | 7 | United Artists | 15,588.04 | 8,541.68 |
| 9/11–17 | *Life With Father | 7 | Warner | 34,116.86 | 17,589.71 |
| 9/18–24 | Life With Father | 7 | Warner | 21,359.68 | 10,121.16 |
| 9/25–10/1 | Life With Father | 7 | Warner | 13,903.17 | 6,327.61 |
| 10/2–10 | Dark Passage | 9 | Warner | 18,058.80 | 8,749.77 |
| 10/11–17 | Down To Earth | 7 | Columbia | 14,796.82 | 7,663.18 |
| 10/18–24 | Unsuspected | 7 | Warner | 12,904.53 | 6,768.73 |
| 10/25–31 | Wild Harvest | 7 | Paramount | 11,128.92 | 4,978.45 |
| 11/1–5 | Husband's Affairs | 5 | Columbia | 9,437.14 | 5,146.14 |
| 11/6–12 | Anthony Adverse | 7 | Warner | 12,182.26 | 6,689.75 |
| 11/13–19 | Christmas Eve | 7 | United Artists | 10,867.43 | 5,021.10 |
| 11/20–26 | Escape Me Never | 7 | Warner | 11,991.96 | 5,724.68 |
| 11/27–12/3 | That Hagen Girl | 7 | Warner | 11,284.19 | 5,502.18 |
| 12/4–10 | It Had To Be You / Royal Wedding | 7 | Columbia / Universal | 16,236.12 | 8,964.11 |
| 12/11–17 | Jezebel | 7 | Warner | 7,164.96 | 3,835.83 |
| 12/18–24 | I Love Trouble | 7 | Columbia | 6,385.22 | 3,013.90 |
| 12/25–30 | Always Together | 6 | Warner | 5,389.04 | 3,439.38 |
| Total Gross for 42 pictures in Year | | | | 810,705.02 | 400,806.28 |

Ambassador's gross for year 49.4% of downtown Earle-Warner Theatre.
*Theatre name changed from Earle to "Warner" with engagement Life With Father.

[fol. 1763]

Statement of Grosses—Warner and Ambassador Theatres, Washington, D. C.
Period 12/31/47 thru 12/31/48

| Date | Picture | Days | Distributor | Gross Warner | Gross Ambassador |
|---|---|---|---|---|---|
| 12/31/47-1/6/48 | My Wild Irish Rose | 7 | Warner | $18,761.44 | $9,511.81 |
| 1/7-14 | My Wild Irish Rose | 8 | Warner | 10,368.40 | 5,080.51 |
| 1/15-21 | I Walk Alone | 7 | Paramount | 13,911.34 | 6,529.67 |
| 1/22-28 | Treasure Sierra Madre | 7 | Warner | 12,250.33 | 6,363.73 |
| 1/29-2/4 | Treasure Sierra Madre | 7 | Warner | 10,137.63 | 5,236.65 |
| 2/5-11 | Voice of the Turtle | 7 | Warner | 16,543.59 | 8,398.47 |
| 2/12-18 | Voice of the Turtle | 7 | Warner | 11,099.60 | 5,637.43 |
| 2/19-25 | My Girl Tisa | 7 | Warner | 7,722.51 | 4,889.12 |
| 2/26-3/3 | The Swordsman | 7 | Columbia | 11,211.07 | 5,460.18 |
| 3/4-10 | "T" Men | 7 | Eagle Lion | 13,340.96 | 6,620.09 |
| 3/11-17 | Saigon | 7 | Paramount | 14,673.23 | 6,700.94 |
| 3/18-26 | Adv. of Robinhood | 9 | Warner | 12,114.00 | 6,690.66 |
| 3/27-4/2 | April Showers | 7 | Warner | 13,944.25 | 6,330.60 |
| 4/3-7 | April Showers | 5 | Warner | 6,775.17 | 2,202.59 |
| 4/8-14 | To the Victor | 7 | Warner | 9,003.25 | 4,831.73 |
| 4/15-21 | To the End of Earth | 7 | Columbia | 12,598.91 | 6,022.79 |
| 4/22-28 | Sainted Sisters | 7 | Paramount | 9,473.39 | 5,223.58 |
| 4/29-5/5 | Lady From Shanghai | 7 | Columbia | 13,824.73 | 7,687.44 |
| 5/6-12 | Winter Meeting | 7 | Warner | 7,562.14 | 4,609.35 |
| 5/13-19 | Woman in White | 7 | Warner | 9,716.52 | 5,591.70 |
| 5/20-26 | Mating of Millie | 7 | Columbia | 16,042.68 | 7,531.19 |
| 5/27-6/2 | Silver River | 7 | Warner | 13,120.16 | 7,065.87 |
| 6/3-9 | Wall Flower | 7 | Warner | 8,291.21 | 4,354.26 |
| 6/10-16 | Fuller Brush Man | 7 | Columbia | 16,757.84 | 8,325.47 |
| 6/17-23 | Letters Unknown Woman | 7 | Universal | 9,951.63 | 6,110.39 |
| 6/24-30 | Hazard | 7 | Paramount | 8,829.53 | 4,875.40 |
| 7/1-7 | Romance on High Seas | 7 | Warner | 10,865.23 | 6,033.11 |
| 7/8-14 | Dream Girl | 7 | Paramount | 10,680.19 | 4,954.39 |
| 7/15-21 | Emperor's Waltz | 7 | Paramount | 20,972.52 | 11,918.15 |
| 7/22-28 | Emperor's Waltz | 7 | Paramount | 11,491.34 | 6,096.13 |
| 7/29-8/4 | Key Largo | 7 | Warner | 20,240.44 | 10,634.89 |
| 8/5-11 | Key Largo | 7 | Warner | 9,277.94 | 4,313.29 |
| 8/12-18 | Babe Ruth Story | 7 | Monogram | 13,081.17 | 4,516.22 |
| 8/19-25 | Life With Father | 7 | Warner | 10,805.52 | 6,134.32 |
| [fol. 1764] | | | | | |
| 8/26-9/1/48 | Pitfall | 7 | United Artists | 13,392.85 | 7,735.07 |
| 9/2-8 | Two Guys From Texas | 7 | Warner | 15,016.00 | 7,625.65 |
| 9/9-15 | Beyond Glory | 7 | Paramount | 14,323.20 | 7,460.67 |
| 9/16-22 | Rope | 7 | Warner | 17,893.76 | 9,219.98 |
| 9/23-29 | Rope | 7 | Warner | 9,320.93 | 4,151.88 |
| 9/30-10/6 | Walk a Crooked Mile | 7 | Columbia | 12,925.49 | 6,061.68 |
| 10/7-13 | Sorry Wrong Number | 7 | Paramount | 16,858.06 | 8,237.62 |
| 10/14-20 | Johnny Belinda | 7 | Warner | 15,064.11 | 8,237.69 |
| 10/21-27 | Johnny Belinda | 7 | Warner | 10,985.09 | 5,553.01 |
| 10/28-11/3 | Loves of Carmen | 7 | Columbia | 14,433.78 | 6,424.16 |
| 11/4-10 | Sealed Verdict | 7 | Paramount | 10,492.26 | 5,342.24 |
| 11/11-17 | June Bride | 7 | Warner | 15,904.33 | 9,342.37 |
| 11/18-24 | Miss Tatlock's Millions | 7 | Paramount | 13,751.72 | 7,603.81 |
| 11/25-12/1 | Fighter Squadron | 7 | Warner | 13,929.05 | 6,221.19 |
| 12/2-8 | Gallant Blade | 7 | Columbia | 8,908.49 | 4,143.51 |
| 12/9-15 | Cannon City | 7 | Eagle Lion | 8,860.50 | 3,857.82 |
| 12/16-24 | Christopher Blake | 9 | Warner | 4,277.29 | 2,512.47 |
| 12/25-31 | One Sunday Afternoon | 7 | Warner | 7,223.25 | 3,677.63 |
| Total Gross for 44 pictures in Year | | | | 639,000.02 | 325,890.57 |

Ambassador's gross for year 51.0% of downtown Warner Theatre.

[fol. 1765]

Statement of Grosses—Warner and Ambassador Theatres, Washington, D. C.
Period 1/1/7-/49 thru 12/30/49

| Date | Picture | Days | Distributor | Gross Warner | Gross Ambassador |
|---|---|---|---|---|---|
| 1/1-7/1949 | Adv. Don Juan | 7 | Warner | $16,388.91 | $7,810.60 |
| 1/8-13 | Adv. Don Juan | 6 | Warner | 8,389.08 | 2,778.05 |
| 1/14-18 | Whiplash | 5 | Warner | 11,017.15 | 4,736.27 |
| 1/19-26 | John Loves Mary | 8 | Warner | 12,360.35 | 6,984.46 |
| 1/27-2/2 | Wake of Red Witch | 7 | Republic | 19,230.71 | 8,245.61 |
| 2/3-7 | Wake of Red Witch | 5 | Republic | 8,329.22 | 3,539.44 |
| 2/8-14 | The Accused | 7 | Paramount | 12,833.03 | 6,818.48 |
| 2/15-21 | Shockproof | 7 | Columbia | 12,427.74 | 5,147.63 |
| 2/22-3/3 | Whispering Smith | 10 | Paramount | 19,188.82 | 8,866.33 |
| 3/4-10 | Walked By Night | 7 | Eagle Lion | 10,976.58 | 4,969.51 |
| 3/11-17 | Flaxy Martin* | 7 | Warner | *27,883.66 | 2,664.00 |
| | *Jack Carson on Stage | | | | |
| 3/18-24 | South St. Louis | 7 | Warner | 13,003.77 | 6,174.99 |
| 3/25-30 | Red Pony | 6 | Republic | 8,025.42 | 4,312.51 |
| 3/31-4/7 | Kiss In Dark | 8 | Warner | 12,551.18 | 6,362.41 |
| 4/8-15 | Man From Colorado | 8 | Columbia | 10,793.63 | 5,470.79 |
| 4/16-22 | My Dream Is Yours | 7 | Warner | 13,585.13 | 5,666.37 |
| 4/23-29 | Knock On Any Door | 7 | Columbia | 13,650.81 | 6,384.46 |
| 4/30-5/11 | Flamingo Road | 12 | Warner | 23,659.57 | 11,700.62 |
| 5/12-18 | Alias Nick Beal | 7 | Paramount | 8,548.61 | 4,370.29 |
| 5/19-25 | We Were Strangers | 7 | Columbia | 14,602.99 | 6,825.98 |
| 5/26-6/1 | Younger Brothers | 7 | Warner | 9,372.53 | 4,179.36 |
| 6/2-8 | Night Unto Night | 7 | Warner | 8,099.17 | 4,053.53 |
| 6/9-15 | Undercover Man | 7 | Columbia | 8,573.14 | 5,134.94 |
| 6/15-22 | Colorado Territory | 7 | Warner | 9,130.57 | 4,901.20 |
| 6/23-29 | Bride of Vengeance | 7 | Paramount | 8,586.06 | 5,423.10 |
| 6/30-7/6 | The Fountainhead | 7 | Warner | 13,780.37 | 7,906.85 |
| 7/7-13 | Sorrowful Jones | 7 | Paramount | 18,733.01 | 10,468.55 |
| 7/14-20 | Sorrowful Jones | 7 | Paramount | 13,001.20 | 5,689.74 |
| 7/21-27 | Girl From Jones Beach | 7 | Warner | 12,573.39 | 7,296.69 |
| 7/28-8/3 | Look for Silver Lining | 7 | Warner | 13,986.63 | 7,958.69 |
| 8/4-10 | Look for Silver Lining | 7 | Warner | 7,716.93 | 3,747.06 |
| 8/11-17 | Lust for Gold | 7 | Columbia | 9,239.82 | 5,661.17 |
| 8/18-24 | It's A Great Feeling | 7 | Warner | 14,092.37 | 6,543.10 |
| [fol. 1766] | | | | | |
| 8/25-31 | Anna Lucasta | 7 | Columbia | 11,923.81 | 6,294.40 |
| 9/1-7 | White Heat | 7 | Warner | 14,526.47 | 6,060.24 |
| 9/8-14 | Rope of Sand | 7 | Paramount | 15,911.62 | 7,941.45 |
| 9/15-21 | Fighting Kentuckian | 7 | Republic | 14,058.78 | 6,050.17 |
| 9/22-28 | Task Force | 7 | Warner | 16,758.99 | 7,787.58 |
| 9/29-10/3 | Task Force | 7 | Warner | 10,650.53 | 4,482.05 |
| 10/6-13 | Under Capricorn | 8 | Warner | 13,334.76 | 6,375.62 |
| 10/14-20 | Tokyo Joe | 7 | Columbia | 12,173.16 | 5,526.35 |
| 10/21-27 | Mr. Soft Touch* | 7 | Columbia | *18,900.22 | 3,649.05 |
| | *High Button Shoes on Stage | | | | |
| 10/28-11/7 | Beyond the Forest | 11 | Warner | 17,066.25 | 8,320.21 |
| 11/8-16 | Story of Sea Biscuit | 9 | Warner | 11,406.34 | 4,441.43 |
| 11/17-23 | Miss Grant Takes Rich. | 7 | Columbia | 12,114.54 | 5,739.20 |
| 11/24-30 | Always Leave 'Em Laugh. | 7 | Warner | 11,624.06 | 5,131.69 |
| 12/1-7 | Red Hot & Blue | 7 | Paramount | 8,467.05 | 3,374.31 |
| 12/8-16 | And Baby Makes Three | 9 | Columbia | 7,088.06 | 2,998.05 |
| 12/17-22 | Hatchet Man and Farewell To Arms | 7 | Warner | 5,508.94 | 2,817.86 |
| 12/23-30/49 | Lady Takes Sailor | 8 | Warner | 8,250.45 | 3,806.94 |
| Total Gross for 50 pictures in Year | | | | 634,095.58 | 289,589.38 |

Ambassador's gross for year on 50 pictures 45.7% of downtown Warner Theatre.

| | | |
|---|---|---|
| Total Gross for 48 pictures (eliminating stage-show engagements) | 587,311.70 | 283,276.33 |

Ambassador's gross for year on 48 pictures 48.2% of downtown Warner Theatre.

[fol. 1767]

Statement of Grosses—Warner and Ambassador Theatres, Washington, D. C.
Period 12/31/49 thru 12/30,50

| Date | Picture | Days | Distributor | Gross Warner | Gross Ambassador |
|---|---|---|---|---|---|
| 12/31/49–1/6/50 | Inspector General | 7 | Warner | $13,637.95 | $8,718.09 |
| 1/7–13 | The Great Lover | 7 | Paramount | 15,102.37 | 7,360.58 |
| 1/14–23 | Hasty Heart | 10 | Warner | 14,478.80 | 7,813.45 |
| 1/24–2/7 | Sands of Iwo Jima | 15 | Republic | 33,998.79 | 13,772.75 |
| 2/8–15 | Montana | 8 | Warner | 12,280.67 | 5,876.93 |
| 2/16–21 | The Sundowners | 6 | Eagle Lion | 9,115.24 | 3,904.32 |
| 2/22–3/1 | Chain Lightning | 8 | Warner | 11,273.15 | 4,831.10 |
| 3/2–8 | Thelma Jordan | 7 | Paramount | 7,681.57 | 4,099.09 |
| 3/9–15 | Young Man With Horn | 7 | Warner | 10,328.89 | 4,734.73 |
| 3/16–22 | Dear Wife | 7 | Paramount | 8,000.14 | 4,331.35 |
| 3/23–29 | Paid In Full | 7 | Paramount | 7,967.65 | 3,640.57 |
| 3/30–4/7 | Perfect Strangers | 9 | Warner | 10,332.63 | 4,220.02 |
| 4/8–14 | Riding High | 7 | Paramount | 12,743.36 | 5,608.78 |
| 4/15–21 | Stage Fright | 7 | Warner | 11,448.52 | 5,058.89 |
| 4/22–28 | Woman of Distinction | 7 | Columbia | 9,475.56 | 4,898.69 |
| 4/29–5/5 | Daughter R. O'Grady | 7 | Warner | 9,460.43 | 4,288.25 |
| 5/6–12 | Damned Don't Cry | 7 | Warner | 10,009.12 | 4,911.73 |
| 5/13–17 | Damned Don't Cry | 5 | Warner | 4,969.09 | 2,194.00 |
| 5/18–24 | No Man of Her Own | 7 | Paramount | 7,501.09 | 3,702.22 |
| 5/25–31 | Colt 45 | 7 | Warner | 11,303.07 | 5,221.69 |
| 6/1–7 | God My Co-Pilot<br>Destination Tokyo | 7 | Warner | 6,652.06 | 3,352.35 |
| 6/8–14 | Caged | 7 | Warner | 8,209.55 | 3,639.50 |
| 6/15–21 | Eagle & Hawk | 7 | Paramount | 7,241.12 | 3,796.29 |
| 6/22–28 | Good Humor Man | 7 | Columbia | 8,242.75 | 4,336.06 |
| 6/29–7/5 | Bright Leaf | 7 | Warner | 9,862.71 | 5,147.23 |
| 7/6–12 | Rogues Sherwood Forest | 7 | Columbia | 9,999.25 | 4,127.11 |
| 7/13–19 | In A Lonely Place | 7 | Columbia | 8,178.99 | 4,366.56 |
| 7/20–26 | Great Jewel Robbery<br>50 Years Before Eyes | 7 | Warner | 6,366.37 | 3,952.27 |
| 7/27–8/2 | Flame & Arrow | 7 | Warner | 14,402.92 | 6,360.24 |
| 8/3–9 | Flame & Arrow | 7 | Warner | 8,002.44 | 2,803.39 |
| 8/10–16 | 711 Ocean Drive | 7 | Columbia | 10,499.58 | 5,731.86 |
| 8/17–23 | Pretty Baby | 7 | Warner | 9,293.30 | 3,929.61 |
| [fol. 1768] | | | | | |
| 8/24–30,1950 | Kiss Tomorrow Goodbye | 7 | Warner | 8,917.27 | 4,035.20 |
| 8/31–9/6 | Tea For Two | 7 | Warner | 15,844.56 | 7,556.99 |
| 9/7–13 | Sunset Boulevard | 7 | Paramount | 16,293.46 | 9,390.11 |
| 9/14–20 | Sunset Boulevard | 7 | Paramount | 9,704.27 | 4,616.59 |
| 9/21–27 | Petty Girl | 7 | Columbia | 11,917.10 | 4,677.17 |
| 9/28–10/4 | Three Secrets | 7 | Warner | 7,902.15 | 4,125.67 |
| 10/5–11 | Breaking Point | 7 | Warner | 7,782.93 | 3,950.61 |
| 10/12–18 | Rocky Mountain | 7 | Warner | 10,271.49 | 4,488.06 |
| 10/19–25 | Copper Canyon | 7 | Paramount | 9,267.48 | 4,683.68 |
| 10/26–11/1 | Glass Menagerie | 7 | Warner | 8,434.28 | 4,482.62 |
| 11/2–8 | Harriet Craig | 7 | Columbia | 8,188.24 | 4,453.59 |
| 11/9–15 | Breakthrough | 7 | Warner | 11,201.05 | 4,151.52 |
| 11/16–22 | Rio Grande | 7 | Republic | 10,742.63 | 4,310.48 |
| 11/23–29 | West Point Story | 7 | Warner | 12,513.68 | 5,599.09 |
| 11/30–12/6 | West Point Story | 7 | Warner | 6,695.40 | 2,192.56 |
| 12/7–15 | Highway 301 | 9 | Warner | 10,817.98 | 4,170.95 |
| 12/16–22 | Dark City | 7 | Paramount | 6,156.33 | 2,409.92 |
| 12/23–30/50 | Let's Dance | 8 | Paramount | 8,924.18 | 4,364.95 |
| Total Gross for 46 pictures in Year | | | | 519,633.61 | 244,389.52 |

Ambassador's gross for year 47.0% of downtown Warner Theatre.

[fol. 1769]

Statement of Grosses—Warner and Ambassador Theatres, Washington, D. C.
Period 12/31/50 thru 12/30/51

| Date | Picture | Days | Distributor | Gross Warner | Gross Ambassador |
|---|---|---|---|---|---|
| 12/31/50–1/6/51 | Dallas | 7 | Warner | $16,552.26 | $7,234.86 |
| 1/7–10 | Dallas | 4 | Warner | 4,017.81 | 1,480.97 |
| 1/11–17 | Between Midnight & Dawn | 7 | Columbia | 8,394.86 | 3,399.08 |
| 1/18–24 | Operation Pacific | 7 | Warner | 14,821.49 | 5,529.34 |
| 1/25–31 | Operation Pacific | 7 | Warner | 6,894.33 | 2,340.31 |
| 2/1–7 | Born Yesterday | 7 | Columbia | 19,464.20 | 9,738.87 |
| 2/8–14 | Born Yesterday | 7 | Columbia | 14,051.81 | 6,451.16 |
| 2/15–21 | Born Yesterday | 7 | Columbia | 11,680.28 | 5,212.32 |
| 2/22–28 | Storm Warning | 7 | Warner | 11,127.20 | 4,892.37 |
| 3/1–7 | The Enforcer | 7 | Warner | 10,550.48 | 4,388.14 |
| 3/8–14 | Branded | 7 | Paramount | 10,522.06 | 4,262.22 |
| 3/15–23 | Sugarfoot | 9 | Warner | 12,198.27 | 4,167.43 |
| 3/24–4/3 | Lullaby of Broadway | 11 | Warner | 20,692.06 | 7,033.13 |
| 4/4–10 | September Affair | 7 | Paramount | 10,030.34 | 5,601.10 |
| 4/11–17 | Lightning Strikes Twice | 7 | Warner | 9,231.35 | 3,197.91 |
| 4/18–24 | Lemon Drop Kid | 7 | Paramount | 14,230.74 | 6,026.07 |
| 4/25–5/2 | Fighting Coastguard | 8 | Republic | 9,743.82 | 3,027.77 |
| 5/3–9 | Raton Pass | 7 | Warner | 7,989.04 | 3,217.61 |
| 5/10–16 | Communist F. B. I. | 7 | Warner | 10,338.91 | 4,352.19 |
| 5/17–23 | Only The Valiant | 7 | Warner | 9,948.49 | 4,560.64 |
| 5/24–29 | Great Missouri Raid | 6 | Paramount | 7,239.22 | 2,732.13 |
| 5/30–6/6 | Goodbye My Fancy | 8 | Warner | 10,877.42 | 5,912.51 |
| 6/7–13 | Appointment With Danger | 7 | Paramount | 11,942.81 | 4,622.40 |
| 6/14–20 | Along Great Divide | 7 | Warner | 9,412.95 | 3,554.60 |
| 6/21–27 | Walls of Folsom Prison | 7 | Warner | 7,193.41 | 3,394.81 |
| 6/28–7/3 | Two of a Kind | 7 | Columbia | 7,065.37 | 3,217.23 |
| 7/4–11 | Stranger on a Train | 8 | Warner | 15,346.42 | 7,162.69 |
| 7/12–18 | Fort Worth | 7 | Warner | 9,487.99 | 4,100.25 |
| 7/19–25 | Sirocco | 7 | Columbia | 11,755.87 | 4,967.02 |
| 7/26–8/1 | On Moonlight Bay | 7 | Warner | 14,218.28 | 5,876.25 |
| 8/2–8 | Capt. Horatio Hornblower | 7 | Warner | 17,057.93 | 8,166.26 |
| [fol. 1770] | | | | | |
| 8/9–15/51 | Capt. Hor. Hornblower | 7 | Warner | 10,077.69 | 4,470.19 |
| 8/16–22 | That's My Boy | 7 | Paramount | 26,079.13 | 9,939.71 |
| 8/23–29 | That's My Boy | 7 | Paramount | 13,910.26 | 4,520.55 |
| 8/30–9/5 | J. Thorpe All American | 7 | Warner | 15,015.68 | 5,620.24 |
| 9/6–12 | Peking Expresse | 7 | Paramount | 9,592.07 | 4,367.07 |
| 9/13–19 | Force of Arms | 7 | Warner | 10,464.95 | 4,448.01 |
| 9/20–26 | Here Comes Groom | 7 | Paramount | 16,583.13 | 7,434.13 |
| 9/27–10/3 | Here Comes Groom | 7 | Paramount | 11,240.97 | 4,215.75 |
| 10/4–10 | Streetcar Named Desire | 7 | Warner | 23,609.47 | 12,932.57 |
| 10/11–17 | Saturday's Hero | 7 | Columbia | 9,572.86 | 3,235.76 |
| 10/18–24 | Painting Clouds Sunshine | 7 | Warner | 9,341.34 | 3,212.10 |
| 10/25–31 | Come Fill Cup | 7 | Warner | 6,934.45 | 3,023.15 |
| 11/1–7 | The Mob | 7 | Columbia | 9,809.53 | 3,257.42 |
| 11/8–14 | Tanks Are Coming | 7 | Warner | 9,507.26 | 2,964.76 |
| 11/15–21 | Close To My Heart | 7 | Warner | 7,364.68 | 2,980.41 |
| 11/22–28 | Starlift | 7 | Warner | 10,259.16 | 3,713.94 |
| 11/29–12/5 | Submarine Command | 7 | Paramount | 10,037.16 | 3,421.55 |
| 12/6–12 | Man In Saddle | 7 | Columbia | 9,086.23 | 3,110.99 |
| 12/13–19 | Wild Blue Yonder | 7 | Republic | 6,184.89 | 2,036.46 |
| 12/20–23 | Captain Blood | 4 | Warner | 3,834.96 | 1,700.33 |
| 12/24–30/51 | When Worlds Collide | 7 | Paramount | 10,220.41 | 3,746.16 |
| Total gross for 45 pictures in Year | | | | 592,804.20 | 244,160.89 |

Ambassador's Gross for year 41.2% of downtown Warner Theatre.

[1771]

May 21, 1952

DEFENDANT'S EXHIBIT No. 21

Computation of Net Loss of Crest Theatre, Baltimore*

| | | |
|---|---|---|
| Gross at Stanley Theatre, Baltimore during claimed damage period, February 25, 1949 to March 23, 1950 (56 weeks) | $406,308.24 | |
| Ratio of gross of Ambassador Theatre, Washington, to gross of Warner Theatre, Washington during period December 25, 1949 to December 30, 1951 (6 years) | X 47.0% | |
| Gross applicable to Crest Theatre, Baltimore | | $190,964.87 |
| Less expenses: | | |
| Film rental—35% of $190,964.87 | $ 66,837.70 | |
| Operating expenses—56 weeks at $2,500 | 140,000.00 | |
| | | 206,837.70 |
| Net loss during claimed damage period | | $ 15,872.83 |

* Based on comparative grosses at Warner and Ambassador Theatres, Washington (See statement attached)

[fol. 1772]

Statement of Grosses—Earle-Warner and Ambassador Theatres, Wash., D. C.

Period 12/25/45 thru 12/30/51

(Six Years)

| | Warner | Ambassador |
|---|---|---|
| 12/25/45 thru 12/30/46 | $963,888.22 | $435,311.32 |
| 12/31/46 thru 12/30/47 | 810,705.02 | 400,806.28 |
| 12/31/47 thru 12/31/48 | 639,000.02 | 325,800.57 |
| 1/1/49 thru 12/30/49 for 48 pictures, eliminating 2 Stage Show Engagements. Week in Warner | 587,311.70 | 283,276.33 |
| 12/31/49 thru 12/30/50 | 519,633.61 | 244,389.52 |
| 12/31/50 thru 12/30/51 | 592,804.20 | 244,160.89 |
| | $4,113,342.77 | $1,933,834.91 |

The Ambassador's gross for six years 47.0% of the downtown Earle-Warner Theatre.

[fol. 1773]

DEFENDANT'S EXHIBIT No. 22

No. 5303 Civil Docket

Theatre Enterprises, Inc.

May 21, 1952

Assets

| | | | As of 2/28/50 | | | As of 2/28/51 |
|---|---|---|---|---|---|---|
| Cash | | | | | | |
| Maryland Trust Co. | | 4,560.82 | | | 611.49 | |
| Petty Cash and Change | | 500.00 | $ 5,060.82 | | 500.00 | 1,111.49 |
| Advances | | | | | | |
| Penn Construction Co. | | | 13,854.00 | | | 14,354.00 |
| Equipment | Cost | Reserve | | Cost | Reserve | |
| Display | 520.47 | 44.44 | | 520.47 | 96.43 | |
| Equip. | 1,384.59 | 96.68 | | 1,384.59 | 235.14 | |
| Office | 508.47 | 37.84 | | 508.47 | 88.69 | |
| Total | 2,413.53 | 178.96 | 2,234.57 | 2,413.53 | 420.32 | 1,993.21 |
| Prepaid Items and Sundry | | | | | | |
| Sundry | | 216.16 | | | 186.84 | |
| Uniforms | | 454.73 | 670.89 | | 341.05 | 527.89 |
| Total Assets | | | $21,820.28 | | | 17,986.59 |

Liabilities and Capital

| | | | | | | |
|---|---|---|---|---|---|---|
| Accounts Payable | | | | | | |
| Operating Expenses | | 7,061.18 | | | 6,447.23 | |
| Berlo Vending Deposit | | 9,760.51 | | | 9,442.78 | |
| Berlo Vending Current | | 301.59 | $17,123.28 | | 482.09 | 16,372.10 |
| Accrued Rent | | | | | | |
| Penn Construction Co. | | | 14,800.00 | | | 24,000.00 |
| Federal and State Taxes | | | 2,132.24 | | | 1,696.85 |
| Thrift Tickets—Outstanding | | | 178.28 | | | 95.75 |
| Capital Stock | | | | | | |
| Subscription | | 300.00 | | | 300.00 | |
| Subscribers | | (300.00) | —0— | | (300.00) | —0— |
| Deficit | | | (12,413.52) | | | (24,178.11) |
| Deficit Current Year | | (12,413.52) | | | (11,764.59) | |
| Total Liabilities and Deficit | | | $21,820.28 | | | $17,986.59 |

[fol. 1774]

DEFENDANT'S EXHIBIT No. 32

No. 5303 Civil Docket

May 26, 1952

Loew's Pictures Played at Crest Theatre Under Guarantees

| Title | Playdates | Day of Week | Contract Terms | Gross Receipts Reported | License Fee Paid |
|---|---|---|---|---|---|
| Duchess Idaho | 9/9–15/50 | Week | 2,000, 50% ov. 4,000 | $2,513 | $2,000 |
| 3 Little Words | 9/30–10/5 | SSMTWT | 1,600, 50% ov. 3,750 | 1,967 | 1,600 |
| Summer Stock | 10/21–25 | SSMTW | 1,500, 50% ov. 4,000 | 1,794 | 1,500 |
| Life of Her Own | 11/5–7 | SMT | 500, 50% ov. 1,800 | 836 | 500 |
| Toast of New Orleans | 11/25–27 | SSM | 500, 50% ov. 1,600 | 1,138 | 500 |
| Right Cross | 12/3–6 | SMTW | 500, 50% ov. 1,600 | 879 | 500 |
| To Pls. A Lady | 12/10–13 | SMTW | 500, 50% ov. 1,600 | 630 | 500 |
| King Solomon's Mines | 1/21–27/51 | Week | 1,200, 50% ov. 3,200 | 2,582 | 1,200 |
| | | | | $12,331 | $8,300 |

60 Units

| | |
|---|---|
| Total Guarantees | $8,300 |
| Total overhead (6 x weekly overhead $1,900) | 11,400 |
| Total cost of operation | 19,700 |
| Gross receipts | 12,331 |
| Loss | $7,369 |

Percentage of Film Rental
12,339)8300(67 + %

LIBRARY
SUPREME COURT, U.S.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1953

## No. 19

THEATRE ENTERPRISES, INC., PETITIONER,

*vs.*

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 9, 1953
CERTIORARI GRANTED MAY 25, 1953

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1953

# No. 19

---

## THEATRE ENTERPRISES, INC., PETITIONER,

*vs.*

## PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

# United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 6512

Theatre Enterprises, Inc.,
Appellant

v.

Paramount Film Distributing Corp.,
Loew's Incorporated,
RKO Radio Pictures, Inc.,
Twentieth Century-Fox Film Corporation,
Universal Film Exchanges, Inc.,
United Artists Corporation,
Warner Bros. Pictures Distributing Corp.,
Warner Bros. Circuit Management Corp.,
Columbia Pictures Corporation

# TRANSCRIPT OF TESTIMONY

SOL C. BERENHOLTZ,
EDWIN P. ROME,

GRAY, ANDERSON, SCHAFFER & ROME,
*Attorneys for Plaintiff-Appellant.*

FILED

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OCT 28 1952

CLAUDE M. DEAN

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## TRANSCRIPT OF TESTIMONY.

[27] MR. RAFTERY:—May it please the Court and Members of the Jury, I think it would be very helpful if we considered the amusement business in general, so that we get a clear idea of run and clearance. This case is going to develop into a very simple case. It is a run and clearance case. That is all it is.

Mr. Myerberg says the downtown theaters in Baltimore, most of them independent theaters, by the way, have first-run pictures, and they are shown downtown ahead of the neighborhood.

In his deposition he says, "I would like to put into Baltimore a new system of distribution. I would like to see the picture field established first run. I would like to see the same picture played out in my neighborhood on Reisterstown Road with first run. I would like to see Mr. Durkee, if he was allowed to have the same picture at Catonsville, the Boulevard, the Senator, and then at the Edmondson Village"—in other words, instead of having run and clearance, "I would like to have an exclusive run in my neighborhood"; and he described his neighborhood in the deposition as being as far north as Reisterstown; then over to the east as far as Roland Avenue, and then to Catonsville, and south as far as Park Circle.

In that area, he says "I want an exclusive run [28] and I want 28 days clearance over the Uptown, the Pimlico, the Avalon, the Ambassador, the theater in Catonsville, and the new theater in Reisterstown." That is his idea of the new manner of distribution, that he wants to put into Baltimore, and thus change the entire manner and method that has been in existence in this state, and most of the states in the United States, for years and years.

• • • • • • •

HARRY MYERBERG sworn: • • •

[44] Q. (By MR. ROME):—As of 1948 through to 1950, Mr. Myerberg, what theaters in the city of Baltimore were exhibiting pictures on first run?

A. The Century.

Q. How large a house is that?

A. I would say about 3,000 seats.

Q. Do you know who is the exhibitor or who owns and operates the Century Theater?

A. Yes; I do.

Q. Who is the exhibitor?

A. Loew's Incorporated.

Q. What other first-run theater is there in the city of Baltimore?

A. Keith's.

Q. Who is the exhibitor there?

A. Mr. Schanberger.

Q. How large a theater is that?

A. I would say between 22 and 24 hundred seats.

Q. And another theater?

A. The New Theater.

[45] Q. The exhibitor there?

A. Mr. Mechanic.

Q. What is its seating capacity?

A. Somewhere around 1300.

Q. Another theater?

A. The Town.

Q. Who is the exhibitor that runs that theater?

A. Mr. Rappaport.

Q. Its seating capacity?

A. Around 1500.

Q. Is there any other first-run theater?

A. Yes; the Hippodrome.

Q. Who is the exhibitor there?

A. Mr. Rappaport, also.

Q. What is the seating capacity of the Hippodrome?

A. I would say between 1800 and 2000 seats.

Q. Any other first-run theater?

A. The Stanley.

Q. Who is the exhibitor that operates that theater?

A. Warner Bros.

Q. What is its seating capacity?

A. As I recall, somewhere around 3200 seats.

Q. Is there any other first-run theater?

A. Yes, sir; there is the Mayfair.

Q. Who is the exhibitor there?

[46] A. That was owned by the Hicks interests.

Q. What is its seating capacity?

A. I think it is under 800 seats.

Q. Is there any other first-run theater?

A. There is the Valencia.

Q. Who is the exhibitor?

A. Loew's Incorporated.

Q. And its seating capacity?

A. Somewhere around between 16 and 18 hundred, I think. I am not sure.

Q. You have described these theaters as being first-run theaters in the city of Baltimore during the period 1948 to 1950. Were they also the first-run theaters in the city of Baltimore for a number of years prior to that time?

A. Yes, with the possible exception of the Town Theater, which was the old Palace Theater rebuilt under the name of Town Theater, in 1949.

Q. Taking up the theaters by turn, Mr. Myerberg, what product has been exhibited at the Century Theater during this period 1948 to 1950?

A. Loew's, Metro Pictures, some Universal, and some United Artists.

Q. Has it exhibited the product of any other distributor company?

[47] A. No.

Q. Has that been true also for the years prior to the period of 1948?

A. Yes, with the exception of—I don't think, in years

prior, that they played Universal pictures. They played United Artists and Metro pictures.

Q. For how long, to your knowledge, has the Century Theater played Metro's and United Artists'?

A. At least 20 years.

Q. What about the Valencia?

A. The Valencia plays the move-over from the Century Theater, of the same product. Sometimes they play what we term a "slough" or a second-grade picture?

Q. What is meant by a move-over picture?

A. A picture which has no clearance and moves directly on its final day from one theater, and opens the very next day in the next theater.

Q. For how long a period of time has the Valencia played that product, that type of product, to your knowledge?

A. For many years, and particularly, periodically, the Valencia has been closed.

Q. What product plays in the Stanley Theater?

A. Warner Bros. pictures and half of Paramount.

Q. For how long has that theater exhibited that product, to your knowledge?

[48] A. For quite a long time; but there was pooling arrangements there with Loew's Theaters.

MR. RAFTERY:—I move to strike out the pooling arrangements.

THE COURT:—Why?

MR. RAFTERY:—He has no knowledge of that, and there is no such. We are dealing with the period 1948 to 1950, and nothing of that character was in existence at any time during that period.

THE COURT:—Are you speaking from your own knowledge?

THE WITNESS:—Yes.

THE COURT:—I will allow the answer. He claims he knows.

THE WITNESS:—It was generally known in the busi-

ness at that time, and from 1930 or '31 to '36, I was with Warner Bros., and I knew the pooling arrangement between Loew's and Warner Bros. at the Century and Stanley Theaters.

MR. RAPPERT:—I move to strike out, as having no connection with an alleged conspiracy. We are dealing with the period from 1948 to 1950, and he is testifying to mere hearsay, in 1930 to 1936.

THE COURT:—I don't know that it is hearsay. I will allow it.

THE WITNESS:—There was a pooling arrangement be- [49] tween——

Q. (By MR. ROME):—Just a minute. What product has been playing at the Hippodrome Theater?

A. RKO and Columbia.

Q. For how long a period of time has the product been playing in that theater, to your knowledge?

A. For at least 20 years.

Q. What about the Town Theater?

A. The Town Theater opened in 1949. It did not get any new product. It split the product that was playing in the Hippodrome Theater. Mr. Rappaport split it between the two theaters and played the same companies, RKO and Columbia, they split between the Town and Hippodrome.

Q. And that product has been playing in the Town Theater since it opened?

A. Yes, to my knowledge.

Q. What product plays in the New Theater?

A. Twentieth Century Fox.

Q. For what period of time, to your knowledge, has Twentieth Century Fox played in the New Theater?

A. I would say, better than 20 years.

Q. What about the Keith's Theater—what product does it play?

A. It plays Universal; that is, part of Universal and half of Paramount, and whatever else it can pick up.

[50] Q. For what period of time, to your knowledge, has Keith played those products?

A. Quite a long time. I would say, the same period of time—20 years.

Q. You have also mentioned Mayfair Theater. What product does it play?

A. The only company that I know, that the Mayfair has, is Republic, an independent company, and it plays the same type of "slough" picture, that the Valencia plays when it plays not on a move-over policy, but plays a direct first-run picture.

Q. For what period of time had that theater exhibited that type of picture, to your knowledge?

A. I think, since they opened. That was early in the 1940's.

Q. Has there ever been a time, in the city of Baltimore, to your knowledge, Mr. Myerberg, in which first run product has played in any other locality outside of the so-called downtown area?

A. Yes, sir.

Q. When was that and what theater was that?

A. That was the Metropolitan Theater, located at North Avenue and Pennsylvania.

Q. How far away is that from the downtown center of the city?

[51] A. I don't know the exact distance, but I would say 2½ miles.

Q. What product played first run in that theater?

A. Warner Bros.

Q. When was that?

A. I would say, in the middle or late 20's.

Q. Who was the exhibitor or operator of the Metropolitan Theater at that time?

A. Warner Bros.

Q. When was it, Mr. Myerberg, that you first got the idea about the erection of the theater that became known as the Crest Theater?

A. In the latter part of '46 or the early part of '47.

Q. What happened at that time?

A. We had purchased a particular tract located at Reisterstown Road and Rogers Avenue, more than a half of which was zoned commercially. We proceeded to build homes on that portion that was zoned residential, and after completing the homes,—we bought the property originally with the idea of establishing a first-class commerical area in that section, and made numerous surveys of the area, and decided that that would be the hub of the entire area in that section of Baltimore.

MR. RAFFERTY:—I move to strike that out as a conclusion, and no statement of fact.

[52] THE COURT:—I will allow it.

Q. (By MR. ROME):—Excuse me. You have used the word "we". Whom do you mean by that?

A. You see, I am in business with my brothers, and if I use the word "we" it actually means that I did it, because we always speak of things collectively. When one of my brothers or myself does something, "we" do it collectively although I may have done it, or one of them may have done it. In this case, I meant my brothers and myself.

Q. How large a tract did you purchase?

A. I don't recall the exact size now. I think, between 12 and 15 acres.

Q. What portion of it was devoted to the construction of homes?

A. I would say, about 40 or 50 per cent of it.

Q. How many homes did you build in that area?

A. I would say, between 50 and 65.

Q. Were they all sold?

A. They were sold before they were completed.

Q. Following the erection of the houses and their sale, what did you do with regard to the development of that area?

A. After a survey was made, we decided that this was

the spot for the commercial area, commercial center. We built what we considered a very fine commercial center and [53] had it planned, we had assigned that portion of the area to accommodate a theater.

Q. You have referred here to surveys. What surveys did you make, Mr. Myerberg?

A. We made population surveys within a certain radius of the theater, and made surveys as to the expansion of the city, and we believed the city was expanding from the center at a greater speed and was taking-in population in that area, although it was not as great as in other sections, it was still formidable, and we had a large interest in building operations, residential building operations.

Q. What was the amount of the population that you found to be in that area—I withdraw the question.

Mr. Myerberg, what do you have in mind when you speak of the area of the Crest Theater?

A. We feel the area of the Crest Theater draws from south to Park Circle, and west to approximately Gwynns Falls Parkway, and in the same line east to Roland Avenue, taking that in a line north through Liberty Road to the west, and east through the Green Spring Valley up into Reiseterstown.

Q. What is the amount of population you found to be in that area, that you have just described?

A. I could not locate the exact survey made at that time. However, we reconstructed it from the same information that we received at that time, and found from the 1950 [54] Census of the Health Department of the City of Baltimore, in that area in 1950, that there was approximately 125,000 people.

[55] Q. What was the source of the statistics you relied upon in reaching that figure?

A. The maps and the information from the Health Department of Baltimore figure, the census figure.

Q. Have you ever at any time testified to a different figure for the population of that area?

A. Yes, I have. During the examination of the defendants.

Q. By the defendants?

A. By the defendants, the question was asked what I thought the population was, and I said around 175,000. I told them then that I did not have the opportunity to look over my records and that was my guess at that particular time. I happened to have been wrong. However, the reconstruction of the population was based on the same method that we used in 1947 to 1950 survey.

Q. So that actually how many people had you found as a result of your investigation to be in that area that you have described as of the period 1947, 1948, Mr. Myerberg?

A. In that area, we found that the population increase was approximately 10,000, as close as we could determine, not an exact figure, from 1947 to 1950.

Q. So that at that time it was something less than 125,000?

A. I would say within 105,000; we will take 20,000 off.

[56] Q. When was it that you actually constructed the stores and shops constituting the shopping center that has been referred to?

A. 1947.

Q. That was before the construction of the theatre?

A. Yes, sir.

Q. And when was it that you were prepared to carry through your idea for the construction of the theatre itself?

A. We had planned the theatre in 1947 and then begun construction of it in the early part of 1948.

Q. At what time did you first get in touch with the distributors with regard to product for your theatre?

A. I would say it was in January of 1948.

Q. When is that time with relation to the actual construction of the theatre?

A. That was before the construction of the theatre.

Q. Before ground had been broken?

A. Yes, sir.

Q. What did you then do in January of 1948?

A. I visited Washington and I saw each of the major distributors over there, the big eight, and told them that we had plans and were about to begin the construction of this theatre, and each one of them told me that they could not discuss—I asked them at that time and told them what we [57] wanted, that we were going to build the type of theatre that would require first-run pictures, it would be of such size and appointments that we would need first-run for the economic life of the theatre, and uniformly each one told me that they could not discuss it. It was a national policy of theirs, their home office was in New York, they were not to discuss the film for that theatre until the theatre was built, to come back after the theatre was near completion and they would consider film for the theatre.

Q. You have said that you saw the big eight of the companies. Whom do you specifically mean that you saw at that time in January, 1948?

A. Warner Brothers, Paramount, Loew's Incorporated, Metro, Loew's Incorporated distributes Metro pictures. Universal, RKO, United Artists, Columbia, and I don't know whether I said Paramount or not.

Q. You did mention Paramount. You mentioned Warner's, Paramount, Loew's, Universal, RKO, United Artists and Columbia. That's seven companies. The other was Fox, was it not?

A. Fox, that is correct.

Q. Following these conversations in January of 1948 what did you then do, Mr. Myerberg?

A. We proceeded with the construction of the theatre.

Q. When next did you get in touch with the distributors?

A. Sometime in the latter part of September, the first [58] of October, 1948.

Q. And where was it that you got in touch with them?

A. I went to Washington to see them.

Q. Washington is the exchange area that serves Baltimore, is it?

A. Yes, sir.

Q. And whom did you go to see first in that connection, if you remember?

A. I went to see Mr. Bob Smeltzer first. I had known Mr. Smeltzer for quite a long time and knew he was probably in seniority the oldest person and probably one of the most capable in the film industry in Washington, and I wanted to talk to him first.

Q. What was his position?

A. Mr. Smeltzer told me——

Q. What was his position with what company?

A. He was with Warner Brothers.

Q. What was his official capacity with Warner Brothers, if you remember?

A. He was District Manager.

Q. What conversation, if any, did you have with Mr. Smeltzer?

A. I told Mr. Smeltzer of the theatre, but he seemed to know of it. He did know of it. I had talked to him earlier in the year and he knew of the theatre, and he had [59] followed the construction of it either himself or through the men in his office, and he said: "You can't expect any first-run pictures from Warner Brothers because we have our own theatre in Baltimore. It is our policy throughout the country to play our pictures in our own theatres, in first-run situations, and it is our understanding that that is permitted to us by the courts." He said, "However, I cannot see why any company that does not have a theatre in Baltimore would not like the opportunity of selling to your theatre."

Q. Did you have any other conversation with him at that time?

A. We probably had some other talk of other things

as well as the theatre and the business in Baltimore and Washington, and then I left Mr. Smeltzer.

Q. Was there any arrangement or indication that you were to get in touch with him in any way?

A. Well, he said that New York passes on these things, he couldn't pass on it, to write him a letter, that he thought he could get word from New York, although he thought he knew what it was going to be.

MR. ROME:—Would you please mark this carbon copy of a letter dated October 12, 1948 addressed to Warner's Film Inc., 901 New Jersey Avenue, N.W., Washington, D. C., attention Mr. Robert Smeltzer from Mr. Harry Myerberg, president?

[60] THE CLERK:—Plaintiff's exhibit No. 1.

(Letter dated October 12, 1948 from Harry Myerberg to Robert Smeltzer was marked Plaintiff's exhibit No. 1.)

Q. (By MR. ROME):—I hand you, Mr. Myerberg, a document which has been marked for identification as plaintiff's exhibit No. 1 and ask you if you can tell the Court and jury what that document is?

A. This is a letter that I sent to Mr. Smeltzer after my visit in October to him requesting first-run pictures in the City of Baltimore.

MR. ROME:—Will you mark this letter dated October 14, 1948 on the letterhead of Warner Brothers Pictures Distributing Corporation, from Robert Smeltzer to Harry Myerberg as the next exhibit, please?

THE CLERK:—That will be plaintiff's exhibit No. 2.

(Letter dated October 14, 1948, Smeltzer to Myerberg, was marked Plaintiff's exhibit No. 2.)

Q. (By MR. ROME):—I hand you a document which has been marked plaintiff's exhibit No. 2 and ask you if you will describe to the Court and jury what that is?

A. This is a letter from Mr. Smeltzer. When I was in his office I asked if it would be possible for the opening of the Crest Theatre not only to get us a first-run picture from his company, but to try to arrange to get some movie

stars there to enhance the opening. This letter was to tell [61] me that it would be impossible to get movie star and also to tell me that he thought he had made his position quite clear that we could not get Warner Brothers pictures first-run in Baltimore.

MR. ROME:—If the Court please, I offer these two documents in evidence.

THE COURT:—Do you want to read them?

MR. ROME:—Not at this moment, sir.

MR. RAFTERY:—I think they ought to be read.

MR. ROME:—If you would prefer, sir, I would be happy to read them.

This, members of the jury, is a letter signed by Mr. Myerberg, addressed to Warner's Film Company, attention Mr. Robert Smeltzer and it reads:

"Gentlemen:

"On October 5, 1948, I had an occasion to talk to you at your office and explain in considerable detail about the new theatre with which I am connected. So that you may have all this information readily accessible for both yourself and for the other officials of your company, I am taking this opportunity to formally present all the facts.

"It is expected that on November 15, 1948, this theatre, located at 5521-29 Reistertown Road, Baltimore, Maryland will be completed and ready to exhibit motion pictures. Advantageously located from a population and transportation [62] viewpoint, the theatre has all the conveniences necessary to insure first-run motion picture success.

"This theatre can truly be said to be the most modern and exquisite in Baltimore. Its architectural design and interior decoration, quality of equipment, and comforts to patrons, make it a unique and different theatre for this area. Having approximately sixteen hundred luxurious seats on the first floor, in addition to superb private accommodations for another hundred in the loges, this

theatre undoubtedly offers the finest showcase for films in the State of Maryland.

"Free to patrons of the theatre is a specially built parking area, accommodating about 400 cars. In addition, there is ample space available on uncrowded streets directly adjacent to the theatre for the parking of automobiles.

"This magnificent motion picture theatre, designed and planned to exhibit first-run pictures in Baltimore, presents itself to your company as an outlet for your highest quality first-run product. To open the theatre, the finest picture available from your company, a first-run film which has received more than the usual pre-exhibition publicity—preferably one which is waited for by the movie-going public with anticipation; one already causing excitement and creating discussion—is required. The splendor of the theatre must be complemented by the quality of a top-notch production. [63] A world premiere is desirable.

"Plans are being formulated to make the opening of the theatre one of the greatest affairs of this year in the industry. Radio and television broadcasts and personal appearances of all political, local and society leaders are to be arranged.

"It is hoped that your company can furnish the final element to complete what promises to be one of the most important and exciting premieres in the history of the motion picture industry in Baltimore—personal appearances of some of your leading actors and actresses. As you so well know, the glamour these Hollywood personalities add can provide the final touch necessary to crown the brilliant opening of the newest first-run film outlet in this area.

"I am at the present time in a position to tender my bid herewith for your first-run pictures Baltimore, which will be available for exhibition at this theatre. I am prepared to offer you any reasonable guarantee against a

percentage of the gross. I can further offer the highest type of exploitation and management, both of which will at all times be under the supervision of the most experienced theatrical people, and which will insure your company greater returns than you have heretofore enjoyed in this area. I am in a highly favorable position to offer these advantageous terms because this theatre's fixed charges are relatively [64] negligible in comparison with those expenses which must be met by other first-run theatres in this city. The maximum playing time for your pictures shown in this theatre is assured because our policy is to thoroughly exhaust each picture's potentialities without indiscriminate 'pulling' to make room for any accumulated backlog of other company's pictures waiting to be exhibited before your pictures have completed their proper run.

"I agree to set a minimum gross figure that would control the completion of each picture's engagement. This policy will guarantee you the fullest playing time possible in Baltimore and will substantially increase your prior earnings for similar showings in this area.

"It would be greatly appreciated if this matter would be given your prompt attention so that the final plans necessary for the grand opening can be formulated.

"With kindest personal regards, I am,

"Very truly yours,

"(Sgd) Harry Myerberg, President."

Plaintiff's exhibit No. 2, members of the jury, is a letter signed "Robert Smeltzer," on the stationery of Warner Brothers Pictures Distributing Corporation, 901 New Jersey Avenue, Northwest, Washington 1, D. C. and dated October 14, 1948, which reads:

"Dear Harry:

[65] "Enjoyed our chat when you were in the office last week, and the contents of your letter of October 12

regarding personal appearances of Stars for the opening of your Hilltop Treatre, will be taken up with the proper executives and you advised accordingly, however, I thought I thoroughly explained to you regarding Warner Products in our own Stanley Theatre, Baltimore, Md., which I thought at the time was quite explicit.

"Kindest personal regards,

"Sincerely yours,

"(Signed) Robert Smeltzer."

Q. (By Mr. Rome):—Mr. Myerberg, the name of the theatre in this communication is referred to as the "Hilltop Theatre."

A. Yes, sir.

Q. Can you describe what happened with regard to the name?

A. We had anticipated calling the theatre the "Hilltop Theatre" but found that Don Swann's theatre was in existence as a summer theatre, and we did not want to have any confusion, so we changed the name to the "Crest Theatre." It is the same.

Q. Who else did you get in touch with in Washington in October, 1948, Mr. Myerberg?

A. We went to Metro.

Q. Whom did you see at the Metro office?

A. I saw Mr. Adams, the branch manager.

[66] Q. What happened when you saw him?

Mr. Raftery:—Well, if you please, fix the time and place.

Mr. Rome:—I thought it had already been fixed, Mr. Raftery, as October, 1948.

Mr. Raftery:—I thought it fixed it with dates in the other one.

Q. (By Mr. Rome):—Do you recall the specific or approximate date of your visit?

A. No, sir, I think it was in the early part of October, 1948. I don't recall the exact date of the visit.

Q. What happened when you saw people at Metro?

A. Mr. Adams told me almost the identical thing that Mr. Smeltzer had told me.

MR. RAFFERY:—I object to that and move he tell us what Mr. Adams said, and not what was almost identical.

THE COURT:—I suppose the witness is trying to save time, which we all ought to try to do. But if you want the exact words, if you remember them, Mr. Myerberg, go ahead.

THE WITNESS:—Yes, sir. Mr. Adams said that Loew's Incorporated owned two first-run theatres in the City of Baltimore and that it was their understanding from their legal department that they could play their own pictures in their own theatre and did not have to submit them to competitive bidding or competitive negotiations in other theatres. [67] Therefore, he could not offer me first-run pictures in the City of Baltimore. However, those decisions were made in New York and for me to kindly write him a letter and then he would in turn take that letter up with his New York office and get their answer in the matter.

Q. (By MR. ROME):—Was there any other conversation with Mr. Adams at that time?

A. At this time I don't recall any others.

Q. Did you write such a letter to Metro, Mr. Myerberg?

A. Yes, sir, I wrote a letter to Mr. Adams.

MR. ROME:—Will you kindly mark this letter dated October 12, 1948 from Harry Myerberg to Metro-Goldwyn-Mayer Corporation, as the next exhibit number?

THE CLERK:—That will be plaintiff's exhibit No. 3.

(Letter dated October 12, 1948, Myerberg to Metro-Goldwyn-Mayer, was marked Plaintiff's Exhibit No. 3.)

Q. (By MR. ROME):—Mr. Myerberg, I hand you a letter which has been marked plaintiff's exhibit No. 3 and ask you if you can identify that?

A. Yes, sir, that is the letter I sent to Mr. Adams.

MR. ROME:—Mark this, please, letter dated October 15, 1948 on the stationery of Metro-Goldwyn-Mayer Pictures, Loew's Incorporated, 1009 New Jersey Avenue, Northwest, Washington 1, D. C., from J. A. Adams, Resident Manager to Mr. Harry Myerberg.

[68] THE CLERK:—That will be marked plaintiff's exhibit No. 4.

(Letter dated October 15, 1948, Adams to Myerberg, was marked Plaintiff's Exhibit No. 4.)

Q. (By MR. ROME):—I hand you plaintiff's exhibit No. 4 and ask you if you can identify that?

A. This is an answer from Mr. Adams notifying me that he had received the letter and would at a future date communicate with me and furnish us with the information he got.

MR. ROME:—Your Honor, I offer plaintiff's exhibits 3 and 4 in evidence, and have discussed with counsel on the other side the fact that we need not read exhibit 3, sir, since it is the same kind of a letter which Mr. Myerberg sent to Warner Brothers which has been marked plaintiffs exhibit 1.

THE COURT:—Well, if it is in evidence the jury can read it if you do not want to read it all.

MR. RAFFERY:—Your Honor, it is the identical letter which was read about the world premiere, and so forth, written on the same day that letter was written to Warner Brothers. In other words, Metro got the same request in the same language that Warner Brothers got.

THE COURT:—I shouldn't think you need read it, then. Do you want to read the answer?

MR. ROME:—I thought Mr. Myerberg had already read it. [69] This is dated October 15, 1948 on the letterhead of Loew's Incorporated and it is from J. A. Adams to Mr. Harry Myerberg, and it reads: "Your letter of October 12, 1948 addressed to this office, with reference to the new theatre located at 3521-29 Reisterstown Road, Baltimore, Maryland, has been received.

"The matter is being investigated and upon receipt of the necessary information, we will communicate with you again. Very truly yours, J. A. Adams, Resident Manager."

* * * * * * *

[71] If the Court please, I should like to offer in evidence as plaintiff's exhibit No. 5 a letter from Loew's Incorporated, signed by J. A. Adams, Resident Manager, under date of October 19, 1948, addressed to Mr. A. M. Eisenberg, New York City. Mr. Eisenberg is a member of the legal department of Loew's Incorporated.

(Letter dated October 19, 1948, Adams to Eisenberg, was marked Plaintiff's exhibit No. 5.)

MR. ROME:—If the Court please, I would like permission to read this letter to the jury.

"Dear Mr. Eisenberg:

"We are attaching a copy of a request and our reply thereto for a first-run in the City of Baltimore, Maryland, made [72] by Mr. Harry Myerberg of the newly constructed theatre on Reisterstown Road, temporarily called the 'Hilltop Theatre'.

"We are also attaching a freehand drawing of the area showing the proximity of this house to other established houses in the area. Obviously we cannot entertain this proposal, but it is suggested and recommended that in the event we are able to place our product here on other than a first-run basis, it be set up to play a first subsequent run on an equal basis with the Uptown, Ambassador and Forest Theatres.

"Awaiting your advice in the matter, and with kindest regards,

"Sincerely, J. A. Adams, Resident Manager."

And there is marked down in the corner, members of the jury, carbon copies being sent to Mr. Berger, Mr. Allen and Mr. Hirsch.

Q. (By MR. ROME):—Mr. Myerberg, before we ad-

journed for lunch, you were testifying concerning your conversation in October of 1948 with Mr. Adams as a result of which you sent the letters that have already been referred to. Now, did you have any conversations at or about that same time with any other company?

A. Yes, sir.

Q. Did you have conversations with RKO?

A. Yes, sir.

Q. Whom did you see in RKO?

[73] A. Mr. Brecheen, the branch manager.

Q. When was this?

A. About the same time, in October.

Q. 1948?

A. Yes, sir.

Q. What conversation did you have with Mr. Brecheen at that time?

A. I saw Mr. Brecheen and recalled our conversation that we wanted first-run pictures in the Crest Theatre we are now nearing completion. It was necessary, however, to have first-run pictures in there. We wanted first-run pictures from his company for our theatre. Mr. Brecheen tried to discourage me and he said he could not possibly see how I could get first-run pictures there since RKO has a national policy which had not permitted first-run pictures except with a few exceptions, to any theatre located outside of a downtown area of a city, that they had a very satisfactory customer over here in the Hippodrome Theatre, in Mr. Rappaport, and as far as he was concerned he had no intention of changing. However, if I wanted him to, he could refer the matter to New York, which he had to do for final authority on it, that if I would write a letter outlining what I wanted to do, he would forward it to New York.

Q. Was there any other conversation with him at that time?

[74] A. At the same time I asked him the same thing I asked the other branch managers I had seen.

Q. What, specifically, Mr. Meyerberg?

A. To the effect that we wanted a first-run picture to open the theatre, and we would like to get some motion picture stars there to enhance the opening, and that I was willing—at that time "Joan of Arc" was just being readied for release, and I think I asked Mr. Brecheen about that, and it is my recollection that Mr. Brecheen said that no selling policy had been furnished for the picture as yet. Therefore, he could not talk about it. And that is all I remember at this time about the conversation.

Q. Following that conversation with Mr. Brecheen, did you write such a letter to RKO?

A. Yes, sir, I wrote a similar letter to RKO that I wrote to the other companies.

MR. RAFTERY:—The witness has referred to this world premiere letter of October 14, 1948, and it has been suggested that some stipulation be made so as to not burden the record with these letters. I am willing to stipulate. I think other counsel are willing to stipulate that a letter identical in form to the letter that the jury have over there now, that is, the October 12th letter about a world premiere, was sent to RKO by Mr. Myerberg on October 14, 1948, the only difference in the letters being the first two that were introduced [75] in evidence were dated October 12, 1948, and this letter, the photostat of which I have, was dated October 14th, and we will save burdening the jury with another reading of the same world premiere letter.

THE COURT:—Very well.

MR. ROME:—If it please the Court, I should like to offer in evidence as plaintiff's exhibit No. 6 a letter under date of October 15, 1948 on the stationery of RKO Radio Pictures, Inc., 203 Eye Street, Northwest, Washington 1, D. C., signed by J. B. Brecheen, Branch Manager, addressed to Mr. William Zimmerman, and I think that we may stipulate Mr. Zimmerman is General Counsel and Assistant Sales Manager.

MR. RAFTERY:—No. He is assistant to Mr. Depinet or Mr. Mochrie, the General Sales Manager. He is also a lawyer, but he is in the distribution end of the business.

MR. ROME:—He is the gentleman to whom this letter was sent. Subject "Hilltop Theatre, Baltimore, Maryland."

"Dear Bill:

"Theatre Enterprises, Inc., of Baltimore, Maryland, headed by Harry Myerberg, will soon be ready to open their 'Hilltop Theatre' located at 5521-29 Reisterstown Road, Baltimore, Maryland.

"This is a neighborhood location one and two-tenths miles from the Uptown Theatre, Baltimore. Mr. Myerberg made an appointment with me Monday of this week to discuss product, [76] and I expected him to ask for first neighborhood run either day and date with the Uptown Theatre or perhaps against the Uptown Theatre, instead he wanted first-run Baltimore, Maryland. I did everything to discourage such an idea because we have in our first-run account in Baltimore one of the finest, most cooperative accounts I have ever seen and whom in the course of a year pays us a lot of film rental. I then went to Baltimore to make a survey of this theatre. No doubt but what it will be a very beautiful house when completed, approximately 45 to 60 days from now. I think that it will compare very favorably with I. M. Rappaport's New Town Theatre in Baltimore. Of course it is a suburban house. Mr. Myerberg, upon returning to Baltimore, wrote me a letter, and I have acknowledged receipt of it. This file is herewith enclosed and is self-explanatory.

"It, therefore, will be necessary for you to instruct me what to do about it. I certainly do not want competitive bidding in this situation because I do not believe a neighborhood theatre can compare with a downtown house in a city the size of Baltimore.

"Form B is also hereto attached.

"Sincerely yours, J. B. Brecheen, Branch Manager."

[79] Q. (By Mr. Rome):—Did you get in touch with any other distributor company at that time, Mr. Myerberg?

A. Yes, sir.

Q. What other company?

A. Twentieth Century Fox.

Q. When was this?

A. About the same time, in October.

Q. Whom did you see at Fox?

A. I saw Mr. Norris.

Q. Who is Mr. Norris?

A. Mr. Norris then was the branch manager of the Washintgon Office of 20th Century Fox.

Q. What conversation did you have with him?

A. I said to Mr. Norris, or spoke to Mr. Norris about our wanting the availability of first-run pictures made available to the Crest Theater; that we were going to open. Mr. Norris told me that he knew, of course, of the theater, and he was, as I recall it now, in a meeting with, a meeting I called him out of, with his New York executives, or executives from out of town; that he would take it up and write them a letter, telling them what I wanted; that this thing probably could not be done, but to write him a letter and he would take it up. It was a very short conversation with Mr. Norris at that time, but I had more meetings after that.

[80] Q. Did he say with whom it would be taken up?

A. He said, with the New York office. I don't recall anything more than that, at this time.

Q. Pursuant to that conversation, you then wrote a letter similar to those that already have been referred to here, to Fox?

A. Yes.

Mr. Raftery:—Now, what is the date of that letter, so that we can make the same stipulation?

Mr. Rome:—October 12.

Mr. Raftery:—We stipulate that on October 12th, the same date as the Metro and Warner Bros. letters, a

similar World Premier letter, the identical World Premier letter, was sent to Mr. Norris, of 20th Century Fox Film.

Q. (By Mr. Rome):—Did you have any conversation with anyone at the Paramount Corporation?

A. Yes, sir; I saw Mr. Benson at Paramount. He was the branch manager of Paramount.

Q. What conversation did you have with him? First, when was that conversation with Mr. Benson?

A. Within the same period of time, the early part of October, '48, and I reminded Mr. Benson of my earlier request, that the theater was now completed and we required pictures, and we wanted them either on an exclusive basis in the city of Baltimore, or on a day and date basis with [81] downtown. He said it was his company's policy throughout the country to exhibit pictures in the downtown areas of the cities, and not in suburban houses. I called his attention to the Kansas City situation, I knew about that, and he said that was an exception which he could not understand.

I also called to his attention the fact that they were doing at that time, at that particular time in Washington, between the Warner and Ambassador Theaters, the same thing, and he said that was something there, an exhibitor owned both theaters, the exhibitor being Warner Bros., and because of that, he thought it was the policy for many years, and his only reason to refuse that was that we could not do it in Baltimore. I said, "Is this final?" And he said, "We will refer this to New York. They make final decisions on these matters, and you, like the others, send me a letter, and I will forward the letter." And I wrote the same letter requesting, or setting forth the theater, setting forth the fact of the World Premier, as I did in the other case.

Mr. Raftery:—We will stipulate that on October 14th the same letter was written by Harry Myerberg, President, to Paramount Pictures, Inc., Attention of Mr. Benson, the same World Premier letter.

Q. (By Mr. Rome):—Did you see anyone at Universal?

A. Yes, sir; I saw the then branch manager, Mr. Martin.

[82] Q. When was this, Mr. Myerberg?

A. About the same time I had been in Washington; I had been in Washington for several days, seeing people.

Q. And you had a conversation with Mr. Martin?

A. Yes. The conversation went along the line of the other conversations I have related; and Mr. Martin told me specifically or substantially what the other branch managers had told me.

Mr. Raftery:—If Your Honor please, I think we ought to know what Mr. Martin is supposed to have said. Unfortunately, Mr. Martin has died since this conversation, and instead of saying "substantially," I think, in fairness to us, we should get his best recollection of the conversation that took place.

The Court:—Do you remember it more specifically?

The Witness:—I saw Mr. Martin, as I recall, the Baltimore salesman was with him, and I went into this matter of the opening of the theater, in my conversation with him, the early part of that year, pertaining to the new theater I was going to open, which turned out to be the Crest Theater, instead of the Hill Top Theater, and Mr. Martin told me that it was Universal's policy throughout the country to exhibit pictures in downtown areas of cities, and that they would not distribute them in suburban areas; and I talked to Mr. Martin about that, and he said, "Well, [83] I can't make any decision on this thing. It has to be referred to someone higher than me, and I have to take it up with New York." And I suggested I would go to New York; and he said, "You send me a letter, and I will forward it to New York." He said that would start it—which I did, and I sent him the same letter I sent to the other distributors, a letter setting forth the type of theater it was, so that the New York people,

who had not seen the theater, and the letter was primarily fitted for that purpose, so that the people in New York, whom he had to refer this to, and who had not seen the theater, might at least have a word picture of what we were putting there, and the run that we were requesting, and what we wanted to do.

Q. And you sent such a letter?

A. Yes.

MR. RAFTERY:—We will stipulate that on October 14th, 1948, he sent the same World Premier letter to Universal, International Film Corporation, care of Mr. H. Martin.

MR. ROME:—I call upon you, Mr. Raftery, for a copy of the letter from Mr. Martin to Mr. Fred Myers, dated October 20, 1948.

MR. RAFTERY:—Here is the letter.

MR. ROME:—I should like to offer in evidence as Plaintiff's Exhibit 7, a letter from Mr. H. J. Martin, Branch Manager of the Universal Company, addressed to Mr. [84] Fred Myers, Home Office, with carbon copies marked for Messrs. J. J. Scully, A. J. O'Keefe, W. A. Scully, and E. T. Gomersall, this letter being dated October 20, 1948:

"Dear Mr. Myers:

"I am attaching hereto copy of letter received from Mr. Harry Myerberg requesting product first run Baltimore for a theater at present under construction and temporarily referred to as the Hill Top Theatre.

"I have seen this theatre and it is all that the gentleman claims from the standpoint of appointments, capacity, et cetera. It is located eight miles from downtown Baltimore and a mile and a half from the Uptown Theatre. Your suggestions as to procedure are solicited.

"Very truly yours,

H. J. Martin Branch Manager."

There is attached a copy of the letter from Mr. Myerberg to Universal, which has already been referred to.

(Letter dated October 20, 1948, from H. J. Martin, Branch Manager of Universal, to Mr. Fred Myers, marked Plaintiff's Exhibit 7.)

Q. (By Mr. Rome):—Who is Mr. Fred Myers, Mr. Myerberg?

A. At that time, I think he was the Eastern Divisional Manager for Universal Pictures.

Q. Having to do with sales and licensing?

A. And distribution; yes.

[85] Q. Did you have a conversation with anyone in United Artists?

A. Yes, sir.

Q. This was also——

A. This was the second conversation I had with each of these exchanges. The first was around January, and this was the first part of October. I saw Mr. Price, of United Artists, and with him, I think, were Mr. Rose, the Baltimore salesman, was also in the room at the time. It was either Mr. Rose or Mr. Young, which, I don't recall, who was the salesman at that time, they change them so quickly and frequently—and I told Mr. Price, I recall that conversation during the early part of the year, and told him that we were now under roof, finished the theater, and we needed pictures, and wanted them as first run Baltimore. He told me that all the pictures that his company had for release at that time had been sold out through January first; that he had nothing to offer.

I said, "Does that mean that as to those that you release after January 1st, you will offer pictures to me?" He said, "No; that doesn't." He said, at the present time, he is going to offer—they have nothing to offer. And we went into the same information, just practically the same thing, to write him a letter and he would take it up with New York. And I sent Mr. Price the same letter

that I sent to the other distributors, [86] again setting forth the same things.

Mr. Raftery:—I will stipulate that on October 12, 1948, the same World Premier letter was addressed by Mr. Myerberg, President, to United Artists, Attention of Mr. J. Price.

Q. (By Mr. Rome):—Mr. Meyerberg, did you ever get any reply from United Artists?

A. No, sir.

Q. Did you ever have any further correspondence of any kind with United Artists?

A. I made numerous phone calls from that time, on, up to just before the opening of the theater, and immediately thereafter I was in Washington, and I sent telegrams and didn't even get the courtesy of a reply to them.

* * * * * * *

[90] Q. (By Mr. Rome):—In any event, you got no reply of any kind from United Artists?

A. No, sir.

Q. Did you have any conversations with Columbia?

A. I have no recollection of the Columbia meeting, with Columbia at all, and I have no recollection of sending them a letter. I did, earlier in the year, but not in October. Was that the particular time—I don't recall talking to Columbia.

Q. Did you get in touch with Columbia at any time thereafter?

A. Yes; at a later date, I got in touch with Columbia, and offered substantial bids on several pictures which apparently were not even acknowledged, to my recollection.

Q. Were you ever able to license for your Crest Theater pictures for first-run exhibition in the city of Baltimore, either on an exclusive basis or a day-and-date basis, from United Artists?

A. No, sir.

Q. Were you ever able to license such pictures from Columbia?

A. No, sir.

Q. Were you ever able to license such pictures from [91] any company that is a defendant in this case?

A. No, sir, I haven't.

Q. Were you ever able to see any executive other than those persons in the Washington office of United Artists?

A. Yes; Mr. Fred Meyers, the Eastern Divisional Manager of Universal, visited my theatre just before it opened.

Q. Do you recall when that was?

A. That was in either November or December, sometime, around that time, 1948, and he stated that he could not grant our theatre either a day-and-date policy with downtown or an execlusive first-run in the city of Baltimore, as it was their policy throughout the country to show their pictures in the downtown areas, first-run.

I reminded, as I recall at that time, Mr. Meyers, that the picture "Hamlet" was being released, and my theatre was very suitable for showing that picture, and that I would like to offer a bid for "Hamlet" to play our theatre as first-run in the city of Baltimore. Mr. Meyers said he would consider it. And that was the extent of the conversation with Mr. Meyers.

I think, as I recall now, that I wrote a letter to Mr. Meyers the day after his visit, recalling his visit and asking him for a decision on the matters we discussed.

Q. Mr. Meyerberg, I hand you a letter dated December [92] 15, 1948, and ask if you can identify that?

A. That is a letter I sent to Mr. Martin, of Universal Pictures.

Mr. Rome:—If the Court please, I offer it in evidence as Plaintiff's Exhibit 9. It is a letter from Mr. Myerberg, dated December 15, 1948, to Universal, Attention Mr. H. Martin:

"Gentlemen:

"It is our understanding that your company has taken the position that the Crest Theatre will not be permitted to competitively bid for your pictures first run,

City of Baltimore either on an exclusive or day and date basis. As you know, it is imperative that we open the Crest Theatre without further delay.

"We are, at this time accepting your offer permitting us the right to bid on your pictures first neighborhood run in this area.

"Please understand that our acceptance of your offer relative to neighborhood run pictures for the Crest Theatre is not a withdrawal of our original request for first-run pictures, City of Baltimore, contained in our letter of October 12, 1948.

"Kindly send, as soon as practicable, all the information necessary regarding pictures available for the Crest Theatre on a first neighborhood run basis.

[93] "Very truly Yours,

"THEATRE ENTERPRISES, INC.
"By: Harry D. Myerberg."

(Copy of letter dated December 15, 1948, from Harry D. Myerberg to Universal-International Film Corp., was marked Plaintiff's Exhibit No. 9.)

Q. (MR. ROME):—I hand you two letters, dated December 31, 1948, and one dated January 6, 1949, and ask if can identify those?

A. A letter I wrote to Mr. Meyers after his visit to the theatre, and his answer to me.

MR. ROME:—If the Court please, I offer in evidence, as Plaintiff's Exhibit 10, two letters clipped together—a letter dated December 31, 1948, on the stationery of Universal Film Exchanges Inc. to Mr. Harry D. Myerberg:

"Dear Mr. Myerberg:

"With reference to your letter of December 15th addressed to Mr. H. J. Martin at our Washington office.

"I note your statement—'accepting our offer—permitting (you) the right to bid on (our) pictures first neighborhood run.'

"So that the record may be straight, this is to advise you that we never made any offers to you whatsoever of the nature referred to by you.

[94] "Kind regards.

"Sincerely,

"(Sgd) Fred Meyers."

Then there is a copy of a letter, dated January 6, 1949, from Mr. Myerberg to Mr. Fred Meyers:

"Dear Mr. Meyers:

"It was my understanding that during your visit to our Crest Theatre in company with your Mr. Scully and Mr. Martin, you refused us the right to competitively bid for your pictures first run, City of Baltimore, either on exclusive or day and date basis. At that time it was also my understanding that you granted us the right to bid on your pictures first neighborhood run in this area.

"It is apparent from your letter of December 31 that my understanding with regard to first neighborhood run pictures is not correct. If the above is a fact, what run are you prepared to offer our Crest Theatre. We have tried continually, through numerous letters, telegrams and phone calls, since October 12, 1948 to have your company set forth the run you will grant our Crest Theatre.

"It is imperative that we receive word from you immediately as further delay in negotiating for films would cause us great financial loss.

"Very truly yours,

"Theatre Enterprises, Inc.

"By: (Sgd) Harry D. Myerberg."

[95] (Letter dated December 31, 1948, from Universal Film Exchanges Inc. to Harry D Myerberg, and copy of letter dated January 6, 1949, from Harry D. Myerberg, to Mr. Fred Meyers, were marked Plaintiff's Exhibit No. 10.)

MR. ROME:—If the Court please, I offer in evidence, as Plaintiff's Exhibit 11, a letter on the stationery of Universal Film Exchanges Inc., Washington Office, dated January 18, 1949, addressed to Mr. Myerberg, signed "H. J. Martin, Branch Manager."

"Dear Mr. Myerberg:

"In reply to your letter of December 15th, be advised that it is our intention to offer you the opportunity to negotiate for our pictures for use in the Crest Theatre, and to be available at the same time as they are to other first neighborhood runs.

"At such time as our next picture is made available to the neighborhood runs, we will have our Sales Representative call upon you for the purpose of negotiating such sale.

"Universally yours,

"(Sgd) H. J. MARTIN

"Branch Manager"

(Letter dated January 18, 1949, from H. J. Martin, Universal Film Exchanges Inc., to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 11.)

[96] Q. (By MR. ROME):—So that ultimately you licensed pictures from Universal on a first neighborhood availability, is that correct, Mr. Myerberg?

A. Yes, sir.

Q. Have you ever seen any other executive of any other company, with the exception of those people assigned to the Washington offices?

A. Yes; I saw Mr. Moon, who to may knowledge then was Eastern Division Manager of Twentieth Century-Fox Film Distributing Company.

Q. Do you recall when it was that you saw Mr. Moon?

A. To the best of my recollection, in November or December of that year, 1948.

Q. What happened on that occasion?

A. I had been asking Mr. Norris for the right to go to New York to see some of his executives and personally talk to them about the situation, and was not getting any answer from him as to what I could do; and at that time Mr. Contee, who was the sales manager of the Washington Branch, called me and said Mr. Moon would be in town, and whether I would talk to him; and I told him I would be very happy to talk to him. And Mr. Moon came to my office with Mr. Contee and Mr. Norris. Mr. Norris was the branch manager. Mr. Contee was the sales manager at that time, and we again renewed the discussion of the first-run pictures, [97] either on a day and date basis or an exclusive basis, in the city of Baltimore, for the Crest Theatre. Mr. Moon told me flatly, it was against his company's policy to do it, and he would not do it; that they don't do it except in a few locations, where they own their own theatres in the country, and that he would not do it here in Baltimore; that he had a satisfactory customer in Mr. Mechanic at the New Theatre, and he would not permit us to play those pictures.

I asked Mr. Moon, as I recall, whether that also held true for a day and date policy with the New Theatre, would he permit the Crest Theatre to play the pictures day and date with the New Theatre. He said he would take that under advisement and let me know at a later date.

I invited Mr. Moon to see the theatre, being he was in town, and none of the top executives of Fox who were making the visit had seen the theatre, and I told him I would be very happy to take them out and show them the theatre, and its location, and so forth. He said he had several appointments, that he could not go at that time. I think it was sometime in the morning when he was there, as I recall it, but that he would see it later in the day, and would certainly see it before he left Baltimore.

I asked Mr. Moon, when he left his last appointment,

to please call me and I would make myself available, [98] regardless of the time, to show him the theatre. I did not hear from Mr. Moon, as I recall, up to the latter part of the afternoon, and I went to the Crest Theatre to see if he had gone there without me. The Theatre was not open yet, and whether he had just gone out, and I asked the watchman if anyone had been it it, or asked for me, or came to see the theatre, and he said "No." And I stayed there for quite a long time, and left, and came back at 10 or 11 o'clock that night, and no one had seen the theatre. So I dont' think Mr. Moon saw the theatre.

Q. Mr. Myerberg, I hand you a letter dated November 8, 1948, and ask if you can identify what that is?

A. A letter I wrote to Mr. Moon, immediately after his visiting my office, requesting information on the decision of his company.

MR. ROME:—If the Court please, I offer in evidence as Plaintiff's Exhibit 12, a letter on the stationery of Theatre Enterprises, dated November 8, 1948, addressed to Mr. Moon, of the Twentieth Century-Fox Company:

"Dear Mr. Moon:

"I was delighted to have the opportunity of speaking with you and your Mr. Contee and Mr. Norris on November 4, 1948 in my office and have been able to supplement verbally the facts sent to your company in my letter of October 12, 1948.

[99] "It is my understanding that you, on behalf of 20th Century Fox, have taken the position that our Crest Theatre, 5425-27 Reisterstown Road, Baltimore, Maryland cannot have the opportunity to competitively and openly bid for pictures first run Baltimore City.

"However, there are several matters which were discussed which are in need of clarification.

"Has your company refused our Crest Theatre the right to open a competitive bidding for your product on a day and date run with first run Baltimore?

"Am I right in understanding that your company would permit our Crest Theatre to bid only on your pictures first subsequent run Baltimore?

"We have delayed the opening of the Crest Theatre until December 27, 1948.

"It is imperative that your company's position in the above matters be clarified immediately so that pictures can be obtained for the theatre. Any delay in negotiating pictures would cause us great financial loss since it would be necessary to postpone the opening of the Crest.

"Very truly yours,

"THEATRE ENTERPRISES, INC.

"By:

"(SGD) Harry D. Myerberg."

[100] (Copy of letter dated November 8, 1948, from Harry D. Myerberg to Mr. Moon, of Twentieth Century-Fox, was marked Plaintiff's Exhibit No. 12.)

Q. (By MR. ROME):—Who is Mr. Andrew Smith?

A. At that time he was the general sales manager of Twentieth Century-Fox in New York.

Q. And Mr. Norris was what?

A. The Washington Branch Manager.

MR. ROME:—I offer in evidence, as Plaintiff's Exhibit 13, a letter on the stationery of Twentieth Century-Fox Film Corporation, dated November 9, 1948, Office of R. E. Moon, Eastern Sales Manager, addressed to Mr. Myerberg.

"Dear Mr. Myerberg:

"This is in reply to your registered letter, dated November 8th.

"Our company's position with regard to first run City of Baltimore is as follows:

"We have a satisfactory customer operating what we consider the best first run outlet in the City of Baltimore and it is our intention to continue to serve our pictures first run to the New Theatre.

"You are correct in your understanding that we would permit your Crest Theatre to negotiate competitively with the Senator Theatre for first subsequent run in Baltimore.

"Very truly yours,

"(Sgd) R. E. Moon."

[101] (Letter dated November 9, 1948, from R. E. Moon to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 13.)

Q. (By Mr. Rome):—Mr. Myerberg, I hand you a copy of a letter dated November 11, 1948, and ask you if you can identify that, first?

A. This is my reply in answer to Mr. Moon's letter of November 9th.

Mr. Rome:—If the Court please, I offer in evidence, as Plaintiff's Exhibit 14, copy of a letter dated November 11, 1948, addressed to Mr. R. E. Moon, Eastern Sales Manager, 20th Century Fox Film Co.

"Dear Mr. Moon:

"Your letter of November 9, 1948 received and contents noted.

"You make your Company's position clear in so far as you will not permit our Crest Theatre to competitively bid on exclusive first run pictures in the City of Baltimore. However, the following needs clarification:

"Does this refusal also include our request for a day and date run with first run City of Baltimore as noted in my registered letter of November 8, 1948?

"In your last paragraph you mentioned the Senator Theatre. I have never requested information regarding this theatre. Will you kindly clarify what is meant by [102] this?

"Very truly yours,

"Theatre Enterprises, Inc.

"By: (Sgd) Harry D. Myerberg."

(Copy of letter dated November 11, 1948, from Harry D. Myerberg to R. E. Moon, was marked Plaintiff's Exhibit No. 14.)

MR. ROME:—If the Court please, I offer as Plaintiff's Exhibit 15 a letter on the stationery of Twentieth Century-Fox Corporation, Office of R. E. Moon, Eastern Sales Manager, addressed to Harry D. Myerberg.

"Dear Mr. Myerberg:

"This is in reply to your registered letter of November 11th, and I will try to give you the requested clarification.

"First, we do not wish to play the Crest Theatre day and date with first run City of Baltimore.

"Second, regarding the Senator Theatre, this theatre is located in your competitive area and is currently playing our product first run in this area. If you desire to play pictures in that position, you would naturally have to compete with the Senator for the run.

"Very truly yours,

"(Sgd) R. E. Moon."

(Letter dated November 12, 1948, from R. E. Moon to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 15.)

[103] Q. (By MR. ROME):—Mr. Myerberg, where is the Senator Theatre in relation to your own theatre?

A. It is on York Road and Belvedere Avenue, about 6½ miles from our theatre.

Q. At any time have you considered the Senator Theatre to be in a competitive situation with the Crest Theatre?

A. No, sir.

Q. At any time did you make any request of Fox Film Company, or any company, regarding the Senator Theatre?

A. No, sir.

Q. What kind of product were you finally able to license from Twentieth Century-Fox, Mr. Myerberg?

A. The first subsequent-run; that is, second-run pictures, 21 days after downtown.

Q. Have you ever seen or talked with any other executive of any other company, apart from those you have mentioned, other than the personnel attached to the Washington office?

A. I had correspondence with Mr. Lichtman, of Twentieth Century-Fox, but I have never seen or talked to him.

Q. Who is Mr. Lichtman?

A. Mr. Lichtman was just then appointed as assistant to the president, Mr. Skouras, of Twentieth Century-Fox.

Q. What led you to get in touch with him?

[104] A. I read in a trade magazine that Mr. Lichtman was reported in a speech, by the trade papers, before a group of exhibitors in Philadelphia, in company with Mr. Andy Smith, who was the general sales manager, and with Mr. Einfeld, the newly-appointed general publicity director of Twentieth Century-Fox, this exact same idea. It was not mine. I had nothing to do with the authorship of it, the multiple first runs in cities. He set forth the facts——

* * * * * * *

[106] MR. ROME:—I offer, as Plaintiff's Exhibit 16, the Film Bulletin dated April 11, 1949, on page 7 of which there appears a story under the caption, "FOX MEETINGS FORECAST CHANGES IN OLD PATTERNS", and there appears this report under the subheading "Multiple First Runs":

"Lichtman expounded on the theory of multiple first-runs and elimination of excessive clearance first advanced by him in the Philadelphia meeting with exhibitors. Instances where pictures played simultaneous first runs in non-conflicting areas has proven a 'boon to the box office,' he said.

"Urging that this plan be explored, he argued that the public, the distributor and the exhibitor might best be served by playing a picture first run in a number of theatres simultaneously and reducing the clearance for subsequent runs.

"We launch a picture with a large expenditure of money for advertising, and we tell the public that they can only see

it in one theatre. They have to come great distances at great inconvenience to transportation and other matters.

[107] "Ad Value Lost.

"After the run in that one theatre, we place the picture in moth balls for a considerable period of time, before that picture reaches the fine theatres in the residential sections of these large cities. By that time the advertising is forgotten and other pictures are being announced with the result that we are losing a great portion of the patronage which of course means a great many dollars to all of."

"Under the plan, Lichtman added, all subsequent run theatres would be moved up with the result that a much larger theatre audience is developed 'because people see pictures when they want to see them.'"

("Film Bulletin" dated April 11, 1949, was marked Plaintiff's Exhibit No. 16.)

Q. (By Mr. Rome) Did the report of the speech of Mr. Lichtman, just referred to, appear elsewhere in the trade press than in the Film Bulletin?

A. Yes, sir; it did.

Q. Mr. Myerberg, I hand you a copy of a letter dated April 13, 1949, and ask if you can identify what that is?

A. That is a letter I sent to Mr. Lichtman, after reading the statement reported in the last document referred to.

MR. ROME:—I offer in evidence letter dated April [108] 13, 1949, from Harry D. Myerberg, to Mr. Al Lichtman, Vice President, Twentieth Century-Fox Film Corp.

"Dear Mr. Lichtman:—

"After reading your statement in the MOTION PICTURE HERALD of April 2, 1949, made at a meeting with exhibitors in Philadelphia and noting your complete accordance with our request to play your company's pictures simultaneously with first run, City of Baltimore, I wish at this time to review the case of our new Crest Theatre, located at Reistertown Road and Rogers Avenue, in Baltimore, Maryland.

"It is evident from your statement that you have not been consulted in your company's unjustifiable refusal to grant our Crest Theatre this run. So that you may have

a complete picture of what transpired, I am enclosing copies of all correspondence between your company and Theatre Enterprises, Inc. and after reviewing this correspondence and satisfying yourself as to the outstanding quality and location of our Crest Theatre, I have no doubt that you will grant us the right to play your pictures simultaneously with downtown Baltimore.

"This theatre was built to accommodate simultaneous run policy with first run, City of Baltimore and therefore is suffering a great financial loss being forced by your company to run pictures 21 days after first run, City of Baltimore. [109] "Your immediate action in this matter will be greatly appreciated.

"Very truly yours,

"THEATRE ENTERPRISES, INC.

"By: (Sgd) Harry D. Myerberg"

(Copy of letter dated April 13, 1949, Harry D. Myerberg to Al Lichtman, was marked Plaintiff's Exhibit No. 17.)

MR. ROME:—I offer in evidence, as Plaintiff's Exhibit 18, a letter from Twentieth Century-Fox Film Corporation, on the stationery of Al Litchman, Vice President, dated April 25, 1949, addressed to Mr. Myerberg.

"Dear Mr. Myerberg:

"I have just returned from my trip throughout the country. Among other things, I spoke with our Washington Manager.

"We discussed constructive plans for the improvement of conditions in the city of Baltimore for all concerned, and I am sure that in the near future, our Mr. Norris will discuss these plans with you.

"With kindest regards and thanking you for writing me, I am

"Sincerely,

"(Sgd) Al Lichtman"

(Letter dated April 25, 1949, Al Lichtman to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 18.)

Q. (By Mr. Rome) Mr. Myerberg, Mr. Lichtman's letter [110] refers to the fact that Mr. Norris would be in touch with you. Did you ever hear from Mr. Norris?

A. Not pertaining to my letter to Mr. Lichtman, no.

Q. Was anything ever done, to your knowledge, to better the situation in Baltimore, as referred to by Mr. Lichtman?

A. The only other thing that I know of was, I think, in the late spring or early fall of that year,—the theatre had been open 7 or 8 months by that time,—Mr. Contee, then the sales manager of Twentieth Century-Fox office in Washington, contacted me and wanted to know whether I would play any multiple first-run in Baltimore, first day and date with downtown, and that they were contemplating such a run.

I said, "Oh, yes, we would, that is the thing I wanted all along." And he said they were getting the information together; and I spoke to Mr. Contee on several occasions about it. In fact, I got in touch, about that time, with Mr. Contee—I don't know whether Mr. Norris was there, but the then manager for Fox came in and discussed the situation with me, and, as I recall, thinking of a certain number—the number I don't recall at this time—to start the policy. [111] Well, after that meeting I never heard anything further from Mr. Contee, and when I inquired they told me New York had vetoed it and it was thrown out.

Q. What specifically was the policy that was being talked about at that time?

A. Playing multiple first-run day and date with downtown, and I think there was something else at that time, about getting in line with what Mr. Lichtman had said was the cutting of clearances.

Q. You mean by "multiple first-run," having a first-run picture exhibited in more than one theatre at the same time?

A. Yes, sir.

Q. Did there come a time when you communicated again with Mr. Lichtman?

A. Yes, I recall about a year later Mr. Lichtman took over the position of General Sales Manager of 20th Century

Fox, replacing Mr. Smith. I took the occasion to write him a letter reminding him of our letter of a year before.

Q. I hand you a copy of a letter dated May 24, 1951 and ask you if you can identify it?

A. This is a copy of a letter I sent to Mr. Lichtman at that time.

Mr. ROME:—If the Court please, I offer in evidence as plaintiff's exhibit No. 19 a copy of a letter dated May 24, [112] 1951, addressed to Mr. Lichtman.

"Dear Mr. Lichtman:—

"I note in the trade papers that you have become the General Sales Manager of Twentieth Century Fox Film Corporation. This fact brought to mind a letter I wrote to you on April 13, 1949, after reading in the Motion Picture Herald of April 2, 1949 a statement you had made at a meeting with exhibitors in Philadelphia, Pa. I am enclosing a copy of my letter and of your reply to it on April 25, 1949.

"Your statement at that time, as reported by the Motion Picture Herald, outlining methods whereby revenue could be increased for both distributors and exhibitors is even more pertinent to the situation in the industry today when we are confronted with the problem of television cutting deeply into grosses. I assume that you must still retain the opinions you expressed two years ago, and, therefore, I wish to invite your attention again to the situation in Baltimore.

"In your letter of April 25, 1949 you wrote as follows:

"'We discussed constructive plans for the improvement of conditions in the City of Baltimore for all concerned, and I am sure that in the near future our Mr. Norris will discuss these plans with you.'

"Although more than two years have elapsed since you wrote to me I have received no information either from [113] you or Mr. Norris as to the plans you discussed and, I may add, there has been no improvement in conditions in Baltimore.

"Having in mind what you have said as well as the known fact that Fox as well as other distributors does exhibit its pictures in numerous cities throughout the country in

theatres located out of the so-called downtown area on a first run basis day and date with the downtown theatres, I cannot understand why a different course of action is followed in Baltimore.

"I would be glad to meet with you at your convenience to discuss this matter with you further.

"Yours very truly,

"THEATRE ENTERPRISES, INC.

"By Harry D. Myerberg."

(Copy of letter 5-24-51, Myerberg to Lichtman, marked Plaintiff's Exhibit No. 19.)

Q. (By MR. ROME):—Did you receive a reply to that letter that you had sent to Mr. Lichtman?

A. No, sir.

Q. Did you have any acknowledgment of it at all?

A. No, sir.

Q. Reference is contained in that letter, Mr. Myerberg, to the effect that Fox in some situation in other areas of the country does pursue this policy of multiple runs. Do you, of your own knowledge, know of such situations?

A. Yes, sir, I know of some situations.

[114] Q. What situation do you know of?

A. I know of Los Angeles where Fox owns the theatres in which they have that policy. They play three or four theatres with a downtown theatre. I think they pursue it at Cincinnati, Ohio, Washington, D. C., but mostly in cases where they own the theatres themselves. I think Denver, Colorado, is another one, but I am not too sure of that.

Q. You mean, your statement is that Fox pursues this policy of a multiple first-run in areas or cities where it owns the theatre downtown as well as in the area outside of downtown?

A. Yes, and there are a few instances where they do not own the theatres and they pursue the policy also.

Q. Did you see any other executives or any other company with the exception of those persons normally assigned to the Washington branch offices?

A. I saw Mr. Zimmerman in New York.

Q. Do you recall when that was?

A. Well, that was the latter part of 1948, but I would say around November or December, sometime in there.

Q. How did that visit come about?

A. I continuously had asked Mr. Brecheen for some word as to the positions of their company and whether I could go to New York to see Mr. Jules Levy, who I think was either the Divisional Manager or General Sales Manager, I don't know [115] which. I think it was Eastern Manager, Mr. Jules Levy. And Mr. Brecheen kept stalling me and kept telling me he would get some information for me, and finally one time he told me to go to Mr. Zimmerman of RKO's legal department in New York.

I told him that I did not want to see attorneys, I wanted to see the sales personnel. I wanted to see Mr. Levy. He said: "Well, I don't understand. Mr. Zimmerman was not only a lawyer but he was also the General Sales Manager of the company and in seeing him, you will be seeing the sales personnel." He said that he would make the appointment, and he made the appointment, and I saw Mr. Zimmerman.

Q. What happened when you saw Mr. Zimmerman?

A. Mr. Zimmerman tried to persuade me from first-run policy in the City of Baltimore, telling me he did not do that anywhere in the country, that their general policy throughout the country was to play their pictures in large neighborhood theatres downtown, and he did not want to and did not see where they could deviate from that policy. I told Mr. Zimmerman that he had a fine picture coming up that would become available for national release at the same time to show at the Crest Theatre, and that picture, was "Joan of Arc," and I offered him a substantial guarantee on the picture. I don't recollect whether or not I offered him a substantial guarantee at that time, but I told him I would post a substantial guarantee on the picture to open my Crest Theatre if he would consider it, and he said: "Well, we haven't formulated a sales policy yet," but that he would contact me and let me know.

Q. Was there anything more to your conversation with him at that time?

A. Well, he said something to the effect: "You should go home now and be a good boy now and take 21-day pitcures," or something to that effect, I think that ended the conversation.

Q. I hand you, Mr. Myerberg, a copy of a letter dated November 23, 1948, and ask you if you can identify that?

A. Yes. This was the copy of the letter that I sent to Mr. Zimmerman after my meeting with him in New York, and it contains an offer that I made for "Joan of Arc."

MR. ROME:—If the Court please, I offer in evidence as plaintiff's exhibit No. 20 a copy of a letter dated November 23, 1948 addressed to William Zimmerman, RKO Pictures, Inc.

"Dear Mr. Zimmerman:

"I was delighted to have had the opportunity of speaking with you at your office on November 18th, 1948 and to have been able to supplement verbally the facts sent to your company in my letter of October 12, 1948.

"I would like at this time to confirm the oral bid which I made for your picture 'JOAN OF ARC' to play our Crest [117] Theatre, first run City of Baltimore.

"Theatre Enterprises, Inc. agrees to pay 55% of the first $8000 gross box office receipts and 65% of all over $8000. We will also place any reasonable guarantee, the figure to be mutually agreed upon.

"It would be greatly appreciated, since time is most important, if you would reply at once to the above.

"Again thanking you for your courtesies while visiting you in New York, I am,

"Very truly yours,

"THEATER ENTERPRISES, INC.

"By Harry D. Myerberg"

(Letter dated November 23, 1948, Myerberg to Zimmerman, was marked Plaintiff's Exhibit No. 20.)

Mr. Rome:—If the Court please, I offer in evidence as plaintiff's exhibit No. 21 a letter on the stationery of RKO Radio Pictures, Inc., Rockefeller Center, New York, dated December 2, 1948, signed William Zimmerman, addressed to Harry D. Myerberg, Theatre Enterprises, Inc., Baltimore.

"Dear Mr. Myerberg:

"You have suggested that I confirm in writing our decision communicated to you by telephone Monday, November 29th. You have requested that your Crest Theatre be permitted to exhibit our pictures first-run in Baltimore either [118] on an exclusive or day and date basis. In considering your request we have made a thorough review of the matter, including discussions with Mr. Folliard, our District Manager, and Mr. Brecheen, our Branch Manager. We have concluded that the Crest Theatre is essentially a neighborhood theatre and as such would not be appropriate outlet for the exhibition of our pictures first-run in the City of Baltimore.

"However, we are willing to afford you a competitive opportunity to obtain our pictures for exhibition in the Crest Theatre on first neighborhood run in its area. If you are interested in obtaining pictures on this run, will you kindly advise us to this effect.

"During our telephone conversation on Monday I advised you that we would further consider your specific offer of October 23rd to exhibit Joan of Arc first-run. After such further consideration we have decided that our conclusion that the Crest Theatre is not an appropriate theatre for the exhibition of our pictures first-run in the City of Baltimore applies with equal, if not greater, force to Joan of Arc. Accordingly, we regret to advise you that we cannot accept your proposal.

"Sincerely,

"(Signed) William Zimmerman."

(Letter dated December 2, 1948, Zimmerman to Myerberg, was marked Plaintiff's Exhibit No. 21.)

[119] Q. (By MR. ROME):—Mr. Myerberg, I hand you a copy of a letter dated December 23, 1948 and ask you if you can identify that?

A. Yes. This is in answer to the letter Mr. Zimmerman sent me.

MR. ROME:—If the Court please, I offer in evidence as plaintiff's exhibit No. 22, copy of a letter dated December 23, 1948, addressed to Mr. William Zimmerman, RKO Radio Pictures, Inc.

"Dear Mr. Zimmerman:

"It is our understanding that your company has taken the position that the Crest Theatre will not be permitted to competitively bid for your pictures first run, City of Baltimore, either on an exclusive or day and date basis. As you know, it is imperative that we open the Crest Theatre without further delay.

"We are, at this time, accepting your offer permitting us the right to bid on your pictures first neighborhood run in this area.

"Please understand that our acceptance of your offer relative to neighborhood run pictures for the Crest Theatre is not a withdrawal of our original request for first-run pictures, City of Baltimore, contained in our letter of October 12, 1948.

"Kindly send, as soon as practicable, all the [120] information necessary regarding pictures available for the Crest Theatre on a first neighborhood run basis.

"Very truly yours,

"THEATRE ENTERPRISES, INC.

"By: Harry D. Myerberg"

(Letter dated December 23, 1948, Myerberg to Zimmerman, was marked Plaintiff's Exhibit No. 22.)

MR. ROME:—If the Court please, I offer in evidence as Plaintiff's exhibit No. 23, a copy of a letter on the stationery of RKO Radio Pictures, Inc., the Washington

office, dated October 3, 1948, to Mr. Wm. Zimmerman, New York, New York.

"Dear Bill:

"I wrote you under date of October 15 concerning the Hilltop Theatre, Baltimore which will soon be ready for opening under the management of Mr. Harry Myerberg.

"You will recall Mr. Myerberg is asking for first run Baltimore, and which I did not recommend personally.

"In the meantime, Mr. Myerberg has called me three times insisting on an answer to his letter. His latest request this week was that I make him appointment and let him *go to New York* and talk to our people there concerning this situation. I stalled him on this request, but did tell him I would write once more to see about getting an [121] answer to his correspondence.

"Will you, therefore, please advise me immediately just what can be done about this situation.

"With kindest regards, I am,

"Sincerely yours,

"J. B. Brecheen
"Branch Manager"

(Letter dated October 3, 1948, Brecheen to Zimmerman, was marked Plaintiff's exhibit No. 23.)

Mr. Rome:—That letter has a notation at the bottom "cc: R. J. Folliard."

If the Court please, I offer in evidence as Plaintiff's Exhibit No. 24 a copy of a letter on the stationery of RKO Pictures, Inc., again Washington, D. C., dated November 9, 1948, addressed to Mr. Wm. Zimmerman in New York, subject: Hilltop Theatre, Baltimore—Crest Theatre, Baltimore. The letter reads:

"Dear Bill:

"Under date of October 15 I sent you Form B, together with explanation of the Hilltop Theatre, Baltimore

having requested first run product for that theatre. On October 30 I wrote you again advising you of the numerous telephone calls we had received from Mr. Harry Myerberg concerning his request for product.

"In the meantime the name of the theatre will be [122] the Crest Theatre and not the Hilltop.

"Hereto attached is a letter dated November 8, which came to me via registered mail from Mr. Myerberg insisting on an answer to his correspondence and telephone calls. You will note that he has moved back the opening of his theatre to December 27, 1948.

"The time has come when we can no longer stall this matter with telephone calls. We are going to have to give him some kind of an answer. He wants to go to New York and see you or Mr. Levy and talk it over with you.

"Please advise immediately upon receipt of this letter just what you want me to do about it or just what you intend to do about it.

"Sincerely yours,

"J. B. Brecheen
"Branch Manager"

(Letter dated November 9, 1948, Brecheen to Zimmerman, was marked Plaintiff's Exhibit No. 24.)

Q. (By Mr. Rome):—What kind of product were you ultimately able to license from RKO Radio Pictures, Mr. Myerberg?

A. First neighborhood run.

Q. And how long after downtown first-run exhibition of the picture in the City of Baltimore was that?

A. Well, it was supposed to have been 21 days.

[123] Q. You say "supposed to have been." What was it, in fact?

A. Well, quite frequently it was much longer than that.

Q. Did you ever see any other official of any one of the distributor companies with the exception of Mr. Zim-

merman, Mr. Meyers, Mr. Moon, Mr. Minsky you have named?

A. I saw Mr. Scully, who was Divisional Manager, but that was in the company of Mr. Meyers, and at the same time I saw Mr. Meyers. The conversation was with Mr. Meyers and not with Mr. Scully at that time.

Q. Did you see anyone else?

A. No, sir.

Q. Was there ever a time when any official from New York came to examine or see your theatre?

A. Only Mr. Meyers.

Q. He is the only official from any company who saw your theatre other than the Washington personnel?

A. At this time, yes.

Q. So that ultimately you were able to license product only on the first-run subsequent availability at the Crest Theatre; is that correct?

A. Yes, sir, from each company.

Q. When actually was the Crest Theatre opened?

A. February 26, 1949.

Q. Your letters that are in evidence have referred to [124] an earlier projected opening for the theatre. What happened to delay that?

A. There were delays in getting some of the material and equipment necessary to open the theatre, which delayed the opening.

Q. You finally opened the theatre on February 26, 1949?

A. Yes, sir.

Q. Now, will you describe for the jury, please, some of the features that are incorporated into the Crest Theatre?

A. Well, the Crest Theatre has many innovations, we feel, in the development of motion picture theatres. One of the important ones is what we term the first hidden projection booth whereby the noise and direct small beam light from the projection booth is not seen nor heard.

We have what we thought to be at that time the first television lounge with a television projection set, a set that projected a picture six by nine feet. That was in 1949 at the opening of the theatre. We had this in the lounge of the theatre, what we called the "television lounge," accessible by two stairways from the lobby and we could seat with additional chairs placed there when we needed them—and we needed them frequently—about 100 people.

We had loges located off of this same lounge that were placed there for persons who wished to smoke during the [125] performance and could use those if they so desired.

We had a parking area, free parking for our patrons. The decorative motif of the theatre was on a very high, artistic plane. In fact, in the front bay of the television lounge, overlooking the marquee of the theatre, being seen readily from the front, was one of the finest examples of carved glass in the country, made by the man who developed that method of art or idea of art, Mr. Lowry, of Washington.

The carpets, the restroom, the ladies' powder room, everything was set up on a basis to accommodate first-run pictures and to handle large crowds. Our standee area in the rear of the theatre is such that the Fire Department permitted us, although we have only 1600 seats, we originally expected to have close to 1800, but we reseated the house—I mean by reseating it we rearranged the seats, so you would have ample room in front of you so your knees would not hit the seat in front of you, and we staggered our seats, instead of looking over the head of a large person in front of you, you would look over their shoulders, having greater vision to the screen.

Q. What is the extent of the parking area, Mr. Myerberg?

A. We can park between 350 to 400 cars on our own lots. They are in the front of the theatre, the side of the

theatre, and the rear of the theatre, and we have reserved [126] another area which we have never paved because we felt we never needed it. We would have paved it immediately if we had gotten first-run pictures, or if we felt the need of it. That would hold an additional 150 cars. We felt we would have from 500 to 550 spaces, be able to park that number of cars on our own lots. And on the streets surrounding the theatre, which are not congested, cars can park as well.

Q. What was the total cost for the Crest Theatre?

A. The total cost without profit, the actual cost, was 460-some thousand dollars.

Q. I hand you a photograph, Mr. Myerberg, and ask you if you can identify this photograph, on both sides, please.

A. Yes, sir.

Q. What is the photograph?

A. This is the front of the Crest Theatre showing the marquee, the box office, and that carved glass that I spoke of before, above the marquee.

Q. And on the other side?

A. Shows a view of the auditorium looking from the stage to the standee area, shows a section of the television lounge with the television screen, and it shows the standee area, the area at the rear of the auditorium of the theatre.

MR. ROME:—If the Court please, I offer in evidence as plaintiff's exhibit No. 25 the photograph so described of [127] the Crest Theatre.

(Photograph of Crest Theatre was marked Plaintiff's exhibit No. 25.)

Q. (By MR. ROME):—I hand you another photograph Mr. Myerberg, and ask you if you can identify that, on both sides, please.

A. Yes, sir. This side is the Crest Theatre and the Hilltop Shopping Center, the rest of the stores together with the Crest Theatre that makes up the shopping center.

Q. And what appears on the other side?

A. On the other side is a plot plan showing the different store locations and some of the parking area.

MR. ROME:—If the Court please, I offer in evidence as plaintiff's exhibit No. 26 a photograph of the Hilltop Shopping Center and the Crest Theatre and a map or plan of the shopping center and theatre.

(Photograph of Crest Theatre and Hilltop Shopping Center was marked Plaintiff's exhibit No. 26.)

Q. (By MR. ROME):—Mr. Myerberg, do you know when approximately these photographs were taken?

A. I think sometime during 1949. I don't remember the exact date, after the theatre had opened.

Q. Was there any recognition accorded the Crest Theatre by virtue of its qualifications as a theatre?

A. I think the recognition of every branch manager in [128] Washington of the different distributors, and there was one special recognition that we received. We received the International Award of the "Exhibitor Magazine" for being one of the most outstanding theatres constructed in the year of 1949 in Canada, the United States and South America. That placque now hangs in the lobby of our theatre.

Q. What is the "Exhibitor Magazine"?

A. It is a trade paper.

* * * * * * *

[131] Q. (By MR. ROME):—That Oscar Award was actually presented to your theatre by whom, Mr. Myerberg? Who was it who made the actual presentation?

A. The actual presentation was made on the television show that we were invited on because of the award, and the presentation was made by Gov. McKeldin.

Q. How many shops or stores are there in the Hilltop Shopping Center?

A. I would say there are about 15 or 16 tenants there.

Q. And do you know what the monthly rental is from those stores, tenants?

A. I would say it would be around $5,000 a month. This does not include the theatre.

Q. Are all of the stores rented?

A. Yes, sir.

Q. Has there been any turnover in the tenancy of the stores?

[132] A. One store. There was a cleaning and dyeing store in there that after a year or so vacated the store. This store was re-rented, and there has been no vacancy since then.

Q. Has the shopping center been a successful venture?

A. Yes, sir.

Q. You have mentioned, Mr. Myerberg, that the cost of the theatre was approximately 460-odd thousand dollars; is that correct?

A. Yes, sir.

Q. How was that financed?

A. Through the first mortgage of approximately $307,000. The balance between the $307,000 and the cost of the theatre was made up by my brothers and myself personally or from companies we completely controlled.

Q. What is the Pem Construction Company which has been mentioned here?

A. That is a building company that builds homes, commercial buildings or any type of construction.

Q. That is the organization which actually constructed the Hilltop Shopping Center and the Crest Theatre?

A. Yes, sir.

Q. And when did Theatre Enterprises, Inc., become the owner of the Crest Theatre?

A. It was in 1951.

[133] Q. Prior to that time had it operated under a lease?

A. Yes, under a lease.

Q. What was the rental, if you know?

A. As I recall, the rental was $600 a week, which was about $30,000 a year, or thereabouts.

Q. When the Theatre Enterprises Company took over the actual ownership of the Crest Theatre from the Pem Construction Company, how was that financed?

A. Well, the Theatre Enterprises and the Pem Construction Company are both owned by my brothers and myself, and when they were transferred, a first mortgage in the amount of $307,000 was made, and the balance was taken back by the Pem Construction Company which was, I say, owned by my brothers and myself, in a second mortgage, I think, of $35,000—these figures may not be exact, but I think they are close enough—and in a chattel mortgage on the equipment of $75,000. Pem Construction Company holds them both.

* * * * * * *

[220] MR. ROME:—* * *. I offer in evidence as Plaintiff's Exhibit No. 28, copy of a letter on the stationery of Theatre Enterprises, Inc., addressed to Universal-International Film Corporation, Attention Mr. [221] Martin, in Washington, D. C.

"Dear Mr. Martin:

"Pursuant to my telephone conversation of November 22, 1948, I submit the following bid for your picture 'HAMLET' to play our Crest Theatre first run, City of Baltimore.

"Theatre Enterprises, Inc. agrees to pay Fifty Percent (50%) of the first Seven Thousand Eight Hundred and Fifty Dollars ($7,850.00) gross box office receipts, and Sixty-Five percent (65%) of all box office receipts over Seven Thousand Eight Hundred and Fifty Dollars ($7,850.00). We will also place any reasonable guarantee, the figure to be mutually agreed upon. We will also set a minimum figure determining the completion of the engagement of this picture.

"It would be greatly appreciated, since time is most important, if you would reply at once to the above."

[222] MR. RAFFERTY:—What is the date of that?

MR. ROME:—November 26, 1948.

(Letter, of November 26, 1948, Theatre Enterprises, Inc., to Universal International Film Corporation, was marked Plaintiff's Exhibit No. 28.)

Q. (By MR. ROME):—Did you have any response to that submission of a bid, Mr. Myerberg?

A. Not until Mr. Meyers visited my theatre sometime in November.

Q. What happened at that time?

A. As I recall now, Mr. Meyers had not received the bid in New York from the Washington office, but he said he would take it under advisement and, as I recall, asked Mr. Martin why he had not forwarded the bid to him. Mr. Meyers told me he would let me know about it.

Q. Did you have any other discussion with him at that time?

A. Only one remark that Mr. Meyers made, and that was that I built the theatre in the wrong place; if I had built it downtown, there would be no doubt about getting first-run pictures.

* * * * * * *

[226] MR. ROME:—Plaintiff's exhibit No. 29 is a copy of a letter from Mr. Fred Meyers on the stationery headed "Copy for W. A. Scully," addressed to Mr. H. J. Martin, Washington, D. C., dated January 14, 1949.

"Dear Mr. Martin:

"In reply to yours of the 14th relative to the Crest [227] Theatre, Baltimore, Maryland, operated by Harry D. Myerberg, it is our mutual decision to offer this exhibitor a first neighborhood run for same break date as all other neighborhood runs after the completion of the engagement in downtown Baltimore.

"Kindest regards. Sincerely, Fred Meyers."

With carbon copies marked to go to Messrs. Scully, Gomersall, O'Keefe, J. Scully, Friedberg and Jordan.

* * * * * * *

MR. ROME:—If the Court please, I offer in evidence as plaintiff's exhibit No. 30 copy of a letter dated December 20, 1949, addressed to Columbia Pictures, New York City.

"Gentlemen:

"We wish to call to your attention our letter of [228] November 1, 1949 regarding the Crest Theatre in Baltimore, Maryland.

"We have not yet had a reply to this letter, but it is our hope that during this time the proposal that the Crest be given access to first-run pictures in Baltimore has been receiving favorable consideration. In other cities of the country such as Washington, Roanoke, Kansas City, Denver, and Los Angeles theatres located outside the so-called business section are exhibiting pictures on first-run. This is, we believe, an inevitable consequence of the spreading growth of cities, the distance from suburban areas to downtown, the complicated and expensive parking problems downtown and the fact that suburban areas are frequently themselves cities within metropolitan boundaries. Baltimore is an excellent example of this very development and, consequently, offers a magnificent revenue-producing opportunity in this connection, and as further evidence of the conviction held by our client that the Crest is entirely suitable for first-run exhibition, we are authorized to submit to you our bid for the exclusive first-run exhibition in Baltimore at regular first-run admission prices of your picture 'Jolson Sings Again.'

"Our client is willing to pay a $10,500 guarantee against 40% of the gross for this picture and will post the guarantee in the form of a certified check if this is deemed desirable.

[229] "It is firmly believed that this bid, as well as the actual play-off of the picture, if the bid is accepted, will conclusively demonstrate what a fine outlet the Crest is for the exhibition of your pictures on first-run in Baltimore.

"Will you please give this letter your early consideration and advise us of your decision?

"Yours very truly, For Gray, Anderson, Schaffer & Rome."

Mr. Raftery:—That was sent from your Philadelphia office?

Mr. Rome:—Yes, it was.

The Clerk:—This will be plaintiff's exhibit No. 30.

(Letter December 20, 1949 to Columbia Pictures from Gray, Anderson, *et al.*, was marked Plaintiff's Exhibit No. 30.)

Mr. Rome:—I offer in evidence as plaintiff's exhibit No. 31 a copy of a prepaid, straight telegram, dated January 9, 1950 to Mr. A. Montague, Columbia Pictures, Inc., New York City.

"We request opportunity to negotiate or bid for Crest Theatre, Baltimore, for 'All The King's Men.' Will guarantee $7,000 against 40% of gross for extended first-run. Alternative bid, $4,000 against 40% of gross for extended run day and date with downtown Baltimore." That letter was signed Gray, Anderson, Schaffer & Rome and was sent from our Philadelphia office.

[230] The Clerk:—Plaintiff's exhibit No. 31.

(Letter January 9, 1950 to A. Montague, Columbia Pictures, from Gray, Anderson, *et al.*, was marked Plaintiff's Exhibit No. 31.)

Q. (By Mr. Rome):—Mr. Myerberg, were any acknowledgments ever received to your knowledge from Columbia Pictures to these two bids?

A. Not to my knowledge, no.

Q. Were those pictures ever licensed to you for exhibition first-run at the Crest Theatre?

A. No, sir.

Q. Now, the bid on "All The King's Men," Mr. Myerberg, refers to a bid, exclusive run and an alternative bid. What was meant by that?

. . . . . .

[231] A. As I recall, that was some time the latter part of 1949, after the theatre had been opened about six or eight months, and we had not been able to license any first-run pictures in Baltimore.

MR. RAFTERY:—I move to strike out everything so far he has asked. The question was what was meant, and he starts telling about what happened.

THE COURT:—That may be proper introduction. You say the letter speaks for itself, Mr. Raftery. I don't know what it means. I do not suppose the jury does, either. So, I think certainly it needs explanation.

Go ahead, sir.

THE WITNESS:—And I had at that time felt it necessary, getting no place with these companies, no license on first-run pictures, to look into the matter through an attorney who was experienced in the picture business, and I engaged Gray, Anderson, Schaffer & Rome, of Philadelphia, for that purpose and asked them to further submit bids to the different companies, to see if they could not do something relevant to that with these companies. And they submitted the bid that you just heard. And the second bid, when I asked them to submit them, was purely they will play the pictures first-run or play them day and date downtown, and that was the way the bid was submitted, and we felt the same bid on the "Jolson [232] Story" on day and date on simultaneous run, that meant we would buy at the same price.

THE COURT:—What do you mean by "day and date"?

THE WITNESS:—At the same time the downtown theatres would be playing, if we would be playing the picture. "Exclusive," of course, would be exclusive of the City of Baltimore.

MR. ROME:—May I call upon you, Mr. Raftery, for a copy of a letter from Mr. George Josephs to Mr. Galanty, dated November 4, 1949?

If the Court please, I offer in evidence as plaintiff's exhibit No. 32 a letter on the stationery of Columbia Pic-

tures Corporation, 727 Seventh Aevenue, New York, dated November 4, 1949, addressed to Mr. S. A. Galanty, Columbia Pictures Corporation, Washington, D. C.

"Dear Sam:

"Attached is a copy of a letter which we received from the attorneys for the Crest Theatre, Baltimore, Maryland. Judging from the description of the theatre as contained in this letter, this seems to be a neighborhood house and it has been our policy not to recognise the requests of neighborhood houses for first-run on our product. We do not intend to reply to this letter and are sending it to you for your information.

"Kindest regards, Sincerely, George." Signed: "George M. Josephs."

[233] The Clerk:—Plaintiff's exhibit No. 32.

(Letter November 4, 1949, Attorneys for Crest Theatre to S. A. Galanty, was marked Plaintiff's Exhibit No. 32.)

Mr. Rowe:—A letter from Mr. Caplon to Mr. Josephs, dated August 7, 1950 and a letter to Mr. Caplon from Samuel Reics, dated August 25, 1950.

If the Court please, I offer in evidence as plaintiff's exhibit No. 33 a copy of a letter dated August 7, 1950, addressed to Mr. George Josephs, Columbia Pictures Corporation, 729 Seventh Avenue, New York.

"Dear George:

"On June 15th, I wrote you and attached a letter from the Crest Theatre, Baltimore, Maryland, wherein they requested the bidding privilege against the Uptown, Pimlico and Avalon Theatres.

"The exhibitor has asked me several times what disposition we have made of his request, and I would appreciate your further advice in this matter.

"Kindest regards, Sincerely, Ben Caplon, Branch Manager."

THE CLERK:—That will be plaintiff's exhibit No. 33.

(Copy of letter August 7, 1950 Caplon to Josephs, was marked Plaintiff's Exhibit No. 33.)

MR. ROME:—If the Court please, I offer in evidence as plaintiff's exhibit No. 34 a copy of a letter on the [234] stationery of Schwartz & Frohlich, 19 East 70th Street, New York 21, New York, dated August 25, 1950, addressed to Mr. Ben Caplon, Columbia Pictures, 928 New Jersey Avenue, Northwest, Washington 1, D. C.

"Dear Ben:

"This is in reply to your several letters addressed to George Josephs regarding the exhibitor's demand for an improved availability.

"As I understand the situation the Crest is playing Columbia product on a first-run availability. Columbia is under no obligation to grant the exhibitor clearance over the Avalon, Uptown and Pimlico and it would seem desirable to retain the status quo. If there are any reasons for treating with the situation differently I would appreciate hearing from you.

"It would be preferable, Ben, in further communications relating to this situation and any others dealing with availability, clearance or related subjects be sent directly to Schwartz & Frohlich.

"With all best wishes—

"Sincerely, Samuel Reice."

MR. RAFTERY:—What was the date of that communication?

MR. ROME:—August 25, 1950.

MR. RAFTERY:—And that was after this suit was [235] started?

MR. ROME:—That is correct.

THE CLERK:—Plaintiff's exhibit No. 34.

(Letter August 25, 1950, Reice to Caplon, was marked Plaintiff's Exhibit No. 34.)

* * * * * * *

[237] Mr. Rome:—If the Court please, I offer as Plaintiffs' Exhibit 35 a letter on the stationery of Paramount Pictures Inc., Washintgon, D. C., dated November 1, 1948, addressed to Mr. Harry Myerberg, Theatre Enterprises, Inc.

(Reading:)

"November 1, 1948

"Mr. Harry Myerberg
"Theatre Enterprises, Inc.
"302 Park Avenue
"Baltimore 1, Md.

"Dear Mr. Myerberg:

"I have for acknowledgment your letter of October 14, 1948, supplying information relative to the new, but as yet unnamed theatre, with which you are connected, which is expected to open on or about November 15 next and requesting the opportunity to bid for Paramount product for exhibition first run Baltimore in that theatre.

"I beg to advise that it has not been in the [238] past, and still is not Paramount's policy to engage in so-called competitive bidding unless it is compelled to do so by some court of competent jurisdiction.

"Upon further consideration of the matters discussed, at our recent meeting, and also of the contents of your letter of the above date, we are still of the opinion that the business and financial interests of Paramount will be served best by the continued exhibition of Paramount pictures first run Baltimore in theatres situated in the downtown business and shopping area of that city rather than in a theatre located in a suburban area. It is to be regretted therefore, that in the exercise of our sound business judgment, your offer to bid competitively for Paramount product for exhibition first run Baltimore in the new theatre, which is located at 5521-29 Reistertown Road, cannot be entertained. However, we shall be pleased to negotiate with you from time to time, for the exhibition

in the new theatre of such Paramount product as may become available, on a picture by picture basis, on some run, on terms to be mutually agreed upon.

"Please accept our best wishes for the success of the new theatre's opening and also for the continued success of its future operation.

"Kindest personal regards.

[239] "Very truly yours,

"(Sgd) A. C. Benson
"Branch Manager"

(Letter, November 1, 1948, A. C. Benson, Paramount Pictures Inc., to Mr. Harry Myerberg, was marked Plaintiff's Exhibit No. 35.)

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[242] If the Court please, I offer in evidence a picture copy of a letter on the stationery of Paramount Pictures Inc., Washington, D. C., dated February 9, 1949, addressed to Mr. E. K. O'Shea, Home Office, "re: Crest, Baltimore, Md. 5521-29 Reistertown Rd. Baltimore, Md.

"Dear Mr. O'Shea:

"The above mentioned theatre is under construction, and will open in the latter part of February. The theatre is owned by Mr. Harry Myerberg, Theatre Enterprises, Inc., 302 Park Ave., Baltimore, Md., which has approximately 1500 seats.

"Mr. Myerberg has visited this office and written [243] us several times in an endeavor to secure a first run availability in the City of Baltimore for the above mentioned theatre. This, we have refused to give him (see correspondence file—Mr. Thomas P. Gibbons, Legal Department). Mr. Myerberg has again contacted us and requested that we license pictures for exhibition in the Crest Theatre on a 21 day availability.

"The Crest Theatre is in opposition to the Garman's Uptown and Pimlico Theatres, being located approximately

one mile distance from the Uptown, and drawing from the same area. Under normal conditions and to avoid litigation, I believe that if an equal availability is given the Uptown and Crest, it will be acceptable to both operators. We have not committed ourselves, as per the correspondence files, to a run in this situation so far as the Crest Theatre is concerned.

"We have been regularly serving the Uptown and Pimlico Theatres on a 21 day basis, the majority of our pictures playing the Uptown. The Uptown Theatre is probably one of the finest theatres in the country, as you know. The Crest is equally as beautiful and is larger than the Uptown.

"My recommendation is that the Crest Theatre be served on a 21 day availability.

"Please advise.

[244] "Very truly yours,

"(Sgd) A. C. Benson
"Branch Manager

"cc: Mr. E. W. Sweigert"

(Copy of letter, February 9, 1949, A. C. Benson, Paramount Pictures Inc., to Mr. E. K. O'Shea, was marked Plaintiff's Exhibit No. 38.)

MR. RAFTERY:—We retyped this one, because the other was so bad, you cannot read it.

MR. ROME:—I offer in evidence, as Plaintiff's Exhibit 39, a copy of a letter on the stationery of Paramount Pictures, Inc., Washington, dated February 15, 1949, "re: Crest Theatre 5521-29 Reistertown Rd. Baltimore, Md.

"Dear Mr. Gibbons:

"In reply to your letter of February 11, 1949, and in reference to previous correspondence.

"*Page 1, paragraph 2:* Mr. Myerberg submitted various opening dates starting with October 14, 1948 for the opening of the above theatre. The house was not ready

and completed at that time, but will be finally and formally opened on February 20, 1949.

"*Page 1, paragraph 3:* In reply to your inquiry as to the door to door mileage between the several theatres involved, we wish to advise that the Pimlico and Uptown Theatres, both owned and operated by Mr. Garman, are both situated on the west side of Park Heights Ave., one block apart.

[245] "The distance from the Pimlico or Uptown Theatre to the Crest is, as follows:

"Route 1: Uptown—Park Heights Ave. to Rogers Ave. to the Crest Theatre—8/10ths miles;

"Route 2: Uptown—Belvedere Ave. to Reistertown Road to the Crest—one mile.

"*Page 1, paragraph 4:* The following is the seating capacities of the theatres involved:

| | |
|---|---|
| "Uptown | 1,100 seats |
| "Pimlico | 1,140 " |
| "Crest | 1,650 " * |

* Architect's estimate—seats being installed now.

"*Page 1, paragraph 5:* There is no doubt that adding the Crest to the 21 day houses in Baltimore will add to the print problem. The problem can be met satisfactorily with the exception of our top flight pictures.

"*Page 1, paragraph 6:* In reply to your inquiry as to the reactions of the exhibitors to (*a*) competitive negotiation; and (*b*) division of the product, we wish to advise, as follows:

"(*a*) Mr. Garman, the operator of the Uptown and Pimlico Theatres, has never bid on a picture from any company, and advises us that he will never enter competitive negotiations, and our [246] experience with him over a number of years convinces us that he means just that. Mr. Myerberg would enter the competitive negotiations only on top flight pictures, passing all others, or as many as possible.

"(*b*) The possibility of a division of the product between the Uptown and the Crest could not be satisfactorily handled in this situation. At the present time, as per the attached Forms 2554, you will note that all of our important pictures receive the proper consideration from Mr. Garman, and play the Uptown Theatre. You will further note that they receive the proper preferred time and also note that the lesser pictures also receive proper consideration and play time. I feel that, if the product were divided, this condition would not continue, as Mr. Garman would not have the interest in the lesser pictures that he has under the present conditions. As to the half of the product which would be licensed to the Crest: The liquidation of this half of the product would be complicated by the fact that Mr. Myerberg has announced a policy of vaudeville 3 days per week. Therefore, with one theatre, he could not absorb 50% of all product [247] available plus the product he purchases 100%. He would, therefore, be forced to pass many of the lesser pictures. Mr. Myerberg formerly operated other theatres in Baltimore, and experience again has taught us that lesser pictures would not receive fair consideration in his operation.

"*Page 2, paragraph 1:* Other distributors are selling the Crest Theatre on a 21 day availability. The theatre will open with WORDS AND MUSIC, a Metro top flight picture on a 21 day availability. We know that DON JUAN, a Warner picture, has been licensed to the Crest on a 21 day availability. We know that Columbia and Universal are now negotiating on a 21 day availability and we know of no company which has refused to negotiate on that same basis.

"From a distribution angle, it would be to the advantage of Paramount to play on a 21 day availability in the Uptown or Pimlico and have the Crest follow either one of these two theatres, but I am sure that you recognize the position we are in from a legal angle.

"We cannot tell what the practical working out of this

problem will be. We will not know until after the policy of the Crest Theatre is definitely set.

"My recommendation is that the Crest be served on a 21 day availability. Our only problem then will be a print problem.

[248] "Please advise if I can be of any further service.

"Very truly yours,

"(sgd) A. C. Benson

" Branch Manager

"Attachments:

"ACT:rhs

"cc: Mr. E. K. O'Shea

Mr. E. W. Sweigert"

(Copy of letter, February 15, 1949, A. C. Benson, Paramount Pictures Inc., to Mr. Thomas P. Gibbons, was marked Plaintiff's Exhibit No. 39.)

* * * * * * *

[250] Mr. Rome:—I offer in evidence, as Plaintiff's Exhibit 40, a copy of a letter dated June 25, 1951, addressed to Mr. Phil Isaacs, Branch Manager of the Paramount Washington Branch office, "Re; Ontario Theatre, Washington, D. C.

"Dear Phil:——"

[251] Mr. Raftery:—Just a minute. What is the date of that?

Mr. Rome:—June 25, 1951.

Mr. Raftery:—I am not going to object. Go ahead.

Mr. Rome:—(Reading).

"Dear Phil:

"I am in receipt of a copy of your communication of June 21st with which you enclosed copy of a letter dated June 11th addressed to you from Mr. Frank M. Boucher, General Manager of the Kogod-Burka Circuit, owner of the above theatre, which presently is in the course of erection and which you advise will be ready to

open around the latter part of October, advising that they are interested in two things, '(1) securing a good picture from you for the opening which could be either on a day and date basis with down town run, or an exclusive first in the city, and (2) we are interested in discussing with you the possibility of playing your product day and date with your down town run on the same basis as it is now being played in the Ambassador. In other words, on pictures that do not play the Ambassador, we would be interested in on the same basis.'

"Inasmuch as the theatre is in the course of construction and not ready for operation, no immediate decision need be made. However, the problem exists and [252] necessarily must be met at some future date, at which time we will have to do one of two things, (a) refuse the request, or (b) grant it.

"I know little of the facts and some time at your convenience, I would appreciate it if you would furnish me with the following information: (a) the location of the Ontario (b) its seating capacity (c) its distance from the downtown area (d) its distance from the Ambassador, etc.

"Of course, an exclusive first run in Washington is out of the question. However, if the Ontario is in substantial competition with the Ambassador, it might be a case, depending upon the facts, for a division of the product between the two theatres or for competitive negotiations between them for a first run on a day and date basis with downtown Washington.

"Please keep me advised.

"Sincerely yours,

"THOMAS P. GIBBONS

"cc: Mr. H. G. Minsky"

(Copy of letter, June 25, 1951, Thomas P. Gibbons to Mr. Phil Isaacs, Branch Manager, Washington Branch Office, was marked Plaintiff's Exhibit No. 40.)

[253] Q. (By Mr. Rome):—Mr. Myerberg, if you know whether the Ontario Theatre, in Washington, presently exhibits Paramount pictures on first run, do you know whether or not that is on an exclusive first run or on a day and date first run basis?

A. It is done on an exclusive first run, City of Washington.

Mr. Rome:—I offer in evidence as plaintiff's exhibit No. 41 a copy of a letter on the stationery of Paramount Film Distributing Corporation, Washington, D. C., dated June 28th, 1951, re Ontario Theatre, Washington, D. C., addressed to Mr. Thomas P. Gibbons, Legal Department, Home Office.

"Dear Mr. Gibbons:

"With reference to your letter of June 25, 1951, I am herewith outlining all facts pertinent to the request made by Mr. Frank Boucher, General Manager of the Kogod-Burka Circuit, owners of the above theatre, presently in the course of erection.

"The Ontario Theatre located at 17th and Columbia Road, N.W., will have 1301 seats upon completion sometime during the month of October. It is located approximately 2½ miles from the downtown area and two blocks from the Ambassador Theatre.

"At present, we are splting our product first run [254] Washington between Loew's Palace, Capitol or Columbia Theatres and Warners' Warner, Ambassador or Metropolitan Theatres. Those pictures which play the Loew situation play one theatre exclusively; whereas, Warners day and date their pictures in the Warner and Ambassador, the Metropolitan playing an exclusive first run.

"The Warner Theatre, located in downtown Washington, contains 2154 seats; the Ambassador Theatre, 1344; the Metropolitan, 1484. As regards the Loew situations, the Palace Theatre has 2423 seats; the Capitol, 3133; and the Columbia, 1174 seats.

"With reference to the last paragraph of your letter, I believe that the operators of the Ontario Theatre are primarily interested in setting up in their theatre the same playing arrangement with Loew's first run as now exists in the Ambassador Theatre with regard to the Warner downtown run.

"It is not necessary that action be taken at this time, as the theatre has not yet reached the completion stage. I will, however, keep you informed of all further developments in this situation.

"Kind Regards."

[255] There is a carbon copy to Mr. Howard Minsky.

(Letter, June 28, 1951, Phil Isaacs to Thomas P. Gibbons, was marked plaintiff's exhibit No. 41.)

MR. ROME:—I offer in evidence, as plaintiff's exhibit No. 42, a copy of a letter dated July 30, 1951, signed "Phil Isaacs," Branch Manager of Paramount, Washington, addressed to Mr. Howard Minsky, Philadelphia Office.

"Dear Howard:

"Kogod-Burka have again written to me, as per the attached letter, requesting first run product for the Ontario Theatre, Washington, D. C.

"I have previously written Tom Gibbons, giving the physical facts pertinent to this theatre, that is, location, appointments, etc. While it is not a problem at this particular moment, you can well see that if the point is pushed, it can result in a real whopper. Warners now take the stand since Frank Boucher has made this request of all major companies that, if we go so far as to permit bidding between the Ambassador and Ontario Theatres (sic), they will ask that the Tivoli Theatre be included in those negotiations. This could lead to one fine mess.

"I would appreciate your advice as to our course in this matter since these things have a habit of sneaking up on you and October is really not too far away. I don't know for sure exactly how far Boucher will want to go

with [256] this Ontario Theatre. Of course, our first offer can be 21 days after downtown and even there we may have some difficulty.

"I would like to discuss this further with you the next time we talk.

"Kind regards."

There is a carbon copy marked to Mr. Thomas P. Gibbons.

The attached letter referred to is on the stationery of K-B Theatres, 4813 Massachusetts Ave., N.W., Washington 16, D. C., dated July 19, 1951, and is addressed to Mr. Phil Isaacs, Branch Mgr., Paramount Distributing Corporation, Washington, D. C.

"Dear Phil:

"As you know, the Ontario Theatre will be ready the middle of October. We have previously advised you we are interested in first run product, either on a day and date basis with down town, or an exclusive first run basis.

"You have such pictures as DEAR BRAT, RHUBARB, HERE COMES THE GROOM, MY SON JOHN, DETECTIVE STORY and PEKING EXPRESS in which we are interested for this theatre. If they have not been sold in Washington we would like very much to have the opportunity of discussing the possibility of having these pictures for the Ontario.

"There is no need for me to tell you the Ontario [257] will be Washington's finest theatre. No expense has been spared to make it one of the outstanding theatres in the entire section. We feel the house has tremendous possibilities. You should have an accurate knowledge of this, as you have been serving the Ambassador, just a short block away, with first run product.

"May we hear from you in regard to these first run pictures."

(Letter, July 30, 1951, Phil Isaacs to Mr. Howard Minsky, with attached letter of July 19, 1951, Frank M. Boucher to Phil Isaacs, were marked Plaintiff's Exhibit No. 42.)

MR. ROMZ:—If the Court please, I offer in evidence as Plaintiff's Exhibit No. 43 a copy of a letter on the stationery of Paramount Film Distributing Corporation, Washington, D. C., addressed to Mr. Tom Gibbons, Home Office, dated August 24, 1951.

"Dear Tom:

"I am attaching hereto a copy of a letter from Fred Kogod, owner of the Ontario Theatre, Washington, D. C., about which I have previously written you.

"You have all the physical facts relative to seating capacity and distances between theatres; further than that, this is a rather ticklish situation as you can readily understand. I would appreciate any comments you care to make as soon as convenient.

[258] "Your very truly,

"/s/ Phil Isaacs
"Branch Manager"

There is a copy marked as going to Mr. Howard G. Minsky.

The attached letter, ladies and gentlemen, is on the stationery of K-B Theatres, Washington, D. C., dated August 20, 1951, addressed to Mr. Phil Isaacs, Branch Manager, Paramount Film Distributing Corporation, Washington, D.C.

"Dear Phil:

"Our new Ontario Theatre, located on the corner of 17th and Columbia Road, N.W., just a short distance from the Ambassador at 18th and Columbia Road, will be completed and ready to open shortly after the first of October. As we have previously advised you, this will be a deluxe house of 1400 seats, incorporating the very latest and finest in theatre design and construction. It is located in one of the most thickly populated commercial and residential areas of Washington, and is readily accessible to the residents of the entire Northwest section of the city,

and to the other sections of the city as well. We are very proud of this house. We started out with the idea of making it the most attractive and comfortable theatre in the city—and we are confident that we have accomplished [259] that objective. So far as the District of Columbia theatregoers are concerned, the Ontario will be second to no other theatre in that area.

"From the very beginning it has been our plan to operate the theatre as a first run house-indeed, in view of the cost of the house it will be necessary to operate on that policy and charge first run admission prices in order to have it pay out.

"In view of the fact that the opening date is not too far off, we are anxious to make arrangements for pictures in the very near future. For many years Paramount has split its product between the Warner and Loew's downtown houses in Washington. That part of the split which plays at the Warner has been exhibited day and date first run at the Ambassador. We are interested in obtaining from your company for day and date first run showing that part of your product which plays first run downtown. In view of the superiority of our theatre, we are confident that such a policy would be even more successful there than at the Ambassador. We are also interested in obtaining from your company for first run exhibition those pictures which will not be shown in the other downtown first run houses.

"If you are in position to discuss this matter with us in further detail, we shall be only too happy to [260] sit down with you in person in the near future. On the other hand, if this is a matter that should properly be taken up with the home office in New York, we will be very happy to go up there for a conference at some mutually convenient tim. in the near future.

"Very truly yours,

"/s/ Fred S. Kogod"

There is also an attachment, ladies and gentlemen, of a copy of the reply from Mr. Isaacs to Mr. Kogod, dated August 24, 1951.

"Dear Mr. Kogod:

"Thank you for your letter of August 20, 1951 wherein you outline your request with regard to a run in the Ontario Theatre, Washington, D.C.

"I have forwarded a copy of your letter to our Home Office in New York and immediately upon receipt of advice from them I will be glad to get in touch with you.

"Kind regards.

"Yours very truly,

"(Sgd) Phil Isaacs
"Branch Manager."

(Letter, August 24, 1951, Phil Isaacs, Branch Manager to Mr. Tom Gibbons; letter, August 24, 1951, Phil Isaacs to Mr. Fred Kogod; and letter, August 20, 1951, Fred S. Kogod to Mr. Phil Isaacs, were marked Plaintiff's Exhibit No. 43.)

Mr. Rome:—If the Court please, I will offer in [261] evidence next, as Plaintiff's Exhibit No. 44, a copy of a letter dated September 10, 1951, from Mr. Thomas P. Gibbons to Mr. Phil Isaacs, Branch Manager, Washington Branch of Paramount, "Re: Ontario Theatre, Washington, D.C."

"Dear Phil:

"Reference is made to your letter of August 24th which was received during my absence on vacation and also to our telephonic interview of September 5th in the above matter.

"I discussed the exhibitor's request with Mr. Phillips, stressed the importance of the matter and conveyed Mr. Minsky's feeling that a conference should be held relative to it.

"I will advise you as soon as I have anything definite to report.

"Kindest personal regards.

"Sincerely yours,

"(Sgd) Thomas P. Gibbons."

And there is a carbon copy marked going to Mr. H. G. Minsky.

(Letter, September 10, 1951, Thomas P. Gibbons to Phil Isaacs, Branch Manager, was marked Plaintiff's Exhibit No. 44.)

Q. (By Mr. Rome):—Mr. Myerberg, do you know whether [262] or not the Ontario Theatre in licensing its first-run pictures from Paramount, is presently doing so on the basis of competitive bidding for those pictures?

A. Yes. It is my understanding that they are competitive bidding for the pictures.

Mr. Raftery:—We concede these telegrams were sent back and forth, without proof from the witness.

Mr. Rome:—If the Court please, I will offer in evidence Plaintiff's Exhibit No. 45, a copy of a telegram addressed to Ted O'Shea, Paramount Pictures Inc., Paramount Bldg., Broadway.

"Offer 10000 dollar guarantee against forty percent of gross for extended run of your production sorrowful jones starring bob hope to play our new 1700 seat crest theatre first run baltimore immediate answer is requested

"Theatre enterprises inc harry d. myerberg, president".

This is dated May 12, 1949.

(Copy of telegram, Theater Enterprises Inc. to Ted O'Shea, Paramount Pictures Inc., May 12, 1949, was marked Plaintiff's Exhibit No. 45.)

MR. ROME:—I offer in evidence as Plaintiff's Exhibit No. 46 an original telegram addressed to Harry D. Myerberg, Crest Theatre, May 13, 1949.

"FULL CONSIDERATION OF YOUR REQUEST AND OFFER ON SORROWFUL JONES LEADS ME TO CONCLUSION THAT WE WOULD [263] PREFER EXHIBIT OUR PICTURES FIRST RUN IN BALTIMORE IN A LARGE DOWNTOWN THEATRE. REGARDS.

"TED OSHEA."

(Telegram, May 13, 1949, Ted Oshea to Harry D. Myerberg, was marked Plaintiff's Exhibit No. 46.)

* * * * * * *

[264] MR. ROME:—If the Court please, I offer in evidence as plaintiff's exhibit No. 47 a copy of a letter on the stationery of Paramount Pictures, Inc., 306 H Street, Northwest, Washington, D. C., dated November 14, 1949, re: Crest Theatre, Reisterstown Road, Baltimore, Maryland, addressed to Mr. Thomas P. Gibbons, legal department, home office.

"Dear Mr. Gibbons:

"This will acknowledge receipt of your letter of November 7, 1949, in which you enclosed a copy of a letter, dated November 1, 1949, addressed to Paramount Pictures, Inc., Times Square, New York City, from Gray, Anderson, Schaffer & Rome, Philadelphia, Pa., signed by Edward P. Rome.

"In the above letter, Mr. Rome advises that he has been retained by Theatre Enterprises, Inc., who operates the Crest Theatre, Reisterstown Rd. and Rogers Ave., Baltimore, and that he is fully acquainted with the efforts that have been made during the past year to obtain first-run Baltimore pictures for the Crest Theatre. Mr. Rome is again renewing that request and calls our attention to the fact that without experimenting with the exhibition of Paramount Pictures first-run in the Crest, it is not possible

to determine that such a [265] policy would be unprofitable for Paramount.

"In my letter to you of February 15, 1949, I gave a detailed report on the Crest Theatre and the theatres surrounding it, and advised you in a letter, dated May 27, 1949, that the Crest Theatre is situated 6-1/10th miles from the nearest downtown theatre in the City of Baltimore playing first-run product.

"Mr. Myerberg, the owner and operator of the Crest Theatre, made several offers with substantial guarantees for first-run product. We elected not to accept these offers.

"The Crest Theatre is now playing Paramount product on a 21-day availability and paying the same terms and playing on the same days as comparable houses in the City of Baltimore, and our relationship with this account is excellent.

"On May 12, 1949, Mr. Myerberg wired Mr. O'Shea, offering the following terms on SORROWFUL JONES:

"'$10,000 guarantee against 40% of the gross for an extended run at the Crest Theatre, first-run Baltimore.

"'This picture played at Keith's Theatre, Baltimore, 6/28-7/19/49, inclusive, 22 days, to the following terms:

| | |
|---|---|
| "'First week | 40% |
| "'Second week | 35/50/9,000 |
| "'Third week and one day | 25% |
| "'Total film rental | 10,052.' |

"In a letter dated August 12, 1949, Mr. James J. [266] Lindsay, on behalf of the Theatre Enterprises, Inc., offered $12,500 guarantee against 40% of the gross on TOP O' THE MORNING to play the Crest Theatre, Baltimore, first-run City of Baltimore.

"This picture was licensed to the Stanley Theatre, Baltimore, and played 9/16-29/49, inclusive. The contract terms were as follows:

"'First week 37½% of the gross $9,684—rental $3,632

"'Second week 37½% of the gross $4,713—rental $1,178*

$4,810 $14,397

*Sold 37½% of the gross—will probably be adjusted to 25% because of low gross.

(The above therefore figured at 25%.)'

"From the above, it is apparent that the offer from Mr. Myerberg is far greater than the rental earned on TOP O' THE MORNING at the Stanley Theatre.

"However, the offer of $10,000 on SORROWFUL JONES is approximately the same amount of money as we secured for the film rental of the exhibition of this picture in Keith's Theatre in Baltimore.

"In making a decision to change the first-run on Paramount product from a first-run downtown theatre located in the heart of the shopping center in a big metropolis to a [267] suburban theatre depending almost entirely on automobile trade, it is necessary that we take into consideration the effect this change would have on the other suburban theatres and also whether or not the suburban theatre playing first-run could profitably carry the enormous guarantee they would post in order to obtain a first-run.

"In view of our experience and in the exercise of our sound business judgment, we feel that the interest of Paramount would be best served by the continued exhibition of our product first-run (Baltimore) in a large theatre situated in the downtown business and shopping area of the City rather than in a theatre located in a suburban area as in the case of the Crest, and I firmly believe that an experiment of playing first-run in the Crest Theatre would prove our judgment to be correct.

"The only condition under which I recommend playing the first-run in the City of Baltimore in the Crest Theatre would be solely for the purpose of avoiding litiga-

tion, as my business experience and judgment convince me that the exhibitor and the distributor would lose financially as a result of the change.

"Very truly yours,

"(Sgd) A. C. Benson, Branch Manager."

With carbon copies to A. W. Schwalberg, E. K. O'Shea, and H. A. Goldstein.

[268] THE CLERK:—Plaintiff's exhibit No. 47.

(Letter November 14, 1949 Benson to Gibbons, was marked Plaintiff's Exhibit No. 47.)

Q. (By MR. ROME):—Mr. Myerberg, with regard to the bids you submitted on the TOP O' THE MORNING and SORROWFUL JONES, would you have been willing to play those pictures in your theatre day and date with a theatre playing them downtown and pay the same rental terms you offered in the bids that you made?

A. Yes, I would have.

* * * * * * *

MR. ROME:—If the Court please, I offer as plaintiff's exhibit No. 48 a copy of a letter dated December 3, 1949, on the stationery of Gray, Anderson, Schaffer & Rome, Philadelphia, Pa., addressed to Mr. Thomas P. Gibbons, Esq., re Crest Theatre, Baltimore, Maryland.

[269] "Dear Mr. Gibbons:

"May I recall to your attention my letter of November 1, 1949 regarding the Crest Theatre, in Baltimore, Maryland? On November 7th you informed me that after consultation with your Washington branch we would hear further from you but as yet we have not.

"We trust that during this time the proposal that the Crest Theatre be given access to first-run pictures has been receiving favorable consideration. It is our information that in other cities of the country, such as Washington, Roanoke, Kansas City, Denver and Los Angeles, theatres

located outside of the downtown business sections are exhibiting pictures on first-run. This is, we believe, an inevitable consequence of the spreading growth of the cities, the distance from suburban areas to downtown, the complicated and expensive parking problems downtown, and the fact that suburban areas are frequently themselves cities within metropolitan boundaries. Baltimore is an excellent example of this very development.

"In this connection it is our understanding that Paramount has presently available for release two pictures THE HEIRESS and SAMSON AND DELILAH. Both of these pictures are obviously "class attractions" which would be ideally suited for first-run showing at the Crest Theatre, located as it is in a growing shopping area in the very center of 90% [270] of the better residential area of Baltimore City and County, running from Catonsville on the west to Towson on the east. It is reasonable to expect that the great number of persons who will go to see these pictures will come predominantly from this area. It is the fact that these residents are situated geographically closer to the Crest than they are to downtown Baltimore. It is also the fact that the ample free parking facilities adjacent to the Crest represent an additional attraction.

"Our client is very desirous for the opportunity to exhibit THE HEIRESS and SAMSON AND DELILAH. We are, therefore, authorized to communicate to you the following bid:

"Ten thousand five hundred dollars ($10,500.) guarantee against 40% of the gross for an extended first-run of THE HEIRESS at the Crest Theatre.

"Thirty-five thousand dollars ($35,000.) guarantee against 50% of the gross for an extended first-run of SAMSON AND DELILAH at the Crest Theatre.

"Our client will also agree to set a minimum gross figure that would control the completion of the engagement of these pictures.

"We are confident that these bids as well as the actual

playoff of the pictures will amply demonstrate the eminent feasibility of exhibiting your pictures first-run [271] at the Crest.

"May we hear from you at your earliest convenience?

"Yours very truly,

"(Sgd) Edwin P. Rome,

"For Gray, Anderson, Schaffer & Rome"

THE CLERK:—Plaintiff's exhibit No. 48.

(Letter December 3, 1949 (carbon copy) Rome to Gibbons, was marked Plaintiff's Exhibit No. 48.)

MR. ROME:—If the Court please, I should like to read to the jury the answer of Paramount Pictures to interrogatory numbers 11, 12 and 13, which give the play-off of the particular pictures that have been discussed here in the City of Baltimore, and shows the film rental actually received by Paramount.

SAMSON AND DELILAH, a special pre-release engagement at the Stanley Theatre and played again in the Stanley Theatre on a first-run regular release. THE HEIRESS and TOP O' THE MORNING also played at the Stanley. SORROWFUL JONES played at the Keith's. Paramount received a film rental from the special pre-release engagement of SAMSON AND DELILAH of $22,990 and received a further film rental from the first-run general release of SAMSON AND DELILAH of $4,105. From THE HEIRESS Paramount received a film rental of $4,074 and from TOP O' THE MORNING received a film rental of $4,326 with a $242 credit by reason of a reduction in terms of the first week's engagement from 37½% to 35% again to [272] the exhibitor.

Paramount received from the exhibition first-run Baltimore of SORROWFUL JONES, $10,053. Paramount also received as a total amount of film rental received from subsequent run less fees in Baltimore of these pictures as follows:

THE HEIRESS ..... $9,097
TOP O' THE MORNING ..... 9,961
SORROWFUL JONES ..... 16,890, the figure as to SAMSON AND DELILAH not being available at the time of the answer to the interrogatories.

Q. (By MR. ROME):—Mr. Myerberg, you stated that your theatre opened Feburary 26, 1949; is that correct?

A. Yes, sir.

Q. Did anything happen in connection with the pre-opening of the Crest Theatre?

A. Well, we had two events: The first was a dinner that we served in the television lounge of the theatre in which we invited all of the distributors from Washington and the general sales managers from New York and the district managers and Eastern division managers, and some newspapermen, and as I recall the then president of the different theatre organizations in the city, to show them the theatre in a completed state.

Q. Excuse me, Mr. Myerberg. Do you recall when that occasion was?

[273] A. It was either two or three days prior to the opening of the theatre.

Q. What happened on that occasion?

A. Well, the little dinner was given purposely to make more acquainted especially those people from New York if they would come in, and, incidentally, no one came in from New York, and the only ones there were the Washington branch managers and some division managers whose offices were in Washington, and salesmen.

And I at that time, again, after they had seen the theatre, and during the evening, would get one or two together and ask them, after seeing the theatre, after seeing the situation, ask them personally whether they could not in some way help me get the runs the theatre should require, that is, first-run, day and date with downtown Baltimore, on an exclusive basis they had authority to sell.

Q. Who was there according to your recollection, from the various companies?

A. I don't know that I can remember them all, but I will try to remember them company for company.

[274] From Loew's Incorporated, there was Mr. Adams, the Washington branch manager, and Mr. Prince, the Washington salesman for the Baltimore area.

From Paramount, there was Mr. Benson, the branch manager, and Mr. Thompson, the sales manager or salesman for the Baltimore area. From Twentieth Century-Fox, there was Mr. Contee, who was then the sales manager of Twentieth Century-Fox, Washington Branch Office, and Mr.—I don't recall his name at this moment, was the salesman of the Washington branch office. From Columbia, I think there was Mr. Wingfield, the salesman in this area for Columbia Pictures. From United Artists, it was Mr. Silvers, who was the Eastern or Division Manager for this area, and Mr. Price, the Branch Manager of Washington, and their salesman—it was either Mr. Young or Mr. Rose.

Q. Was anyone there from RKO?

A. It was Mr. Kahn, who was then the salesman of RKO in this territory; and from Warner Bros., there was Mr. Smeltzer and Mr. Biersdorf. Mr. Smeltzer was Division Manager, and Mr. Biersdorf was Branch Manager in Washington, and Mr. DeFaizio, who was then the Baltimore salesman.

Q. Was there anyone there from Universal?

A. I don't recall who was there from Universal.

Q. What, if anything, happened on that occasion, Mr. Myerberg?

[275] A. I remember one time that Mr. Smeltzer and Mr. Adams and Mr. Biersdorf and myself were sitting at Mr. Smeltzer's table, and I again renewed my request, and the conversation, although I don't remember the exact conversation, it was to the effect that, "You know we can't do that. You are not going to get that from any

company. You might as well take these pictures on a 21-day basis and make the best of it." And I had a similar conversation with Mr. Price and Mr. Benson, and possibly Mr. Thompson, there at the same time. I asked them the same question, and I got practically the same answer, that nobody was going to do this; that it was an impossible thing to do, and the New York office would not go along with it. "We don't make the decisions; they make them. We submit it to them and these are the answers, and we can't do anything about it."

Q. Is there anything that occurred, anything else that occurred on that occasion?

A. Well, everyone there, I think, without exception was pleasantly surprised to see the way the theatre had finished, and the beauty of the theatre, its appointments, its equipment, which they had leisure time to inspect, because there was no performance that evening.

Q. With what picture did the theatre actually open?

A. Warner Bros. picture, DON JUAN.

[276] Q. And that you played on a first-run-subsequent-run availability in the city of Baltimore?

A. Yes.

* * * * * * *

[279] MR. ROME:—If the Court please, I offer in evidence, as Plaintiff's Exhibit 50, a copy of a letter dated November 2nd, 1949, addressed to Twentieth Century Fox Film Corporation, New York, from me:

"Gentlemen:

"We have been retained by Theatre Enterprises, Inc. of Baltimore, Maryland, which operates the Crest Theatre at Reiserstown Road and Rogers Avenue, Baltimore. As a result of our study we have become fully acquainted with the efforts that have been made during the past year to obtain access for that theatre to your first run pictures, and also with the failure of those efforts.

"The idea of first run pictures at the Crest is in

full accord with statements that have been made on behalf of your company and justifies the interest that has been expressed earlier by some of your representatives. It is our thought, therefore, that the situation deserves further attention.

"It occurs to us that, without at least experimenting with the exhibition of your pictures in the Crest on first run, it is not possible to say fairly and with justification that such a policy would be unprofitable for you. On the contrary, it would seem that the extraordinary [280] growth of the area near the theatre, with its increasing population and expanding business enterprises, coupled with the unique facilities offered by the Crest itself actually present an incomparable outlet for your product and hence a source of revenue far superior to any presently available to you in Baltimore. We are confident that experience would soon prove this to be true.

"We are aware that first run theatres are more usually in the so-called downtown shopping districts but we suggest that there is nothing inherent in the industry or in the law that precludes a theatre not so located from access to first run product so long as other determining factors are duplicated. Thus, when a theatre is of adequate size, unquestionably suitably equipped and properly managed, in a thriving community from which it can draw on a large population, when it can charge the same admission price and pay comparable and potentially even greater film rentals, it is our belief that such a theatre is entitled to access to first run pictures. Certainly it is reasonable to request an opportunity to demonstrate whether or not this contention will be borne out by experience. In this fashion what has become a longstanding and troublesome difference of view could be readily resolved to the satisfaction of all.

"We urge you most earnestly to consider this [281] suggestion in a favorable light. To experiment in this way cannot possibly react to your detriment since our

client stands ready to bid competitively for your product and, indeed, to offer any reasonable guarantee you deem appropriate. On the other hand, if we are correct your company will have another outlet in the City of Baltimore, and one which is generally conceded to be the finest and most modern theatre in the State.

"Your reply at an early date will be appreciated."

(Copy of letter, November 2, 1949, Mr. Rome to Twentieth Century-Fox Film Corporation, was marked Plaintiff's Exhibit No. 50.)

Mr. Rome:—If the Court please, I offer in evidence as Plaintiff's Exhibit 51 a letter on the stationery of Twentieth Century-Fox Film Corporation, Office of A. W. Smith, Jr., Vice-President in Charge of Distribution, dated November 4, 1949, addressed to me.

"Dear Mr. Rome:

"This will acknowledge receipt of your letter of November 2 in which you request a first-run showing of our feature pictures in your client's Crest Theatre, Baltimore.

"We have given and are giving considerable thought to the selection of first-run outlets for our pictures in cities like Baltimore and it our present thinking that permitting our better pictures to play first-run in a [282] suburban theatre in Baltimore is detrimental to the best interests of our company. We believe in serving as first run in a city like Baltimore a theatre which is in the central zone of a downtown area of the city, in the shopping zone where the stores are located, which is the center of trade and, in our experience, the center of amusement. We find that those people who come into the downtown area of a city come because they have business interests there, to shop, to look around, to go to restaurants and to seek entertainment.

"While your suggestion for experimenting with such

a run on one or two pictures may present a certain appearance of reasonableness, an unsuccessful experiment of that type might prove extremely damaging to us. The first-run of an important picture in Baltimore not only may affect the public reaction to the picture in that entire area but the results are often carefully scrutinized by exhibitors in other areas. Each of our pictures represents a substantial investment in a rather fragile product so that an unsuccessful experiment of the type you suggest might well do our company substantial irreparable damage.

"I trust that further consideration of our problems will convince you that we cannot agree that the method of distribution which we have found to be successful [283] for many years can be suddenly departed from in this city.

"Kindest regards.

"Sincerely,

"(Sgd) A. W. Smith, Jr."

(Letter, November 4, 1949, A. W. Smith, Jr., to Edwin P. Rome, was marked Plaintiff's Exhibit No. 51.)

Mr. Rome:—Sir, I offer in evidence as Plaintiff's Exhibit 52 a copy of a letter dated November 9, 1949, from me to Mr. A. W. Smith, Jr., Twentieth Century-Fox Film Corporation:

"Dear Mr. Smith:

"Thank you very much for your letter of November 4th which we have read with great interest.

"While our opinions differ we can understand your view concerning the advisability of serving a downtown theatre with your first run pictures rather than a suburban theatre. There is, however, another approach to this problem which we think is equally valid and, indeed, a necessary result of the logic of your own thought. Even if we assume your view to be correct that the downtown

theatre is a more profitable outlet for your company than the suburban theatre in the event one plays a picture first run to the exclusion of the other, we believe that it must necessarily follow that a day and date policy of the two theatres together can mean only a still greater revenue for [284] the distributor.

"We have always been impressed by your testimony in the Bordonaro case that, generally speaking, you would rather have two outlets than one. Although the circumstances in Baltimore differ from those in Olean, we firmly believe that the fundamental wisdom of your statment is equally applicable and indisputable. Simply as a matter of business policy it cannot be questioned that your company, or any other distributor, stands to receive a much greater film rental from two first-run houses than from one. This is particularly true when, as in Baltimore, the two theatres are sufficiently far apart not to encroach on each other's patronage.

"This must be the thought behind some of the recent distribution policies of your company in the Philadelphia area. It must be the explanation for the fact that in Washington, Roanoke, Kansas City and other cities, according to our information, theatres located in a so-called suburban area are playing day and date with downtown first run houses. We note too that this issue has arisen in certain pending litigation.

"The spreading growth of cities, the distance from suburban areas to downtown, the complicated and expensive parking problems downtown, the fact that suburban areas are frequently themselves cities within metropolitan boundaries [285] with their own business and shopping and entertainment centers, all emphasize and substantiate the basic soundness of a day and date policy.

"We can appreciate your disinclination to experiment on an exclusive first run basis because of the possibility of risk outlined in your letter. We suggest, however, that the risk would not be present if you were to experiment with a day and date policy at the Crest.

"We feel that your letter has expressed a genuine interest in the problem involved and we are sure that you will give this new proposal full consideration. We repeat that our client stands ready to negotiate competitively and to offer any reasonable guarantee you deem appropriate."

(Copy of letter, November 9, 1949, Edwin P. Rome to Mr. A. W. Smith, Jr., was marked Plaintiff's Exhibit No. 52.)

Mr. Rome:—Sir, I offer in evidence as Plaintiff's Exhibit 53 a letter on the stationery of Twentieth Century-Fox Film Corporation, dated November 14, 1949, Office of A. W. Smith, Jr., Vice-President in Charge of Distribution, addressed to me.

"Dear Mr. Rome:

"This will acknowledge receipt of your letter of November 9 regarding your client's Crest Theatre, Baltimore, Maryland.

[286] "We have studied the Baltimore area carefully and have come to the conclusion that it is not a practical distribution policy for us to serve the Crest Theatre day and date with our first run showing of a picture in Baltimore and to the exclusion of other equally fine theatres in the city which might also request such a day and date run. I have read carefully your paragraph regarding the spreading growth of cities and feel that your reasoning along these lines may point to something that will develop in the future. However, to answer your question, our study of Baltimore does not indicate the present need for the move on our part that you request.

"While problems like this are usually governed by the circumstances of their particular locality, since people show a tendency, as you did, to say we ought to do in one place what we have done elsewhere this gets us into the practical problem of prints. Our analysis of print costs and returns indicates that we cannot economically buy

more than our present number of prints, and we could not go into the kind of operation you suggest generally without the employment of many additional prints.

"Your information regarding situations where suburban theatres play day and date with first runs is incorrect insofar as Washington is concerned. In Roanoke we have from time to time served more than one theatre first [287] run day and date, but we have considered that a special procedure necessary to protect our first run revenue in that situation. In Kansas City the theatres are operated by our own subsidiaries, and we have felt that we had greater room for experiment when we were showing our own pictures in our own theatres.

"Answering that paragraph in your letter where you refer to my testimony in the Bordonaro case, it is my recollection that when I said I would rather have two outlets than one, I referred to having two opportunities for a first run in Olean and not to the desirability of serving two theatres day and date.

"With kindest regards,

"Sincerely,

"(Sgd) Andy
A. W. Smith, Jr."

(Letter, November 14, 1949, A. W. Smith, Jr., to Mr. Edwin P. Rome, was marked Plaintiff's Exhibit No. 53.)

Mr. Rome:—Sir, I offer in evidence as Plaintiff's Exhibit 54 a copy of a letter dated December 13, 1949, addressed to Mr. A. W. Smith, Jr., Twentieth Century-Fox Film Corporation.

"Dear Mr. Smith:

"Please forgive our delay in replying further to your letter of November 14th concerning the Crest Theatre, in Baltimore, but we have been giving the entire situation [288] further detailed study.

"Your letter would seem to indicate some misunder-

standing of our proposal since we are not requesting a day and date run at the Crest 'to the exclusion of other equally fine theatres in the city which might also request such a day and date run'. We do not know that any other theatre has made such a request but, of course, our client would be glad to meet that competition if and when it arises. From the point of view of the distributor, however, such a situation would provide only a still greater revenue and would be in accord with Fox's recent policies as we understand them.

"You mention that our request raises the practical problem of prints. In this connection, we have been much interested in the reports published in the trade papers concerning your recent speech in New Orleans announcing that Fox is intending to increase the number of prints available. It was our belief, however, that the matter of prints became a problem only on subsequent runs not on first run since even if our request were to be granted it would mean only a second print for Baltimore. Moreover, are we not correct in believing that the number of prints is not a real problem in Baltimore which plays pictures very early and hence at a time when there are sufficient prints available? And, if we are correct on the profitable nature of [289] the day and date policy would that not amply compensate any possible increased cost involved for a print?

"You say our information about Washington having a suburban theatre which plays first run pictures is incorrect but that is the information submitted by affidavit in the Meiselman case. Passing that, however, there remain the other cities in the country such as Los Angeles and Denver and Kansas City where, according to our information, our proposal has actually been in operation for some time. It has, undoubtedly, been successful in those cities since otherwise the policy would not be pursued. That being so, there must then be some other reason for refusing to adopt it in Baltimore which is, perhaps, even more suitable for it.

"The ultimate test for the suitability of a theatre is, from the distribution point of view, the ability to produce and pay film rental. The confidence of our client in the grossing potentialities of the Crest is evidenced by the willingness and capacity to pay the most substantial rentals, accompanied by guarantees in the form of certified checks if need be, in order to license your product. Since this is the case how then does Fox run a risk by adopting the day and date policy? In all good faith, we do not see anything in your letters which answers this thought.

"Further in this connection we think that to re- [290] fuse the Crest the opportunity to play day and date with the downtown first run theatres and to insist upon a clearance in favor of those theatres is to act counter to the ruling of the United States Supreme Court which enjoins the granting of any clearance between theatres not in substantial competition. It is our view that the distance between the Crest and the downtown first run houses is such as to preclude their being in substantial competition and to permit their playing day and date.

"Permit us to repeat that the film rentals our client is prepared to pay, with guaranteed minimums, are such as to invite further consideration of our proposal."

(Copy of letter, December 13, 1949, Edwin P. Rome to A. W. Smith, Jr., was marked Plaintiff's Exhibit No. 54.)

Q. (By Mr. Rome):—Mr. Myerberg, in the letter read from Mr. Smith, he refers to the fact that a plan of playing pictures first run in the Crest, which you had been seeking to have adopted, would have excluded the playing of similar pictures first run in other equally fine theatres in the area. Was that ever your intention?

A. No, sir.

Q. Did you ever express such a thought in any way to any person representing any one of the distributor companies?

A. No, sir.

Q. What was the thought that you did express to the [291] companies with regard to the licensing of first-run pictures in the Crest Theatre?

A. That there was a certain competitive area that we considered the Crest to be in. Outside of that area, they could license as many houses as they desired, on first-run. Inside the area, if they felt, if the exhibitors felt they wanted an opportunity to license that picture, they had an equal opportunity that we had, and we would have to enter into competitive negotiations for a picture, and were willing to take our chances on that basis.

Q. Did you discuss with any representative of the distributors what various theatres might enter into such a policy in the city of Baltimore?

A. There was only one detailed discussion about it, and that was with Mr. Contee.

Q. Of what company?

A. Twentieth Century-Fox. He told me he was making an analysis of the first-run situation in the city, and generally investigating multiple first-runs in the city of Baltimore; that is, pictures playing a downtown area at the same time as other theatres in the outlying sections, and that he had picked out several theatres, of which the Crest was one, to do this thing, and he was thoroughly convinced to a mathematical certainty, as he claimed, that Fox Films could get more money for their product in the [292] city of Baltimore out of four or five day and date runs of their pictures in the city than they were then enjoying with first-run and subsequent-runs, and that they would still have the subsequent-run business to run throughout the city; and that was the way he intended to present it to his people.

And, pursuant to that, Mr. Minsky, who was then division manager of Twentieth Century-Fox, visited my theatre to go into the matter, and they mentioned several theatres, such as the Edmondson Village, which I think

just opened or had been opened a couple months, and the new Northway Theatre, which was being built.

Q. Northwood Theatre?

A. The Northwood Theatre. And he mentioned a theatre in Dundalk as a possibility, and a theatre in the Brooklyn area, and the Victory Theatre in Brooklyn as being a possibility. Not Mr. Minsky—Mr. Minsky, in fact, as I recall, at that time had even tentatively selected a picture, the picture I don't recall. That was the only time I think of, where they went into the distributors, the possibility of other theatres playing it in other areas, and on what basis or at what theatres they would play it.

Q. When you say, Mr. Myerberg, that the city would be divided into areas, would you explain that, so the Court and jury may understand just what the thought was that was discussed with Mr. Contee at that time?

[293] A. Well, the area surrounding Edmondson Village would come east to approximately Gwynns Falls Parkway, and north, west and south, covering Catonsville, and the Edmondson Village area, all over to Frederick Road, and from Gwynns Falls Parkway, taking a line there from Park Circle to Gwynns Falls Parkway, and from Gwynns Falls Parkway north, from Park Circle to the east, toward Roland Avenue, and to line that north, winding up somewhere around somewhere Reisterstown, inasmuch as there were not any first-class theatres, except one small theatre in Reistertown.

[294] Q. Was it intended that only theatres in any one of those particular areas would have access to pictures on first-run?

A. Well, it was Mr. Contee who thought that only one theatre would have access to pictures in those areas besides the downtown area. Of course, the downtown area would also play the picture day and date with two or three theatres in different particular areas.

Q. What if it occurred that more than one of the theatres in one of these areas wanted first run?

A. There would have to be negotiations in that area.

Q. Nothing, however, came of the suggestion that had been made to Mr. Contee?

A. No, I had discussed with Mr. Contee several times in Washington and several times in Baltimore, but after I had continuously asked him what happened to the policy he said that finally New York vetoed it and I can't do anything with it, and that ended it there.

Q. Was there any reason given by Mr. Contee why that suggestion was rejected?

A. Mr. Contee said he could not understand why it was rejected, that New York made the decisions, and that was the only thing he had to go by.

Mr. Rome:—If the Court please, I offer in evidence as Plaintiff's exhibit No. 55 a copy of a letter dated April [295] 6, 1951 from Mr. A. W. Smith, Jr., of Fox, addressed to Mr. Al Lichtman, Cincinnati.

"Dear Al:

"We have been having great difficulty in getting our pictures dated first-run City of Cincinnati and greater difficulty making deals with the subsequent run theatres.

"Maurie White is our customer in Cincinnati and he is a motivating influence in an exhibitor group which, apparently, has banded together to keep down film rentals.

"After much discussion, we have taken the following action:

"We have sold a number of pictures to play first-run City of Cincinnati day and date at the following theatres:

"The Twin Drive-In
"The Valley Theatre
"The Theatre in Covedale
"The Theatre in Covington, Kentucky
"The Mariemount Theatre
"The Cox Theatre

"These six theatres, or at least five of them, will play the pictures first-run and with a 21-day clearance

over subsequent runs. The owners of these theatres are the leading members of Maurie White's buying and booking group and we have assurance that with the action we have taken we will secure satisfactory subsequent run business.

[296] "The following pictures have been dated:

| | |
|---|---|
| "April 25th | FOLLOW THE SUN |
| "May 2nd | I CAN GET IT FOR YOU WHOLESALE |
| "May 9th | MONTE CRISTO AND NICK CAIN (Equal billing) |
| "May 16th | FOURTEEN HOURS |
| "May 23rd | YOU'RE IN THE NAVY NOW |
| "May 30th | ON THE RIVIERA |
| "June 6th | RAWHIDE |
| "June 13th | HALF ANGEL |
| "June 20th | TELEGRAPH HILL |
| "June 27th | THE GUY WHO CAME BACK |

"So as not to eliminate Maurie White entirely and so that he may have a chance to go along with us, our arrangement permits of his playing one of his first-run downtown theatres day and date with these other theatres. He probably will not do so, but he is being given the opportunity.

"Maurie White will probably contact Bill Gehring and perhaps you and Mr. Skouras. Therefore, I am giving you this informantion so you will know our story.

"(Sgd) A. W. Smith, Jr."

With a carbon copy to Mr. W. C. Gehring.

THE CLERK:—Plaintiff's exhibit No. 55.

[297] (Copy of letter April 6, 1951 Smith to Lichtman, was marked Plaintiff's Exhibit No. 55.)

MR. ROME:—Mr. Raftery, may I call upon you for letters from Mr. R. E. Moon to Mr. A. W. Smith, Jr., dated April 6, 1951, regarding Cincinnati?

If the Court please, I offer in evidence as plaintiff's exhibit No. 56 copy of a letter on the stationery of Twentieth Century-Fox Film Corporation, office of R. E. Moon, Central Sales Manager, Chicago, Cincinnati, Cleveland, Detroit, Indianapolis, dated April 6, 1951 to Mr. A. W. Smith Jr., New York, New York.

"Dear Andy:

"We have arranged to sell our pictures first-run Cincinnati on a non-exclusive basis to the following theatres:—Twin Drive-In, Valley, Covedale, Covington. We hope to also include one run in the Oakley or Mariemount section of Cincinnati, one at Peebles Corners, the location of the RKO Paramount Theatre and a run downtown.

"We have sold fourteen pictures to the above four theatres, each to play a 7-day run in each theatre, one a week beginning April 25th. Schedule of the bookings and playdates is attached. We have granted a clearance of 21 days.

"The combined advertising budget of the four theatres listed is $650 per week and we have agreed to split [298] 50/50 over this budget. Terms are 7 days, 35% to a 66⅔% split. I understand that the above theatres propose to charge an adult admission price of 70 cents and that the admission at the Twin Drive-In Theatre will be 75 cents.

"I will arrange to have an exploitation man, probably Lee Siegel, cover each engagement, and it would certainly be wonderful if we can secure the services of Eddie Solomon right away to line things up and get it rolling.

"Joe Rosen did a great job in lining up these theatres on a first-run basis and it is his considered opinion that we should receive from $7,500 to $9,000 film rental on each picture played in these four theatres. Of course, if other theatres are added, then this figure will increase.

"Under this arrangements, we are assured of repre-

sentative terms and will, of course, have a steady flow of releases. We do not anticipate any difficulty marketing our pictures to the balance of the subsequent run possibilities in Cincinnati, with the possible exception of the White Circuit Theatres.

"The sale to the above theatres will include Shorts, News, and March of Time, on a first-run basis.

"Kindest regards.

"Very truly yours,

"(Sdg) Ray
"R. E. Moon."

With a copy to Mr. J. Rosen. There is attached, members of [299] the jury, a list of pictures and their dates.

THE CLERK:—Plaintiff's exhibit 56.

(Copy of letter, April 6, 1951, Moon to Smith, was marked Plaintiff's Exhibit No. 56.)

* * * * * * * *

[301] MR. ROSE:—If the court please, I want to offer in evidence, as plaintiff's exhibit No. 57, a copy of an Inter-Office correspondence or note on the stationery of Twentieth Century-Fox Film Corporation, dated April 13, 1951, to Mr. H. B. Johnson, from W. C. Gehring, reading as follows:

"Note the attached which Andy Smith wrote to Al Lichtman telling him of the decision we have made regarding the distribution of our pictures 1st run Cincinnati.

"Mr. Lichtman has asked me to have you give thought to the subject outlined in Mr. Smith's letter and advise me please if you find a legal problem involved.

"Will you please return the attachment."

MR. ROSE:—I think we can stipulate that the attachment indicated was a copy of the letter which has already been offered and read in evidence.

(Letter, April 13, 1951, W. C. Gehring to H. B. Johnson, was marked plaintiff's exhibit No. 57.)

MR. RAFTERY:—And Johnson is their lawyer.

MR. ROMM:—Johnson is a member of the legal staff of Twentieth Century-Fox.

I offer in evidence, as plaintiff's exhibit No. 58, a copy of a memo, dated April 16, 1951, signed "H. B. J.", [302] presumably Mr. Johnson, to Mr. W. C. Gehring. "RE: CINCINNATI.

"As requested, I have examined Mr. Smith's memo to Mr. Lichtman of April 6th, 1951. Speaking generally, I see no legal objection to the playing policy outlined therein. In fact, a departure from established playing arrangements made individually by a single distributor usually appears excellent evidence of absence of conspiracy or combination.

"There are two dangers to a radical change in policy of this type:

"1—Such a change is liable to prove so irritating to some exhibitors who liked the previous system better that he may bring an antitrust suit based upon some alleged past wrong.

"2—The existence of such a policy in Cincinnati will enable people to who would like to see a similar policy in some other town to use Cincinnati as a precedent against us.

"There are also at least two legal advantages to the proposed change in policy:

"1—There was considerable danger of litigation from the operator of the Twin Drive-In Theatre if that theatre were not afforded an opportunity to negotiate for first run pictures.

[303] "2—There was considerable danger of litigation on behalf of some of the subsequent run operators in Cincinnati who were claiming that the previous clearance given to first run was too long.

"It is my opinion, based on the correspondence I have seen relating to Cincinnati, that the change pro-

posed will lessen rather than increase the danger of anti-trust litigation against Twentieth Century-Fox in Cincinnati.

"H. B. J."

(Copy of memo. April 16, 1951, H. B. Johnson to W. C. Gehring, was marked Plaintiff's Exhibit No. 58.).

* * * * * * *

[312] MR. RAFTERY:—Mr. Rome has asked me to stipulate that on November 2, 1949, he sent the same letter to RKO Radio Pictures, that he read to the jury. I think you have read two or three of them, that you wrote all the companies about that time on behalf of Theatre Enterprises, Inc., and with the approval of Theatre Enterprises, Inc., a letter similar to Exhibit 50; and we will waive the necessity of his rereading to the jury the same story that he read several times before.

THE COURT:—Very well.

[313] MR. RAFTERY:—You are going to have it marked?

MR. ROME:—Yes. This is a copy of a letter from me to the RKO Radio Pictures Inc., written on behalf of Theatre Enterprises, Inc.

(Copy of letter, November 2, 1949, Edwin P. Rome to RKO Radio Pictures Inc., was marked Plaintiff's Exhibit No. 62.)

MR. ROME:—I should like to offer, as Plaintiff's Exhibit 63, a letter from RKO Radio Pictures Inc., New York City, on stationery of the Legal Department, the letter being dated November 23, 1949, addressed to me, "Re: Crest Theatre, Baltimore."

"Dear Mr. Rome:

"We have your letter of November 2nd. It is our view that in large cities such as Baltimore the most satisfactory method of exploiting and marketing our pictures is achieved by licensing their first-run exhibitions to theatres located in the downtown area.

"Our investigation of the Crest Theatre and its location does not disclose such exceptional circumstances as would make appropriate a modification or variance of our present policy for the benefit of that theatre. In our judgment the Crest Theatre, however glowingly described, is, in the final analysis, a neighborhood theatre. We have been furnishing pictures to the Crest Theatre on first [314] neighborhood run, which is the availability we consider appropriate to that theatre.

"Very truly yours,

"(Sgd) William Zimmerman"

(Letter, November 23, 1949, from William Zimmerman, of RKO Radio Pictures Inc., to Edwin P. Rome, was marked Plaintiff's Exhibit No. 63.)

[315] Mr. Rome:—Mr. Raftery, may I call upon you for a letter from Mr. Zimmerman to Mr. Seymour Simon, re Crest Theatre, Wichita, Kansas, dated April 17, 1950, and also a letter from Mr. Zimmerman to Mr. H. H. Hunt, concerning the Tower Theatre, Wichita, dated April 18, 1950?

Mr. Raftery:—I don't know whether we are getting far afield or not. We are across the Mississippi to Wichita, and I do not want to be captious about it. Mind you, this is one lawyer writing another lawyer.

Mr. Rome:—This is correspondence coming from the defendants themselves, sir, and designed, we believe, to show the jury and Your Honor, sir, the nationwide pattern of this situation, the intent, motive and knowledge of these defendants with regard to the situation when a theatre located outside of the downtown area calls for access to first-run product.

The Court:—Very well.

Mr. Raftery:—We have to find them first. What are the dates?

Mr. Rome:—April 17 and 18, 1950.

If the Court please, I offer in evidence as Plaintiff's

exhibit No. 64 a letter dated April 17, 1950, addressed to Mr. Seymour Simon, 29 South LaSalle Street, Chicago, Illinois, re Crest Theatre, Wichita, Kansas.

[316] "Dear Mr. Simon:

"As I explained to you, it is our view that in a city the size of Wichita our pictures are best marketed and their exhibition possibilities most fully realized if their first-run exhibition is confined to the theatres in the downtown area. We feel that the present playing position upon which our pictures are being exhibited in the Crest Theatre is appropriate for that neighborhood theatre.

"However, in an effort to avoid litigation between us, we have decided to afford your client's Crest Theatre and the competitive Tower Theatre an opportunity to obtain our pictures on an exclusive first-run in the City of Wichita, This opportunity is being afforded the Crest and Tower Theatres on an experimental basis and these theatres will be competing for our pictures first-run against the theatres in the downtown area.

"We, of course, reserve the right to discontinue this procedure if and when experience has, in our judgment, demonstrated that a discontinuance is desirable.

"Sincerely,

"(Sgd) William Zimmerman."

Carbon copies to Mochrie, Branson, Timberlake, Kolitz, Lewis, Loventhal.

MR. RAFFERAY:—Now, if Your Honor please, I move to strike from the record the remarks made by counsel before— [317] I did not raise the objection, but when we were dicussing this proposition he says "I am showing part of the national" something or other, where it says just the opposite, where they gave the neighborhood theatre the right to bid first-run to avoid litigation.

MR. ROME:—On the contrary, I believe that within the next few minutes I will be able to show the reason it was

done in Wichita, Kansas, which is because Fox Theatre owned a theatre and was discriminating as against the independents in that area.

MR. RAFFERTY:—Oh, no.

MR. ROME:—I submit, sir, that we are entitled to ask the jury to infer from that situation the fact these people do it in situations where they have their own theatres in a suburban area, that they have access to the product.

THE COURT:—Go ahead.

THE CLERK:—Plaintiff's exhibit No. 64.

(Copy of letter, April 17, 1950, Wm. Zimmerman to Seymour Simon, was marked Plaintiff's Exhibit No. 64.)

MR. ROME:—I offer in evidence as plaintiff's exhibit No. 65 a copy of a letter dated April 18, 1950, copy to Mochrie, Branson, Timberlake, Kolitz, Lewis, and Loventhal, to Mr. H. H. Hunt, Hunt & Chase Theatres, Cincinnati, Ohio, re Tower Theatre, Wichita, Kansas.

[318] "Dear Sir:

"With regard to your letter of January 4, 1950, it is our view that in a city the size of Wichita our pictures are best marketed and their exhibition possibilities most fully realized if their first-run exhibition is confined to the theatres in the downtown area. We feel that the present playing position upon which our pictures are being exhibited in the Tower Theater is appropriate for that neighborhood theatre.

"We have decided to afford you and the competitive Crest Theatre an opportunity to obtain our pictures on an exclusive first-run in the city of Wichita. This opportunity is being afforded the Tower and Crest Theatre on an experimental basis and your theatre will be competing for our pictures first run against the Crest Theatre and the theatres in the downtown area. We, of course, reserve the right to discontinue this procedure if and when

experience has, in our judgment, demonstrated that discontinuance is desirable.

"Very truly yours,

"RKO Radio Pictures, Inc.

"(Sgd) William Zimmerman"

THE CLERK:—Plaintiff's Exhibit No. 65.

(Copy of letter, April 18, 1950, Wm. Zimmerman to H. H. Hunt, was marked Plaintiff's Exhibit No. 65.)

MR. ROME:—Now, sir, I would like to offer in evidence as plaintiff's exhibit No. 66 a copy of a letter——

[319] MR. RAFTERY:—Is this the one you say refutes something, or is that the only one you put in?

If your Honor please, I now move to strike any exhibits—I am perfectly willing they stay in—the remarks made where Your Honor refused to strike the first remark. Now, the letter he puts in reaffirms exactly what is in the other letter. RKO opened its——

THE COURT:—Counsel, they are not marked in evidence.

MR. RAFTERY:—I know they are not, but he is consistently making statements that are absolutely misleading.

MR. ROME:—On the contrary, sir, I am attempting in answer to Mr. Rafterys' statement, to give to the Court the reasons we are introducing these letters, and I can only say that, sir, as each letter comes along in turn——

THE COURT:—Go ahead.

MR. ROME:—Thank you, sir.

I offer in evidence, sir, as plaintiff's exhibit No. 66 a copy of a letter dated December 13, 1948 addressed to Mr. Harry R. Hamburg, Kansas City branch office.

This, members of the jury, was a Paramount letter.

The letter concerned Tower Theatre, Wichita, Kansas.

"Dear Harry:

"I discussed with Mr. Smith by telephone on December 8, 1948, the request for an opportunity to negotiate

for a-day and date first-run against the Fox Boulevard Theatre [320] which was contained in Mr. Hunt's letter of December 4, 1948, a copy of which was received by us here in New York.

"Both Mr. Smith and myself have reached the conclusion that because we have licensed this run in the past from time to time in the Fox Boulevard Theatre, we could be accused of discriminating in favor of Fox, if we do not offer a comparable theatre the same opportunity.

"I am enclosing herewith draft of a letter which I suggest be sent over your signature to Mr. Hunt and which you will list such pictures as have not already been licensed for exhibition first-run in Wichita and which have been trade-shown.

"You will send a similar letter to Fox Midwest leaving out the introductory matter in the draft of the letter to Mr. Hunt and merely state that a request has been received from the operator of the Tower Theatre to negotiate competitively for this run and that we are offering them an opportunity to submit offers in respect to the same pictures.

"You will also, of course, want to indicate in the letter which you send to both exhibitors the final date which you will set for the receipt of offers in respect to any of the pitcures which they may desire to exhibit. You will affix this date also on a self-addressed, envelope to be enclosed with each letter and the answers will be retained after their receipt until the dates given as the [321] final date, at which time they will be opened and considered.

"Kindest personal regards.

"Very truly yours,

"(Sgd) Richard P. Morgan."

With carbon copies marked going to Messrs. G. A. Smith and H. Wirthwein.

"P.S. Since dictating this letter several days ago, a re-reading of it indicates to me that the first paragraph

on page 2 of the draft of the letter to Mr. Hunt should, of course, be left out on the copy which you send to Fox Midwest. As a matter of fact, the paragraph is probably misplaced and should be the concluding paragraph in the letter.

"If you have any questions in regard to the procedure in handling this matter, I suggest you call me."

Will you stipulate, Mr. Raftery, that Richard P. Morgan, who sent this letter, was a member of the legal staff of Paramount?

MR. RAFTERY:—Yes, he was a lawyer for Paramount at that time, surely.

MR. ROME:—There is attached, members of the jury, to Mr. Morgan's letter to Mr. Hamburg, a draft of a letter being addressed to Mr. Herman H. Hunt, offering him the opportunity to bid for Paramount pictures on an experimental [322] basis.

THE CLERK:—Plaintiff's exhibit 66.

(Copy of letter, December 13, 1948, Richard P. Morgan to Harry R. Hamburg, was marked Plaintiff's Exhibit No. 66.)

MR. ROME:—With the permission of the Court, I would like to read to the jury, if I may, sir, the answer of Fox to plaintiff's interrogatory No. 7, the interrogatory being a request for the reasons why Fox refuses to license pictures on first-run to the Crest Theatre.

The answer of Twentieth Century-Fox Corporation to that question, members of the jury, was as follows:

"For over 20 years Twentieth Century-Fox Film Corporation and its predecessor in name, Fox Film Corporation, has licensed most of its pictures on first run in the City of Baltimore to the New theatre, operated by an independent exhibitor named Morris A. Mechanic. The New theatre is located in downtown Baltimore in the heart of the business and amusement section of the city. Its drawing power is not limited geographically to a definite neig-

borhood, but extends over the entire city of Baltimore and nearby towns.

"For over 20 years the New theatre has been known as the home of Twentieth Century-Fox pictures. Mr. Mechanic operates only the New theatre as a first run theatre. He is not affiliated with any circuit of theatres or any booking and buying combine.

[323] "For many years Twentieth Century-Fox Corporation has had in the New theatre virtually an exclusive first run show case for its pictures in Baltimore. In fact, Mr. Mechanic operates the New theatre exclusively on Twentieth Century-Fox pictures. In the New theatre, Twentieth Century-Fox Film Corporation has the finest show case for its pictures in Baltimore. Twentieth Century-Fox pictures of high quality are always given preferred playing time at the New theatre and receive long runs. This is possible because of the fact that Mr. Mechanic operates exclusively as an exhibitor of Twentieth Century-Fox pictures. Mr. Mechanic exploits the pictures to the fullest extent.

"Since a substantial part of the revenue of Twentieth Century-Fox Film Corporation in the City of Baltimore is derived from the first run exhibition of its pictures, it is of the utmost importance that first run pictures receive the longest possible playing time with the greatest possible exploitation. A long playing time and proper exploitation not only rebounds to the benefit of Twentieth Century-Fox Film Corporation on the first run exhibition but also in the subsequent run exhibitions. Word-of-mouth advertising by those who have seen a first run picture at a downtown theatre is of incalculable value when a picture is shown on subsequent runs.

"A neighborhood theatre such as the Crest, catering [324] to its own neighborhood and in intense competition with other nearby theatres, could not hope to exhibit a picture as long as the New theatre. Some pictures are exhibited at the New for four or five weeks and most are exhibited for two or three weeks. The revenue to be de-

rived from a first run exhibition at a subsequent run theatre such as the Crest, could not compare with what would be received from exhibition at the New theatre. A neighborhood theatre does not and can not have the matinee patronage that a downtown theatre has.

"Plaintiff's request to license Twentieth Century-Fox pictures on first run was given careful consideration by this defendant. The decision not to license the Crest theatre on first run in Baltimore was based upon the experience of the Company and the experience of its sales personnel. That decision was arrived at independently and without consultation with any other defendant in this action. It is the opinion of Twentieth Century-Fox Film Corporation that the decision is based upon sound business reasons. Plaintiff's allegation that Twentieth Century-Fox Corporation refused to license its pictures to the Crest theatre on first run because of a conspiracy among the defendants is not true."

Q. (By Mr. Rome):—Now, Mr. Myerberg, in the answer of Twentieth Century-Fox Film Corporation it is stated that the Crest Theatre could not hope to exhibit a picture as long as the New Theatre, that pictures are exhibited at the New [325] for four or five weeks and most are exhibited for two or three weeks.

Did you have any discussions with representatives of Fox or any other company with regard to the length of time you would be able to play a picture first-run in the Crest Theatre?

A. Yes, and I think in my letter of October 12, 1948 they requested me to send to them, I outlined the fact that the picture cannot be pulled or taken out until the gross of that picture had reached a gross that would be mutually agreed upon. In plain words, if we set the figure at $7,000 or $8,000 or $6,000, before we could take a picture out, that we should agree with them what that figure should be.

Q. And the picture would play until the gross received at the box office had reached that figure; is that correct?

A. That is correct. As long as it was more than that figure, we continued to play. And we continued to explain to them further that although we had expenses for a second-run theatre that were prohibitive for a second-run theatre, as a first-run theatre our standing expenses were such that we could play a picture for a much longer period than downtown, because we did not need as much gross to break even.

Q. What was the actual operating expense per week of your theatre, Mr. Myerberg?

A. Under a first-run policy we had a projected statement [326] at that time of around $2,400 or $2,500 a week without film.

Q. Without having to pay film rental for the pictures as shown in your theatre?

A. Yes, sir.

Q. And what did your operating expenses prove to be when you ran your theatre on the first subsequent run policy?

A. Between $1,800 and $1,900.

Q. Per week?

A. Per week, without film.

Q. The Fox answer, Mr. Myerberg, also refers to the fact that a neighborhood theatre cannot and does not have the matinee patronage that a downtown theatre has. What has been the experience of the Crest Theatre with regard to that question of matinee patronage?

A. Well, we do not claim any great matinee patronage for the Crest Theatre. We agree that the matinee downtown patronage would be greater than the Crest patronage. Nighttime patronage of the Crest Theatre would be considerably greater than the downtown theatres, and that is the time when you get the most money out of your box office. That is when the receipts would be greater.

You go back to drive-in theatres in Cincinnati, and those theatres only operate after it gets dark, they have no matinees at all.

MR. RAFTERY:—I presume this is being received only [327] as an opinion of this witness and not as evidence.

THE COURT:—Yes, he is giving evidence. Do you know that to be a fact?

THE WITNESS:—Yes, sir.

Q. (By MR. ROME):—Is it known in the industry, Mr. Myerberg, that a drive-in theatre only operates in hours of darkness?

MR. RAFTERY:—That is a point we all know, whether we are in industry or not.

THE WITNESS:—Yes, sir.

Q. (By MR. ROME):—Mr. Myerberg, what is generally considered to be the best movie day of the movie week?

A. Sunday.

Q. And what is the experience in the industry with regard to matinee patronage on Sundays?

A. Very good.

Q. What is generally considered to be the worst week in the movie year?

A. I would say the week before Christmas.

Q. Is there any reason generally accepted in the motion picture business for that?

A. Yes, although there is a tremendous number of people downtown, they are all, of course, in a buying mood and not many going to theatres.

Q. Mr. Myerberg, can you please identify what this [328] large map represents?

A. I cannot see it very well from here.

Q. With the Court's permission, I will have you come over here.

A. This map represents the relative position of the Crest Theatre to the downtown first-run theatres in the center of the city. It also represents a one mile radius and the population within this one mile radius. It also represents the areas I described before, from Gwynn's Falls Parkway to Druid Park Drive and Roland Avenue to the county line and out in the county to comprise the section

we think the Crest Theatre draws from. And it would be in substance competitive to any theatre in that area.

We have shown those theatres in that area to which we are in substantial competition.

Now, in the downtown area there is located the Stanley, Mayfair, Century, and on top of the Century is the Valencia. We have the Town and Hippodrome and Parkway Theatre on North Avenue. In the first mile of population surrounding those theatres we have 117,311 people. In the second mile radius, but only between the first and the second mile, there is a total of 307,020 people. In the third mile radius between the second and the third mile, there are 228,401 people, giving a total population in the three-mile radius from these downtown theatres of 600 and some odd [329] thousand, I think it is 622,000 people. It shows the relative position of that 3-mile radius, that that does not come within our area, that we are not in substantial competition.

Q. What theatres are shown to be in the area of the Crest Theatre?

A. Yes. In the area of the Crest Theatre we have the Pimlico, the Uptown, the Avalon, the Gwynn, the Ambassador, the Forest, and on this map we do not have the county, so we do not have the Pike's Theatre in Pikesville.

Q. How far away is the Pimlico Theatre and the Uptown Theatre from the Crest?

A. Approximately one mile.

Q. And the Avalon Theatre from the Crest?

A. Approximately one and one-half miles.

Q. How far is the Crest from the Ambassador?

A. About a mile and three quarters.

Q. And the Gwynn is directly across the street from the Ambassador?

A. Directly across the street from the Ambassador.

Q. And the Forest Theatre from the Crest is how far?

A. About two and one-quarter miles.

Q. On the first subsequent run of product that you

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have been playing in the Crest Theatre, Mr. Myerberg, what theatres have been playing day and date?

[330] A. Playing day and date with the Uptown, with the Avalon, and the Ambassador, and sometimes the Forest.

Q. That was because the distributor companies believed you were not in substantial competition with those theatres; is that correct?

A. Yes, sir; but that will show up better from this map here (indicating).

Q. On the other hand, the companies took the view, did they, that you were in substantial competition with the theatres located downtown?

A. Yes, sir.

Q. How far away are you from the nearest downtown theatre at the Crest?

A. Very close to six miles from the Stanley Theatre to the Crest, the closest theatre.

* * * * * * *

[334] Q. (By Mr. Rome):—Mr. Myerberg, what is this smaller map which has been placed on the stand?

A. This is to show the mile radius of the Crest Theatre, using the Crest Theatre as the point of radius, and showing a one-mile radius from the Crest Theatre in our drawing area. It also shows, in the corner, a 3-mile circle from the center of the city relative to the position that has to the outside perimeter of our draw and our area. It shows the new units built in the area from 1949, 1950, and 1951, it shows the approximate increase in the city population during 1950 and 1951, and it shows the county population of 1950 and 1951 and also the increase in the county new housing units built in the county area.

Q. When you refer to new units built in the area, [335] you mean new housing units?

A. New housing units.

Q. How are they shown on this map?

A. They are shown on the map, in the city, with the blue areas. In the county, this was information from the Bureau of Buildings in Baltimore City, and in the county they did not have the exact locations of the different new developments. They had the number in each district; and we have placed that in the district indiscriminately. We did not have the exact locations.

Q. Each one of these blue marks noted on the map refers to how many units of housing?

A. Twenty or more, 20 up to 3 or 4 or 5 hundred.

Q. And you do not show on this map the number of new housing units that have gone up, in which there are fewer than 20 houses?

A. No, sir; we haven't taken into consideration, at all, single-family units, single houses built by private people, or houses built by any contractor that was under 20 in number.

Q. What does the yellow line indicate on the map?

A. This is the city boundary line.

Q. What is found to be the population in the area drawn upon by the Crest Theatre, as you have described it?

A. About 125,000 people.

[336] Q. As of what date is that, Mr. Myerberg?

A. That would be as of 1951.

Q. Have you any knowledge of the number of people who lived in that area, at the earlier date, 1948 and 1949, when your theatre was first built and opened?

A. Yes; we have taken the number of new units built in the area in 1949, 1950 and 1951, and taken what is conceded by everyone to be 3.6 people per housing unit in Baltimore, and we have used that in this area of Baltimore, and we have used that, multiplying the number of units, and we come to the fact that the population has an increase of about 10,000. That is only supposed to be approximate; that is not supposed to be exact.

Q. What do your figures reveal with regard to the amount of new housing that has gone up in that area; what has been the extent of that new housing?

A. In the city, in 1949, there were 372 new units in the city area, in here.

Q. In the city area encompassed within the area drawn upon by the Crest Theatre?

A. That is right. And in 1950 we had 605 new housing units, and in 1951, 846. Now, in the county, in 1949, we had 947 in the different areas, in the different circles of population drawn on by the Crest Theatre. In 1950, we had 1,765 in this area located outside of the city of [337] Baltimore, and in 1951, 1,152, giving us a total in population increase, or population in this area here, of 22,604.

Q. And, each time you used the word "units", you are speaking in terms of housing projects of 20 or more houses?

A. Yes, sir.

Q. What theatres are shown on this map, Mr. Myerberg, with reference to the Crest Theatre?

A. We have the Crest Theatre here, and here is the Pimlico, the Uptown, and the Avalon; over here, the Forest, and Ambassador, and Gwynn, and the Pike.

Q. And how far out do you consider that the Crest Theatre draws for its patronage into the county area?

A. We go out into the fourth district, to Reisterstown, to Reisterstown, located out there, in which there is a small theatre, I think, some three or four hundred seats.

Q. How many miles away is that from the Crest?

A. About 10 miles.

Q. Is there any reason why you consider that the Crest draws from as far away as 10 miles out into the county?

A. Yes. There is no other theatre there, other than at Pikesville, which is in competition with the Uptown or Crest.

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[340] Mr. Rome:—If the Court please, I would like now, if I may, to read to the jury the Answer of Loew's [341] Incorporated, to Plaintiff's Interrogatory No. 7, which asks Loew's why it was that the company refused to license first-run pictures to the Crest Theatre.

This answer, Members of the Jury, from Loew's Incorporated, to that question, is as follows:

"It is the policy of Loew's Incorporated not to license its feature motion pictures for first run exhibition in any city on a day and date basis in a downtown theatre and in a suburban theatre. It is also the policy of Loew's Incorporated to have the first run exhibitions of its feature motion pictures in a city of the size and importance of Baltimore take place in a downtown first run theatre.

"It is the opinion of Loew's Incorporated that neither the Crest Theatre nor any other suburban theatre in Baltimore would be an adequate exclusive first run outlet for any feature motion picture distributed by Loew's Incorporated and that such a first run exhibition of any of its feature motion pictures in any suburban theatre in Baltimore would return much less first run film revenue than would be derived from its first run exhibition in any adequate downtown first run theatre.

"It is the opinion of Loew's Incorporated that either an exclusive or a day and date first run exhibition of any of its feature motion pictures in any suburban [342] theatre in Baltimore would seriously impair the full license revenue which Loew's Incorporated otherwise would obtain from the subsequent run exhibitions of that picture in Baltimore and in the surrounding area.

"Loew's Incorporated indirectly owns 50 percent of the capital stock of Century-Parkway Corporation which operates Loew's Century Theatre and Loew's Valencia Theatre as first run theatres in Baltimore, Maryland. Marcus Loew Booking Agency, Inc., a subsidiary of Loew's, Incorporated, does the buying and booking of

pictures for Loew's Century and Loew's Valencia Theatres and performs other managerial functions for those theatres. Loew's Incorporated regularly exhibits its own feature motion pictures on first run in its own theatre in any city in which it operates a first run theatre.

"It is the opinion of Loews' Incorporated that Loew's Century Theatre, because of its location, seating capacity and other physical characteristics, and management, is the best first run outlet in Baltimore for Loew's feature motion pictures.

"It is the opinion of Loew's Incorporated that Loew's Century Theatre and Loew's Valencia Theatre each is in direct and substantial competition with every other theatre in Baltimore and in the surrounding area, including the plaintiff's Crest Theatre, and that any theatre in [343] Baltimore exhibiting a feature motion picture on its first run in Baltimore is entitled to clearance over every other theatre in the city and in the surrounding area.

"Even if Loew's Incorporated were willing to license any of its feature motion pictures for an exclusive first run exhibition in a suburban theatre in Baltimore, it is the opinion of Loew's Incorporated that the location and grossing possibility of the Crest Theatre are not such as to entitle it to preference as such a first run outlet over various other suburban theatres in Baltimore and over the downtown first run theatres in Baltimore and that therefore it would be discriminatory and unfair to license the plaintiff for such a first run exhibition in its Crest Theatre except on a competitive bidding basis as between the Crest Theatre and other suburban theatres in Baltimore as well as the downtown first run theatres in Baltimore.

"Even if Loew's Incorporated were willing to license any of its feature motion pictures for a day and date first run exhibition in a suburban theatre in Baltimore, it is the opinion of Loews' Incorporated that the location and the grossing possibilities of the Crest Theatre are

not such as to entitle it to preference as such a first run outlet over various other suburban theatres in Baltimore and that therefore it would be discriminatory and [344] unfair to license the plaintiff for such a first run exhibition in its Crest Theatre except on a competitive bidding basis as between the Crest Theatre and other suburban theatres in Baltimore.

"For the aforesaid reasons Loew's Incorporated is not willing to license any of its feature motion pictures to the plaintiff for its first run exhibition in Baltimore at the Crest Theatre as demanded by the plaintiff."

Q. (By Mr. Rome):—Mr. Myerberg, during the first 12 months of its operations on the first subsequent run policy what was the gross earned by the Crest Theatre?

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[345] The Witness:—$122,000.

The Court:—For what period?

Mr. Raftery:—Twelve months.

Q. (By Mr. Rome):—That was actually the box office admissions received by the Crest Theatre during that period?

A. Yes; without any miscellaneous income in it.

Q. Do you know, Mr. Myerberg, what film rental was paid by the Crest Theatre to the distributor companies on that gross admission?

A. Around $45,000.

Q. Has it ever been your thought, Mr. Myerberg, or did you ever request Loew's Incorporated, that you should have an exclusive first-run in your theatre, to the exclusion of any other so-called fine suburban theatres, as described in Loew's answer to the Interrogatory?

A. No, sir.

Q. Have you at all times been willing that other suburban theatres in the city of Baltimore should have equal access to first-run product in the city of Baltimore?

A. Yes, sir.

• • • • • • •

[353] Q. (By Mr. Rome):—Mr. Myerberg, with regard to the Metro pictures, distributed by Loew's Incorporated, you have already testified that you were not able to get access to first-run pictures from Loew's Incorporated either on an exclusive basis or a day and date basis in Baltimore. Is that correct?

A. Yes, sir.

Q. On what basis were you finally able to license pictures from Loew's Incorporated?

A. On the first subsequent run basis.

* * * * * * *

[387] Q. One of the reasons that was given to you why the Crest Theatre could not have access to first-run product, either on an exclusive or day and date basis, with downtown, was that your theatre was in substantial competition with the downtown theatres; is that correct, Mr. Myerberg?

[388] A. That was one of the reasons given. The other reasons uniformly given to me was the fact that that was the national policy, that they absolutely would not play these pictures in theatres located out of the downtown area; that they had done it, and I pointed out a few exceptions to the contrary; but those were exceptions to the general rule, and that is their policy, and you could not get it from anybody.

Q. Do you consider your theatre in substantial competition with the first-run theatres located in the downtown area of the city?

A. No, sir.

Q. Why not?

A. Because of distance, mostly. As I stated before, we are between 5½ and 6 miles from the closest downtown theatre.

Another explanation for that, we have gone into this fact rather thoroughly from the time before me built the theatre up to the present time, continuously trying to analyze the situation, and we have come up with one thing,

the fact that the largest grossing theatre downtown is the Century Theatre. Now, on an average—these are averages—on an average, the Century Theatre, as close as we can come to it—and I believe that is fairly close—plays to approximately 20,000 people a week. That means 20,000 [389] paid admissions a week. In Baltimore and Greater Baltimore, the population is 1,300,000, or thereabouts. We take out of that population approximately 275,000 colored people, which gives the Century the possibility of draw from a high of 1,025,000 people, in round figures. Their 20,000 represents two percent of the entire population of the city of Baltimore, and that is the largest grossing house in the city of Baltimore.

Suppose 2 percent that came from our area, or let's say, put it at 50 percent more, that 3 percent came from our area, certainly, that is not substantial competition.

Q. Now, there are how many people located in the area from which the Crest Theatre draws?

A. 125,000.

Q. In your opinion, as a result of your experience in the motion picture industry, is a population of 125,000 people sufficient to support a first-run theatre?

A. More than sufficient.

Q. Is there anything on which you base that?

A. Using the same figures, we would only have to play to approximately 15 percent of our population to almost equal the number of people that go to the Century Theatre. That is 15 percent of our population. And may I add here, that population, with the exception of a couple thousand, is all white.

[390] Q. How do you compare your theatre with the downtown theatres, in so far as suitability for first-run is concerned, Mr. Myerberg?

A. Well, we are a newer theatre, with newer, as I described before, ideas in motion picture design. We have a greater comfort in the seating of the theatre, because of the fact, as I have explained before, the staggered seats

and the spaces between the seats, where your knees are not in contact with the seat in front of you, if you are sitting in an upright posture, of course. The fact of our free parking lot, the fact of our television lounge, and then, although the Stanley and the Century, and probably Keith's, are larger than our theatre, we still have ample size for first-run pictures, or to exhibit first-run pictures, and return a considerable return to ourselves and to the distributors, as great, if not greater than downtown theatres.

Q. Does any theatre located downtown offer free parking facilities to its patrons?

A. Not to my knowledge; no, sir.

Q. What about the suitability of your theatre with regard to its equipment, projection equipment?

A. We have the finest projection equipment that is possible to buy, projection and sound. I might add something; the suitability of the theatre is borne out in another respect. We grossed, in the first 12 months of our [391] operation, over $122,000. That does not include any candy concession business, or any miscellaneous income. That is actual box office receipts. In the year 1950, we claim close to equalling the gross of the Hippodrome and Town Theatres.

Mr. Raftery:—That is objected to.

The Court:—What did you say, sir?

Mr. Raftery:—He said he came close to grossing with his theatre what the Hippodrome and Town Theatres grossed. There is no evidence of this, regarding what the Hippodrome or Town Theatres gross, and he has not even testified to what he grossed.

Mr. Rome:—On the contrary, Mr. Myerberg has testified to what the gross of his theatre was.

The Court:—If the witness claims he knows, I will let him testify to the comparative figures.

Mr. Raftery:—He said, in the first 12 months he grossed $122,000, and then it was from February, 1949,

to February 25, 1950. Now, he has volunteered the statement that in the year 1950, without telling us what he grossed in 1950, he grossed almost as much as the Hippodrome Theatre, a downtown theatre run by somebody else, and the Town Theatre, run by somebody else. No evidence in this record——

THE COURT:—He has not been asked for the figures. I assume you will ask him.

[392] MR. RAFTERY:—How can he testify to what somebody else grossed?

THE COURT:—He might if he had the information.

MR. RAFTERY:—Where would he get it?

THE COURT:—From them, I suppose.

MR. RAFTERY:—Pure hearsay.

MR. ROME:—Mr. Raftery forgets the fact that in interrogatories in this case, these distributor companies, the defendants, have furnished figures concerning film rental received by them from the downtown first-run theatres, and the gross receipts reported by those theatres to them.

THE COURT:—I will allow it.

MR. RAFTERY:—If that is what he is testifying from, it is different.

Q. (By MR. ROME):—On what do you base the statement, Mr. Myerberg, with regard to the gross that has been earned at the Crest Theatre and its comparison with the grosses earned at the downtown theatres?

A. In the interrogatories that were asked of the distributors during the pretrial examination of this case, which figures you made available to me, I can go even further than that, Mr. Rome. If we would project—I said almost grossed as much. I would say we would have out-grossed them, and I can prove that, without the shadow of a doubt. [393] We played an admission price——

MR. RAFTERY:—I submit that is a voluntary statement of what he thinks he could do.

THE WITNESS:—This is not what I think I could do.

THE COURT:—Go ahead.

THE WITNESS:—We grossed $122,000. The accounting year, normally, for a theatre, if not using the calendar year, is from September to September. What accounting Mr. Rappaport or any other exhibitor, or Warner Bros., or Loew's Incorporated, use, I don't know; but that was the usually accepted method in the business.

My receipts show on a fiscal year basis through February of one year and through February of the next year. I gave the 1950 of the Hippodrome and Town Theatres, because I assume it was from September, 1949 to September, 1950, which closely resembled, or resembled more closely, the period of time that I was trying to compare in my own theatre. If you wish, we can examine the 1950-51 in the same light.

But, to go back to the fact that we charged an admission price at the time of 40 cents, including tax, which gave us 33 cents net, the Town and the Hippodrome—I think the Hippodrome charged 70 cents, although I am not positive. But give them 65 cents, which is 54 cents net, which is 14 cents per admission more than I charged, [394] which would be 42 percent or 43 percent more. If you take that 43 percent and add it to our $122,000 of actual gross you would come up with a greater amount of gross even though we were playing on a day and date policy, with a theatre a mile away; or suppose we had a run in our own area, not of this sort of run, but with clearance over the other theatres; certainly we could have grossed considerably more than that. But, as Mr. Raftery has said, that is mere speculation. We would have grossed more if we projected the admission price which we would have charged. We would have charged downtown prices if we had day and date with downtown. That comes to a figure greater than the gross of the Town or the Hippodrome Theatre for that year.

MR. RAFTERY:—I move to strike out his answer. It is pure speculation, not based upon any figures or books or records of either the Hippodrome or the Town; and it is entirely hearsay on the part of this witness.

THE COURT:—He used admission tabulations.

MR. RAFTERY:—No; we haven't any admission tabulation. I just looked up the record.

THE COURT:—He has given it in his testimony. He spoke hypothetically of figures, but he matched them with figures, or he has used the figure he said he would have charged. [395] I will allow it.

MR. RAFTERY:—An exception, if Your Honor please.

Q. (By MR. ROME):—If you had had access to first-run pictures; how many pictures a year would be needed for the operation of the Crest Theatre?

MR. RAFTERY:—That is objected to. How would he know?

THE COURT:—I did not hear that.

MR. ROME:—I asked how many pictures would be needed by the Crest Theatre if it were to have access to first-run product. Mr. Raftery has said he wonders how he knows. I think the witness' answer will amply demonstrate it.

THE COURT:—That is a good deal more speculative, because it will depend upon the character of the picture, what the public thought of it, how much it had been advertised, the appeal it had emotionally and in every other way, whether a reproduction of a famous play; there are many, many factors which would enter into it.

MR. ROME:—It would range within certain limits.

THE COURT:—I will allow the witness to give the general estimate. I think, as the operator of the theatre, he is entitled to that.

THE WITNESS:—As you have said, Your Honor, it is very true it depends upon the excellence of the picture.

THE COURT:—Not always on the excellence, but [396] notoriety,—doesn't it?

THE WITNESS:—Quite frequently. I would say anywhere between 25 or 35 to 52 pictures a year. I cannot play any more than 52, because the policy would be on a week basis. The number less than 52 would depend solely

upon the box-office value of the picture. It may be anywhere from 25 to 52.

Q. (By Mr. Rome):—If your theatre were to play first run pictures, how many more prints of film would that make necessary to be furnished to the City of Baltimore?

A. One, if my theatre played first run, if there is only one print being played downtown.

Q. How many theatres a day in Baltimore play the first subsequent run on the same date?

A. Between 22 and 30, depending upon the picture.

Q. Meaning, as you have testified, each one of those theatres means a print of the picture?

A. Yes. That would be anywhere, let us say, from 22 to 30 prints of the picture, simultaneously.

Q. What clearance would you ask for the Crest Theatre if it were to have access to first run pictures?

A. The same clearance as downtown now enjoys,—with the exception of the Parkway situation—and I believe that that clearance could be lowered as time went on.

Q. There has been some statement made that you were [397] attacking the system of run and clearance. Are you leveling any attack against the system of run and clearance?

Mr. Watkins:—He agreed with the clearance and run.

Mr. Rome:—I will withdraw the question and put it in this way:

Q. (By Mr. Rome):—Are you making any attack on the system of run and clearance in the City of Baltimore?

A. No; runs and clearances, basically, are all right; but they are not all right when they set a definite pattern whereby nobody can come in and nobody can change it, or where people are completely excluded from doing business.

Q. Would the granting of first run product to your

Crest Theatre hurt in any way the downtown first run theatres?

A. No, sir.

Q. Why not?

A. For the first I outlined before, that the largest grossing theatre downtown would only be within 3 percent competition. Assume it is 3 percent; they would not draw more than 3 percent from our area. That is not substantial competition. With plently of people in our area, we would do more than that. I think this bears out what Mr. Lichtman said in his article that has been introduced here, that there is a great loss of motion picture revenue from [398] people who are the lost audience of the motion pictures. It is not the many other things they talked about; it is this lost motion-picture audience. And that is caused by the rigid control of the first run pictures in the downtown area, making it inconvenient, and sometimes impossible, to go downtown to see them, instead of bringing them out where people can see them conveniently.

Q. Would the granting of first run product to the Crest Theatre hurt the other theatres that are located in the immediate neighborhood of the Crest Theatre?

A. Theatres playing subsequent to the Crest Theatre would be helped. They would be helped because of the large advertising that we would do in the area that would bring the picture to the attention of more people in our area, and its attributes, and also by word of mouth of a larger number of people in our area who saw the picture. That can only help it; it can't hurt it.

Q. Would the granting of first run product to the Crest Theatre have any effect on the public, in your opinion?

A. It would be much more convenient for the public; and I think we would get back into the theatre a great number of the audience that has been lost,—where it would not be necessary for them to make a journey down-

town through the traffic and then try to find a parking place, if they could, at expense. They could come to the theatre and [399] park in our free parking area. And, also, it is more convenient for them, because they do not have to drive through the congested traffic in the congested area.

Q. What you have just said with regard to the convenience it would be to the public from playing first run at the Crest Theatre would be equally true of any other theatre located outside of the downtown area of the city, that is, which had access to first run product?

A. Yes, as long as they have the parking facilities and everything necessary.

Q. The two defendant companies that own theatres downtown are Warner and Loew's. Do any of the other distributing companies which are defendants in this action own any theatres, to your knowledge, Mr. Myerberg?

A. No, sir.

Q. In Baltimore?

A. In Baltimore, no, sir. They own them throughout the country. They own many theatres, and it goes into the thousands throughout the country,—the Big Five.

MR. RAFTERY:—I object. The question was: do any of these defendants other than Warner and Loew's own theatres in Baltimore. The witness says "no".

Q. (By MR. ROME):—Do any of the defendants own theatres anywhere apart from Baltimore?

MR. RAFTERY:—I object. We are trying the [400] Baltimore case. Why go off on side issues?

MR. ROME:—On the contrary, sir, it goes to the very vital issue.

THE COURT:—I will allow it.

THE WITNESS:—Yes, sir, they do. They own thousands of theatres throughout the country.

Q. (By MR. ROME):—What defendants do own theatres?

A. Those known as the Big Five: Loew's Incorporated, Warner Bros., Paramount, RKO——

Q. You mentioned Loew's, Warner Bros., Paramount and RKO. The other one is Fox, isn't it?

A. That is correct; it is Fox.

* * * * * * *

[408] MR. ROME:—Members of the jury, Loew's Incorporated answered certain supplemental interrogatories, one of which inquired as follows:

"State year by year the total income received by the Loew's Century Theatre during the years 1948, 1949 and 1950, excluding admission taxes."

Answer by Loew's Incorporated:

"For the year 1948, $572,014.28; for the year 1949, $497,317.33; for the year 1950, $452,036.96."

Interrogatory number 10, members of the jury, inquired as follows:

"State year by year the total income received by the Loew's Valencia Theatre during the years 1948, 1949 and 1950, excluding admissions taxes."

Answer:

"For the year 1948, $136,836.77; for the year 1949, $125,457.00; for the year 1950, $118,505.84."

A similar interrogatory, members of the jury, was [409] addressed to Warner Brother Circuit Management Corporation as to the Stanley Theatre, and it was answered in the following manner as to the Stanley Theatre:

"For the fiscal year ending August 28, 1948, boxoffice receipts of $498,378.17; miscellaneous income for that period of time is shown as $6,192.50; for the fiscal year ending August 27, 1949, boxoffice receipts of $398,046.59, with miscellaneous income being shown as $6,174.61; for the fiscal year ending August 26, 1950, boxoffice receipts reported as $362,083.17, with miscellaneous income being shown as $7,947.40."

A similar interrogatory was addressed to Twentieth Century-Fox Film Corporation, which answered as follows:

"This interrogatory requests the total amount of admissions paid to each of the theatres to which Twentieth Century-Fox Film Corporation licenses its pictures on first-run, in volume, for the years 1948, 1949 and 1950. Twentieth Century-Fox Film Corporation does not keep records which would enable it to give 'the total amount of admissions' paid to each theatre to which it licenses its pictures on first-run in Baltimore during that period. It does, however, have the boxoffice receipts reported by the exhibitor on pictures licensed on a participation or a percentage basis. The information reported by the exhibitor, it is presumed, does not include admission taxes. Set out below are the [410] total boxoffice receipts for the pictures licensed first-run in Baltimore for the years 1948, 1949 and 1950, for which the requested information is available.

"On most pictures which were licensed on a flat rental basis, Twentieth Century-Fox Corporation has no information as to the boxoffice receipts. Occasionally boxoffice receipts were reported for flat pictures. Where an exhibitor submitted such a report the receipts are included below :

"As to the year 1948 the total boxoffice receipts reported for the New Theatre, $403,012.14. For the Mayfair Theatre $9,293.35; for the year 1949 for the New Theatre, $359,469.66; for the Mayfair Theatre, $27,268.91; for the Valencia Theatre—"just a statement—" 'flat rental of one picture.' For the year 1950 the total boxoffice receipts of the New Theatre reported as $287,651.36; for the Mayfair Theatre, $5,536.20; Keith's Theatre, $5,166.84; the Little Theatre, $910.48; the Hippodrome Theatre is reported as having one picture at a flat rental basis, no figures being given."

A similar interrogatory was addressed to RKO Radio Pictures, Incorporated, which answered as follows:

"The following list for the seasons 1947 and 1948, for 1948 and 1949, and for 1949 and 1950, indicates the admissions paid to each of the theatres listed in answer to Interrogatory 1—"that is those theatres to which they licensed first-run pictures in Baltimore"—while a film distributed by RKO Radio Pictures, Inc., was being exhibited in the indicated theatre. This list is limited to films licensed on percentage terms. This amount indicated does not include admission taxes.

"For the Hippodrome Theatre for the season 1947-1948, a total amount of admissions $177,633.97; for the season 1948-1949 as to the Hippodrome Theatre, $23,371.72; for the season 1949-1950, $97,981.60; for the Town Theatre for the season 1947-1948, total amount of admissions, $253,173.25; for the season 1948-1949, $224,264.00; for the season 1949-1950 $124,035.93."

Again a similar interrogatory being addressed to Paramount Film Distributing Corporation, which was answered in the following manner:

"The total gross receipts received on the first-run exhibtion of pictures distributed by this defendant or an affiliated or predecessor company at each of the theatres named in the answer to Interrogatory No. 1 for each of the years 1948, 1949 and 1950, were as follows:

For the year 1948 as to the Keith Theatre, $227,280.60; for the year 1949 as to the Keith Theatre, $123,356.32; for the year 1950 as to the Keith Theatre, $130,122.00; for the year 1948 as to the Stanley Theatre, $61,501.40; for the year 1949 as to the Stanley Theatre, $65,143.74; for the year 1950 as to the Stanley Theatre, [412] $104,338.68; as to the Mayfair Theatre in the year 1948, $43,749.75; in the year 1949 as to the Mayfair Theatre, $18,935.66; and in the year 1950, $23,318.25."

There was reported for the year 1950 at the Little Theatre, total gross receipts of $13,096.00. This added that the amount set forth in the sub-division "A" which I have just read, does not include admission taxes.

A similar interrogatory having been addressed to Columbia Pictures Corporation, it was answered as follows:

"The gross admission receipts exclusive of admission taxes reported to have been received from theatres, from exhibition in Baltimore on first-run of such of this defendant's motion picture features from which film rentals were computed as a whole or in part of gross receipts were as follows:

"For the Hippodrome Theatre for the season 1948-1949, $109,328.00; for the year 1949-1950, $144,563.00; for the season 1950-1951, $22,567.00; for the Town Theatre, the season 1948-1949, $43,024.00; for the season 1949-1950, $36,401.00; for the season 1950-1951, $75,501.00; for the Mayfair Theatre for the season 1949-1950, $1,799.00; for the season 1950-1951, $11,745.00; for the Little Theatre for the season 1949-1950, $3,838.58; for the season 1950-1951, $1,292.00."

* * * * * * *

[419] MR. ROME:—I offer that in evidence, sir, as plaintiff's exhibit No. 90, a report headed: "Statement of operations Theatre Enterprises, Incorporated, for the period February 26, 1949 to February 28, 1950.

* * * * * * *

[421] MR. ROME:—For the period February 26, 1949, to
[422] February 28, 1950, there is shown as income:

| | | |
|---|---|---|
| Box Office Admissions.... | $122,796.86 | |
| Income from Concessions. | 5,239.49 | |
| Miscellaneous Income .... | 283.72 | $128,320.07 |

There is shown or reported as expenses:

| | | |
|---|---|---|
| Film Costs | $45,859.21 | |
| Freight and Express | 589.47 | |
| Stage Attractions | 440.00 | |
| Payroll | 29,919.68 | |
| Rent | 33,000.00 | |
| Repairs | 27.17 | |
| Taxes and Licenses | 2,055.16 | |
| Depreciation | 178.96 | |
| Advertising | 11,753.44 | |
| Dues and Subscriptions | 751.00 | |
| Entertainment | 662.76 | |
| Heat, Light, Power and Water | 6,709.04 | |
| Insurance | 1,264.18 | |
| Miscellaneous Operating Expense & Supplies | 3,997.63 | |
| Service Charges — Equipment | 864.86 | |
| Traveling Expenses | 290.00 | |
| Telephone and Telegraph | 751.39 | |
| Other Expenses | 1,610.64 | $140,733.59 |

[423] Showing a loss of $12,413.52.

Mr. Raftery:—For what period was that?

Mr. Rome:—February 26, 1949, to February 28, 1950.

Mr. Raftery:—The first full year?

Mr. Rome:—That is right, sir.

(Statement of Operations, Theatre Enterprises, Inc., February 26, 1949 to February 28, 1950, was marked Plaintiff's Exhibit No. 90.)

Q. (By Mr. Rome):—Mr. Myerberg, did Theatre Enterprises, Incorporated, pay any executive salaries to any of its officers or directors?

A. No, sir. Those salaries are only the operating salaries in that statement, as I understand, the salaries of the manager, ushers, clearners, and so forth.

Q. There is an item there shown as income from concessions. What has that reference to?

A. That represents the candy stand, the drink stand, and so forth, in the theatre.

Q. There is shown expenses of $440 for stage attractions. What has that reference to?

A. We were running a little kiddie show on Saturday morning, and that represents the cost to take care of that, for that period of time. It was a children's amateur stage show.

[424] Q. There is shown an item of $33,000 for rent. What does that represent?

A. That was the rent Theatre Enterprises was to pay Pem Construction Company for the theatre, the lease on the theatre.

Q. There is shown an item of $11,753.44 for advertising. If you were to have access to first-run pictures, would your advertising expense go up in any way?

A. Yes; that would increase five or six hundred dollars a week.

Q. There is shown here an item of $6,709.04 for heat, light, power and water. It has been testified that the Crest Theatre is part of the Hill Top Shopping Center. Did any of those items have reference to any of the shops which are part of the center?

A. It only has reference to the two or three stores that are located in the theatre building and are served by the heating plant of the theatre. However, during that period of time covered by this statement, the stores were unoccupied and the entire amount is attributable to the theatre.

Q. You have already testified, Mr. Myerberg, but will you please give it again, what your weekly operating expenses for the Crest Theatre on this present basis come to?

A. For that period?

[425] Q. Yes.

A. Somewhere between $1,800 and $1,900 per week, without film.

Q. Would those operating expenses on a weekly basis be affected in any way if you were to have access to first-run pictures at the Crest Theatre?

A. The only substantial way that would be affected would be through the increased advertising, and perhaps a few more ushers to handle the crowds that would come.

Q. Is there any other way in which your operating expenses would be affected up or down?

A. No, sir.

Q. Despite the amount of gross admissions taken in at the box office, has it been a fact that the Crest Theatre has actually operated at a loss from the period of its opening?

A. Yes, sir.

Q. Some statement has been made byMr. Raftery concerning the fact that the Hill Top Shopping Center was not a planned shopping center, as is the Edmondson Village. What is your statement with regard to that, Mr. Myerberg? Was it a planned center?

A. I don't know what Mr. Raftery meant by a shopping center, but the shopping center was a completely planned shopping center. It is true, it is not as large as [426] Edmondson Village, and it is a different design than Edmondson Village; but it is our impression that the planned shopping center covers the outward appearance of the buildings, all of the brick, the front trim, the granite that is used in it, the design of the canopy—it is all designed, it was all designed, at one time, as a planned shopping center, along with the parking areas, and so forth. I don't know what Mr. Raftery meant, as I said before, because the thing was planned by an architect, my brother Julius, who was the architect, at one time to be built as a planned shopping center.

Q. Now, the statement has also been made by Mr. Raftery that Baltimore, in so far as its first-run motion pictures are concerned, is an illustration of the greatest

competition in the motion picture industry that one might possibly be able to find. Has it been the fact that there has been the greatest competition in the first-run field in the city of Baltimore?

A. There is great competition for the patronage of each theatre, but there has been no competition whatever between the distributors to license pictures between the theatres.

Q. Will you explain that a bit more?

A. Well, it has been the policy for the New Theatre always to have Fox pictures, except what we call slough [427] pictures, a very second-grade picture, has always gone into the New Theatre for a period of 20 years, as I testified before. The Hippodrome and Town have always had Columbia and RKO, and it seems incredible, but at the same time, they will not give a picture to another theatre where they would have gotten more rentals, as exemplified by the fact that some theatres gross more than others, and it seems the distributors, if there was competition between distributors to go into certain theatres, that they would have sent their pictures into the theatres where they would have got the greatest return; but that has been the practice along that line for 20 years, that I know of.

Q. Has there been any change in the personnel of the branch offices in Washington during the period of time that the Crest Theatre opened?

A. Yes; there has been considerable change.

Q. What changes have come about, to your knowledge, with regard to any of these companies?

A. Well, Mr. Benson is no longer with Paramount. Mr. Isaacs is there. Some of the salesmen that had been with some of the other companies are now with different compaines. Do you want me to list them? I can list them.

Q. Have there been any changes in the position of branch manager, with the exception of Mr. Benson being replaced by Mr. Isaacs?

[428] A. Mr. Martin changed to Philadelphia and, unfortunately, subsequently died. Mr. Biersdorf is no longer with Warner Bros. Mr. Rosen has come in to replace Mr. Norris with Fox, and Mr. Norris has moved out. Mr. Minsky, who was then division manager at that time for Fox, is now with Paramount. Mr. Lichtman, who was going a little higher, he was with Metro at one time, and, I think, president of the United Artists at one time, or some executive, is now general sales manager of Fox.

Q. Despite all the changes in the personnel in Washington, has there ever been a visit made to your theatre, to your knowledge, or any investigation made of the situation, as to the Crest Theatre in Baltimore by any of the new people who have come in to replace the outgoing personnel in those Washintgon offices?

A. There may have been, but not to my knowledge.

Q. No one ever came, that you know of?

A. No.

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*Cross Examination.*

[498] A. Well, yes, it has a greater potential draw, but evidently it does not draw it because people will not come downtown, and I may further pursue that, Mr. Raftery, and I do not mean to go far from this. Fox Film, as far as a loss to the theatre is concerned, Fox Film has another picture coming up, DIPLOMATIC COURIER, I think. You are familiar with it.

Q. I am not.

A. Tyrone Power. Anytime Fox Film wants an offer on that picture to play day and date exclusive in the City of Baltimore, I will give them a $15,000 certified check, to be put up within 24 hours, either to play that picture day and date downtown or exclusive in the City of Baltimore.

Q. Can you tell this Court and jury the date that Mr. Rome on your behalf made the $35,000 offer to Paramount how much money the plaintiff in this case had in the bank?

A. Very little, in the Theatre Enterprises, but we were willing, as our communication called, to send them a [498] certified check in the amount of $35,000 if they accepted our bid.

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[518] Q. Now, don't you know as a man of some experience in the business, that the usual and the normal manner of showing a picture in any city is to show it on a first run basis in the downtown area?

A. That is the uniform way that the distributors use to completely control and dominate the first run situation in this country, yes, sir, I know that.

Q. You know that?

A. Yes, sir.

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[521] THE WITNESS:—May I say something that will clear this up? I think I said a number of times the thing I am objecting to is the elimination of the possibility of any independent exhibitor receiving access to first run pictures located outside of the downtown area of any city. I said of any city, including Baltimore.

THE COURT:—Well, I understood that is what you said in your testimony the past few days.

THE WITNESS:—Yes, sir, I said that.

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[534] Q. You knew that each of these eight distributor defendants licensed their pictures to this group of theatres in the manner you have described, with 21 days clearance over all theatres located in and around Baltimore City?

A. Yes, sir.

Q. And that had been, as you put it, the custom for many years?

A. That is correct.

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[687] THE COURT:—After all, as I see this case, it is not going to rest upon what kind of shopping center there is there. It is going to turn upon the population within a reasonable radius of this theatre, and the people that live there, and move to and from there, and are likely to frequent this place, either on foot, bus, or in their own automobiles; and it seems to me that the store situation, while it is an attraction, is purely a secondary attraction, if you have sufficient density of population. I am not excluding this, but I am just trying to warn you against giving it a classical designation to all of the [688] shopping centers of Baltimore.

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WILLIAM ZIMMERMAN sworn: * * *

[715] Q. Were you at that time familiar with the way in which your product was licensed in Baltimore City?

A. I was generally familiar with the manner in which we licensed our pictures in Baltimore, yes.

Q. And what was that general manner?

A. Well, we had been licensing our pictures for first run in Baltimore, I think over 20 years, to Mr. Rappaport who owned the Hippodrome Theatre, and I think who at that time had recently completed, maybe a year or two before, the Town Theatre.

Q. Was Mr. Rappaport a satisfactory or unsatisfactory customer?

A. Well, I think that letter that Mr. Brecheen sent me accompanying the letter of Mr. Myerberg illustrates it pretty amply. I think in that letter Mr. Brecheen points out that we have a very, very satisfactory customer in Mr. Rappaport. That was no news to us at the home office.

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*Cross Examination.*

[746] Q. Yesterday, under questioning by Mr. Watkins, you said that RKO Radio Pictures, Inc., does not own any

theatres. That is not so, however, with other corporations within the family of the RKO corporations. They own a great many theatres. Isn't that the fact?

A. Well, the fact is this: that prior to December 31, 1950, there was a holding company called Radio Keith Orpheum Corporation, which owned all of the stock of the RKO Radio Pictures, Incorporated. It also owned all of the stock of RKO Theatres, but there was a complete divorcement and disaffiliation in December, on December 31, 1950.

Q. A divorcement stemming from the Paramount case; is that correct?

A. Yes.

Q. And this holding company, which was the holding company of RKO Radio Pictures, Inc., was also the parent company of a corporation which owned the theatres; isn't that so?

A. Yes.

Q. And the corporation which owned the theatres, one [747] of your affiliated companies, owned theatres all over the country; isn't that the fact?

A. Yes. When you say "all over the country", I do not want you to give the impression that we had many hundreds of theatres. Actually, over the country, I would say, in possibly 20 large cities throughout the United States, RKO Theatres would own a theatre.

Q. How many theatres were actually owned by that corporation within the RKO family?

A. I would say there are in the RKO theatre group, roughly, somewhere between 100 and 110. I am not familiar with the RKO theatres now, because RKO Pictures, Inc., have nothing to do with those theatres.

Q. Since this divorcement?

A. For at least two years now.

Q. How many large cities did you say there were in which the RKO Theatre Corporation had theatres?

A. Well, now, I am not an expert on RKO theatre locations.

Q. But, roughly.

A. I gave it at 20. And I said to myself, I wondered whether I am accurate. I can tell they operate in, San Francisco is one, Los Angeles is one, Chicago, Washington, Boston, New York.

Q. And, in those cities that you have in mind, the [748] theatres owned by the RKO Theatre Corporation are located in the downtown area of those cities; isn't that so?

A. By and large, that is correct.

Q. And those are the theatres that have played first-run RKO Radio pictures?

A. Not necessarily, because in many of those cities we have competitive bidding. In fact, in quite a few of them, we have opposition to the RKO theatres bidding against RKO for the product.

Q. That would be only since 1950, though?

A. As a matter of fact, prior to 1950. We even put the bidding in in 1949.

Q. But, prior to 1949, the RKO theatres were playing the product not only of RKO, but of all companies that are distributor-defendants in this action; isn't that so?

A. No; I don't think that is so. As a matter of fact, in most of the large cities, Mr. Rome, RKO would have the product of RKO Radio Pictures, this is prior to 1949, as I say, in many instances, they have competitive bidding; but let's go back prior to 1949. RKO theatres had a product of RKO and possibly one other distributor, you see.

Q. The other members of the so-called Big Five of the industry, Fox, Paramount, Loew's and Warners, and also, to your knowledge, owned theatres in many sections of the [749] country?

A. Yes, sir; they did.

Q. And you are thoroughly familiar with the fact that those companies and the other companies that are defendants in this action are engaged in various phases of the motion picture business, aren't you?

A. Yes. Of course, you mean the Metro distributes pictures, and the Loew's Theatres exhibit pictures,—sure.

Q. The only reason I raise that, Mr. Zimmerman, is due to the fact that the answer that has been filed by RKO in this very suit professes to have no knowledge or information as to the business of these other distributor companies, and I want to establish the fact that this is known to your company?

A. Right. If you mean, as a matter of common knowledge, we in the industry would know that. Of course, I know it. What our lawyers do, as a technical matter, is something else. That is technical pleading, I understand.

Q. Who is the Mr. Mochrie you referred to as being the gentleman you were going to discuss the Crest situation with?

A. Robert Mochrie is our vice-president in charge of domestic distribution.

Q. Is that position comparable to the position referred to as general sales manager?

[750] A. That is right.

Q. Has Mr. Mochrie always been with your company?

A. Mr. Mochrie has been with our company, to my knowledge, since 1939.

Q. Prior to that time, was he with any of the other companies?

A. Yes; prior to that time he was for some period with United Artists, and some period with Warner's, and some period, I think, with FBO, or one of the small producing distributor companies. I don't remember just exactly which. It is back in the twenties.

Q. In the capacity of the sales department, generally speaking; isn't that so?

A. Yes; he was branch manager. He was district manager, and he was division manager.

Q. Always in the sales office?

A. Always in distribution.

Q. And, before he became the person in charge of the domestic distribution for RKO, who had been the sales manager, or the person occupying that same position with RKO?

A. I think his predecessor was Andy Smith.

Q. That is the same Andy Smith who subsequently became the general sales manager of Twentieth Century-Fox?

A. Yes. Now, he is no longer connected with Fox; [751] that is right.

Q. To your knowledge, Mr. Smith was also at one time associated with Warner Bros. in a distribution capacity, wasn't he?

A. Yes; he was.

Q. And the Mr. Goldwyn, whom you referred to, who produces pictures distributed by your company, at one time was one of the important personages having to do with United Artists, wasn't he?

A. I think he was an owner of some of the stock of United Artists by reason of the fact that he produces pictures for them to distribute.

Q. When you say an important phase of the duties of RKO Pictures, Incorporated, is to distribute the pictures of independent producers, you refer to Mr. Disney and Mr. Goldwyn and Mr. Lesser. How many pictures a year are produced by Mr. Disney, usually; that is, feature pictures?

A. I would say he produces about two a year.

Q. About two a year. How about Mr. Goldwyn; how many pictures, feature pictures, does he generally produce a year?

A. I would say he produces about one a year; but there isn't any magic in numbers. It is a question of the importance of the pictures.

[752] Q. I readily appreciate that.

A. Goldwyn releases a very important picture, a picture which might gross over $5,000,000. Now, that is as important as a half-dozen pictures, or ten pictures, that each produce a half-million dollars.

Q. There is no question about that, Mr. Zimmerman, but, actually, as far as the number of pictures which are

distributed by RKO, it is a fact, isn't it, that the greater number of its pictures are produced by RKO, itself?

A. Yes; but I would say this: I havn't mentioned other independent producers. If we were to list our roster of pictures a third are put out by independent producers.

Q. You know, do you not, who the general sales managers, or the persons in charge of distribution of the other distributor companies, are?

A. Yes; I know them. I know them personally, and I know who they are.

Q. You see them frequently?

A. I wouldn't say I see them frequently, but I see them from time to time, of course.

Q. You have mentioned the fact that you are thoroughly acquainted with the business these other companies are in. That is a fact, is it not?

A. When I say "thoroughly acquainted", I know the [753] business they are in. When you say "thoroughly acquainted", you don't mean the details of their operation? I don't.

Q. You do know however the group of eight companies, the eight distributing companies that are here in this action, produce and distribute by far the greater number of important feature motion pictures in the United States, do they not?

A. They do; and I think they would like to produce even more of them.

Q. I am sure they would.

A. I know we would.

Q. You have referred to the fact that RKO had 32 autonomous branches in various sections of the country. That is also true of the other distributors in this action, generally speaking, is it not?

A. Yes; when you talk about autonomous, to be an autonomy depends on the confidence which the top executives have in a particular branch manager or district manager. Some require more surveillance. The Washington

Branch Manager, for example, Mr. Brecheen, is one of our top branch managers, and he has pretty much carte blanche in a great many matters.

Q. That is not entirely so with regard to all phases of his activity, is it? You have referred to the fact that [754] there are district and division managers over the branch managers?

A. Yes.

Q. And, actually, Mr. Brecheen refers matters to New York for decision?

A. Yes; there is an irreducible hard core of supervision. I am just talking about the degree of supervision.

Q. It is equally true, is it not, that branch managers from as far away as Los Angeles, when a problem comes along regarding a theatre seeking access to first-run pictures, must necessarily submit that to New York?

A. Yes; they submit it to Mr. Walter Branson and myself.

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[756] Q. Do you know whether or not the branch manager or division manager who interested himself in the Baltimore situation ever sought to license RKO pictures to any theatres in Baltimore for first-run, other than the Town and Hippodrome Theatres?

A. I frankly don't know that. I know that, of course, we have competitive bidding first-run in Baltimore, because other exhibitors have indicated an interest. Other large exhibitors have indicated an interest in our product first-run; we give them that opportunity. I would say, the reason we did not license the others is that we did not get any request from anybody else for first-run.

[757] Q. As of what time did other exhibitors begin to express interest in your product?

A. This winter.

Q. Just this winter?

A. Yes.

Q. Now, did your own company ever interest itself in seeking to obtain other outlets for first run in Baltimore?

A. Well, now, the only way I can answer it is this: From a business point of view we have Mr. Rappaport, who is a man who has two good theatres. He has the New Theatre, the Town Theatre and the large Hippodrome Theatre. He is an excellent show man. He is a man whom we have enjoyed very good relations with for 20 years. He shows a great interest in RKO pictures. He works very closely with us over the years, and has spent a great deal of money in advertising, in setting up the first run of our pictures, because he realizes the importance of first run to obtain maximum revenue throughout the area. He is one of our best customers in the United States.

Now, I don't think good business requires us to look around for somebody else.

Q. Has there ever been an occasion over these years, Mr. Zimmerman, in which RKO had some particular picture for which it was seeking a large theatre, or, perhaps a theatre that had the potential of returning a greater amount of gross [758] than was being returned by the Town or the Hippodrome Theatres?

A. As far as large theatres are concerned, Mr. Rome, I think the Hippodrome has about 2,250 seats, which is a pretty large theatre, plus the fact that there isn't any real virtue or magic in size. That may be offset, you know, in part by additional playing time. In any event, my point is, the Hippodrome is large enough for the City of Baltimore. When Baltimore was able to support longer runs, Mr. Rappaport went to greater expense to himself and built that Town to give even better representation to our pictures.

So, here was a man who was supporting us on every picture—let us assume this Hippodrome case, but I am talking from a business point of view, let us assume we have a top picture, a picture in which he can make a lot

of money. He supports us on the A-minus pictures. I do not think it would be loyal for us to look for someone else, when he has supported us so well over the years.

Q. He was a thoroughly satisfactory customer to RKO?

A. Oh, an excellent customer, one of the best.

Q. So far as the problem of seating, which you raised, a theatre of 1,600 seats, so far as size is concerned, is completely suitable as a first run theatre, is it not?

A. I would say a theatre of 1,600 seats would be perfectly suitable, as far as seating capacity was concerned.

Q. Are you undertaking to say with regard to the [759] satisfactory nature of your customer relationship with Mr. Rappaport, that that would be sufficient in itself to prevent your product going to any other exhibitor with a suitable theatre to first run product from RKO?

A. I am not saying that. Now, our policy is this: That regardless of how satisfactory our customer relationships are, we think that in order to comply with apparent current legal requirements, if there is a downtown theatre which is a representative outlet, which asks for an opportunity to get our pictures regardless of how satisfactory Mr. Rappaport is, we have some kind of a legal compulsion, no matter how distasteful it is. And it is distasteful for us to leave a very satisfactory customer, and we nevertheless put the pictures up for competitive bidding. That is what we are doing now in Baltimore first run, Mr. Rome.

Q. So that as long as the theatre is suitable, it would have, as you describe it, the right to have access, perhaps, under competitive bidding to your product?

A. Suitable, of course, is a conclusion from a variety of factors. Location would be one, and so forth.

Q. Now, let us take this specific example. Suppose the Crest Theatre was located in the downtown area of Baltimore. Would it have right to have access?

A. Yes.

Q. It would have right to have access to RKO pictures [760] on first run in the City of Baltimore?

A. It would be offered a competitive opportunity.

Q. So, if I understand you and follow you, it is only by reason of the fact that it is located outside of the downtown area that it has been denied that right of access to RKO pictures?

A. I think that is a fair statement of the reason for our decision.

Q. And that would be true as to any theatre located outside of the downtown area, no matter how fine it might be?

A. That is correct. I mean it is true of any theatre in Baltimore. It is true of any theatre located outside of the downtown area.

Q. Is not that true also with regard to other cities in the country?

A. Yes, generally true with respect to other cities, depending on circumstances. Now, when you mean cities, we have permitted in Wichita, Kansas, where the—as I think I explained yesterday—well, it was a smaller city, 150,000, it was not an important key city, you were not running too much of a penalty on subsequent run in depreciating the value of the picture. There you could afford to take a chance, and we did permit bidding, a competitive opportunity, in the neighborhood house to obtain first run in Wichita, Kansas.

[761] Q. Is it not true, however, that there is more likelihood of a city of greater number of people being able to support day and date first run than a smaller community?

A. Well, fortunately that is so, but on the other hand, let us take New York City. It is a very interesting thing that we have never gotten, and there is some big neighborhood theatres in the Bronx.

THE COURT:—I cannot hear you.

THE WITNESS:—I am sorry. I was saying in New

York City, which is our largest city, we have never received a request from a neighborhood house for an opportunity to play first run day and date with Broadway.

What you say is true, and we do have very large neighborhood houses in New York City and you would think throughout the years you at least would have had one request.

Q. (By Mr. Rome):—And your thought is the larger the City, the less possibility there is for you to undertake experiments?

A. No. That is not my thought. Frankly, I do not know, because we have not experimented in the large cities. But that is not the consideration with respect to a large city. What I have said with respect to a large city is as follows: That in a large city such as Baltimore, where you have a downtown area, which is your important shopping area, where you have your entertainment and where you have a very [762] large number of subsequent run theatres, the success of your exhibition in these subsequent run theatres depends in part upon the exploitation value and the success of your first run.

It also applies to the surrounding area, the exhibition in the theatres in the surrounding area. There, if you play your picture in the neighborhood house, in the mind of the public, in the mind of the exhibitors, it is a "B" picture, it is a small picture, it is an unsuccessful picture.

So, instead of getting top terms from exhibitors on subsequent runs, you get low rentals, low percentages.

Now, the penalty for experimenting in a large city, of putting your picture in a neighborhood house, is so great that we see no reason why we should do it, especially because we think the methods that we have of first run downtown and subsequent runs is a perfectly proper, good, sound marketing method, which gives the public the opportunity of going to the theatre downtown, they can see the picture earlier downtown at a higher admission price. If they want to wait—and there is nothing wrong

in waiting—and they want to see it in a neighborhood theatre at their convenience and at lower admission prices, they can do so. If they want to wait still further, they can do that, and see it at a subsequent run theatre in the neighborhood at still lower [763] admission prices. It seems to me it is not only for the convenience of the public, but we obtain maximum revenue.

We see no reason in the world why we should alter that satisfactory marketing system we have, for Mr. Myerberg.

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[769] Q. It is a fact generally recognized in the industry, is it not, if a theatre moves up its availability, places pictures earlier, generally speaking its gross would increase?

A. Generally speaking, yes.

Q. And if a theatre were to have access to first run product as distinct to product on the later availability, that same generalization would hold true, would it not?

A. Yes, but you have to look at the particular cases. I just had an experience with the situation in a town in northern New York where the exhibitor was given the opportunity for first run pictures, and after he had them for a while he found he could make more money oporating second run. That is not rare. So that the particular facts determine the answer to that question.

Q. Yes, I agree. But is it not generally true that a greater amount of gross, a greater amount of gross will be earned by a theatre playing first run pictures?

A. Yes, it certainly is true.

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[772] Q. You have stated if a picture opens first run in a so-called neighborhood house it is necessarily tagged as a "B" picture. Is not that the necessary result of the fact that as a result of the activities of your company and the other distributor companies, the public has never had

an opportunity to see a first run picture in such a suburban or neighborhood theatre?

A. Well, I would say that is only—I do not know which comes first, the chicken or the egg. I do not know whether the reason is because the picture companies have only put or licensed neighborhood houses with "B" pictures first run or it is because the neighborhood theatres being unimportant theatres, there is no reason to put an important picture in there. When I say "unimportant," I mean unimportant from a point of view of drawing, from the city, to support the first run in that theatre.

Q. Well, how you are able to reach that conclusion, Mr. [773] Zimmerman, if as you have stated to be the fact, you have never experimented in a large city in the United States?

A. Now, let me just say this: This obligation to experiment, I have always wondered how valid that obligation is. In other words, if we have a perfectly satisfactory business way of marketing our pictures, what compulsion is there upon us to abandon this tried and true method, and in a large city experiment with another method with a costly, expensive picture, which would result in the loss of a substantial amount of revenue to us and the only one at the same time that it would satisfy would be Mr. Myerberg.

Q. Now, is it not a fact, Mr. Zimmerman, that one of the reasons why your company and these other companies before us in this action have time and again been found guilty of conspiracy to violate the anti-trust laws, is the fact that you have not experimented?

Mr. Watkins:—I will object to it as having no relevance in law or in fact to this situation.

The Court:—I will allow it.

The Witness:—If we have been found guilty we must have been found guilty of conspiring.

Q. (By Mr. Rome):—Is one of the reasons you have been found guilty of conspiring to violate the anti-trust laws is your unwillingness to experiment?

A. I do not know. We are getting in a legal argument [774] here.

I just want to say this: I think if there is any merit in what you have said, it is only because we have failed to experiment when it was to our business interest to do so. Now, I say to you here it would not be to our business interest to do so. That is what I have been saying this morning and yesterday afternoon.

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[776] Q. (By Mr. Boggs):—Mr. Zimmerman, is it not a fact the net result of the position that has been taken by yourself here and your company, as well as the position that has been taken by the other defendants, is that in effect a fence is placed around the downtown area of Baltimore as well as these other large cities which you speak of with the result that no theatre located outside of that fence, outside of that area, can have access to first run pictures?

A. I do not know if there is a fence. I do not know about the policies of any of the other companies and I am not interested. I am only interested in the policy of RKO, that policy which will give it maximum revenue. Now, I will say this, that the effect of our decision naturally is to confine our first run exhibition of our pictures in the downtown area where it belongs, if that is what you mean.

[777] Q. You said you are not interested in the policies of the other companies and do not know anything about them.

A. I do not say I do not know about them. I do not care about them. All you have to do is look at the newspapers. You can see where Warner's play W, X and Z pictures.

Q. And those are downtown areas?

A. Yes, sir, they are.

Q. Have you ever seen the Crest Theatre?

A. No, I have not.

Q. Has Mr. Mochrie ever seen the Crest Theatre?

A. No, he has not.

Q. Has any New York executive ever seen the Crest Theatre?

A. No. We thought it much more important for the local representatives who know the territory and know the competitive factors, to inspect and make recommendations than to have Mr. Mochrie or myself take flying trips here to Baltimore and make some kind of a decision. And, of course, Mr. Brecheen and Mr. Folliard, both of them, made a thorough inspection of the Crest Theatre and the surrounding territory before we made our decision.

Q. But it was neither Mr. Brecheen nor Mr. Folliard who actually made the decision?

A. But they made the recommendations. In other words, it was their evaluation that there was very substantial [778] competitive conditions between downtown playing first run and the Crest Theatre territory.

Q. You would have known that before, would you not?

A. I would say I would know it generally, but obviously we want to be as thorough as possible.

Q. Is it not necessarily true that so long as there is only one theatre in a city like Baltimore playing your product first run, that it must draw from all the areas of the city where people want to see first run pictures?

A. Yes, of course.

Q. So that there is nothing unusual about the fact that Mr. Brecheen should have told you that the Crest Theatre would be in competition with downtown because it draws from that area?

A. Mr. Myerberg described this very unique character of the Crest territory. He indicated that there was an enormous shift of population, almost like the center of gravity of Baltimore had shifted. I was very interested to

see if there was in effect a new downtown area being created, a second city in Baltimore. If there was that very unique and special situation, of course we might reconsider our decision. Actually, Mr. Brecheen and Mr. Folliard went there and said it was a very nice area, a perfectly nice community, period. But it is a neighborhood area.

[779] Q. Do you know what the population of the area around the Crest Theatre is?

A. Do I now know? I heard in court some statement as to what the population was.

Q. Did you know what the population was at the time RKO made its decision?

A. As I remember, I asked the figures they had in mind. I certainly was not impressed, and my recollection was it was under a hundred thousand, very substantially.

Q. Who was it that gave you the figure that was under a hundred thousand?

A. Either Mr. Brecheen or Mr. Folliard.

Q. It has been testified, as you now know, Mr. Zimmerman, that the population in the area around the Crest Theatre was, at the time in 1948 when the Crest Theatre was being built, just about a hundred thousand, or 105,000.

Mr. Watkins:—That was the area defined by Mr. Myerberg.

Mr. Romm:—I take it that is what we are talking about.

The Witness:—I don't know that. I was talking about the immediate area of the Crest Theatre. I cannot tell you as defined by Mr. Myerberg, because he did not define it for me.

[780] Q. (By Mr. Romm):—In your opinion, is a population of 100,000 people enough to support a first-run theatre?

A. I cannot answer that.

The Court:—I think we are just going over the same thing in a little different way. The witness has

already answered and given you his views on that. You are just asking it in a little different fashion.

MR. ROME:—I will not pursue that, if I have the answer to that one question.

THE WITNESS:—The only way to answer that, is in relation to downtown. In other words, it has no meaning if the hundred thousand is part of the population of a city that is served by downtown deluxe theatres for first-run.

Q. (By MR. ROME):—Which, of the Town, or Hippodrome Theatres, do you consider to be your better outlet in the city of Baltimore?

A. Better outlets? I don't know. I think it depends on the type of picture. I imagine that a picture like FLYING LEATHERNECKS, a big Technicolor picture, drawing from all classes, probably the Hippodrome. If you are talking more of a class picture, I imagine the Town Theatre would be more appropriate. It depends on what picture you are licensing.

Q. You recall, do you not, Mr. Zimmerman, that Mr. [781] Brecheen informed you that in his opinion the Crest Theatre was comparable to the Town Theatre?

A. Yes; I remember that, he said it was a fine theatre, comparable to the Town Theatre, but he said it is a suburban house. I remember the end of that sentence.

Q. Do you know what kind of gross has been earned at the Town Theatre, or at the Hippodrome Theatre, in downtown Baltimore, during the years '48, '49 and '50?

A. I told you about JOAN OF ARC. I don't know what the gross is. I think the Baltimore film rental varies anywhere from 5,000 or 10,000. Around in that figure; I think Mr. Brecheen will be in a better position to tell you the actual figures for 1949.

Q. According to the information furnished us by your company and the other companies in interrogatories, Mr. Zimmerman, it is shown that the Hippodrome Theatre, during the season 1948-49, grossed $132,699, and it has

been shown that the Town Theatre during that period of time grossed $267,288. Now, in your opinion, is a gross of $132,000 the kind of gross that you expect from one of your showcase theatres?

A. Very disappointing; but these grosses were down everywhere.

Q. Are you familiar with the total gross earned by the Crest Theatre on subsequent-run, playing pictures at [782] an admission price which was 57 percent lower than downtown?

A. No; I am not familiar. The only figures I ever saw were the comparative figures that showed that the Uptown grosses more, put more money in the box office, than the Crest.

Q. Would it have any effect on your decision, if it is now brought to your attention that the Crest Theatre, when playing a subsequent-run policy, day and date with theatres which you have described as being in substantial competition, grossed $122,000?

A. No; it wouldn't. I tell you what we might do: if we found that the Hippodrome was an unsatisfactory outlet, we would look for another downtown outlet. We would not put it in a neighborhood house.

Q. Despite the Crest Theatre at subsequent-run admission prices grossed $122,000?

A. Of course. I am sorry, I thought you were through.

Q. And, despite the fact that even with the Crest Theatre, if it had played at first-run admission prices, without taking any single additional patron, would have grossed approximately $200,000, your position would be the same?

A. That is a hypothetical case I would like to [783] answer. I think there is one thing here that has not been brought out; that is, that there is an apparent assumption that people will pay first-run prices, first-run downtown admission prices, to see a picture at neighborhood thea-

tres, I am not at all sure they will,—plus the fact that, acutally, if we give you a first-run, I assume here, are you talking of day and date with downtown, or just exclusive?

Q. Either way.

A. Certainly, if you gave it day and date with downtown, we can see no reason to discriminate in your favor. There are many neighborhood first-run theatres, in which event we would probably have to set up six or seven or ten or twelve neighborhood theatres first-run. We have grave doubts as to whether people in those neighborhoods, for the privilege of seeing a picture a week or two earlier, the same picture, will consistently pay first-run downtown prices.

Q. But, again, you don't feel certain, because you have never experimented with it?

A. No. But I can answer, assuming they would.

Q. You are not attempting to suggest that Mr. Myerberg ever suggested to you that he wanted first-run for his theatre, to the exclusion of any other theatre in the so-called suburban section of Baltimore?

[784] A. We didn't know quite that, but he certainly didn't say, "Mr. Zimmerman, I want you to understand that if you give this to me, I don't want you to discriminate against any other theatre, and you can make the pictures available for them." He did not say that.

Q. That would necessarily follow, in your own mind, wouldn't it?

A. It wouldn't necessarily follow, in my mind, if he didn't say it. If I was deciding the way he wanted,—what I would do is something else; what I would have in my mind is that I wanted to be fair, wanted to treat everybody fairly.

Q. You said that the rentals from your downtown theatres might vary from five to ten thousand dollars?

A. I took a guess. I really don't know.

Q. You don't know?

A. I don't know what the figures are. The figures speak for themselves. You must have them.

Q. May I say, then, that according to the figures which your own company has furnished, which was during the season 1947-48, the average rental earned by your company per picture from the Hippodrome Theatre was $2,028?

Mr. Watkins:—You are dividing the total by 52. You are making an average?

Mr. Rome:—No, no. I am taking the ten pictures [785] that played the Hippodrome Theatre, and divided it into the total film rental received by RKO Radio Pictures from those ten pictures.

The Witness:—Have you made the same computation for the Town Theatre?

Q. (By Mr. Rome):—Yes; and during the same season, 1947-48, the average film rental per picture for the 16 pictures which played in the Town Theatre was $5,916?

A. Almost $6,000; yes. That is probably where I got the five to ten.

Q. Are you acquainted with the fact that during '48-'49 season, the average rental per picture paid by the Hippodrome on the nine pictures played there was $1,314?

A. Not then. I am now acquainted with it.

Q. May I also bring to your attention that during the season '48-'49, of the 19 pictures of your company that played in the Town Theatre, the average film rental paid was $2,670?

A. Yes; I know it now.

Q. And, in the season '49-'50, the average film rental per picture paid by the Hippodrome for the ten pictures it had from your company was $2,911, and during the season of 1949-50, of the 23 pictures played by the Town Theatre, the average film rental was $1,725. Those are the kind of film rentals you have in mind, then, necessarily, when you [786] speak of the large film rentals earned by your fine downtown outlets in the city of Baltimore; is that correct?

A. No, sir; that is not correct. I certainly have in

mind large film rentals. I would like to say, we would like to have them as large as possible, and I think, as far as the Town is concerned, you have pretty fair film rentals, $6,000; but let me ask you——

MR. WATKINS:—No.

THE WITNESS:—Pardon me, I am sorry. The questions are so argumentative that I find myself indulging in a kind of a debate, which I would like to avoid.

Q. (By MR. ROME):—It is a fact that, nevertheless, the two outlets of RKO pictures produced film rentals on the averages that I have mentioned?

A. It is a fact; but I would like to add that, having a first-run exhibition of our picture in a downtown house certainly preserves the importance of that picture, however moderate the engagement was, preserves the importance of that picture with respect to subsequent-run, preserves the exhibition value of the picture.

Now, if we are getting argumentative and hypothetical, then I might say to you, on a hypothetical basis, even if it were conceded—and I don't think it is—I don't think it proves that Mr. Myerberg's theatre would have paid us more. But, assuming it did, I think the losses we would [787] have had on the subsequent runs would have been much greater than the additional amount of revenue that Mr. Myerberg's Crest Theatre could give us.

Q. You keep talking about subsequent-run revenues derived by your company. Does your company keep records showing the amount of subsequent-run revenue derived from Baltimore?

A. Of course.

Q. It is a fact, you keep such records for every city where your pictures play?

A. We have records for every city, for every engagement.

Q. Who is Mr. Joseph J. Laub?

A. Mr. Joseph Laub is a lawyer in our company.

Q. He is assistant secretary of RKO Radio Pictures?

A. He is a lawyer. That is his primary function, in the legal department.

Q. Are you acquainted with the fact that Mr. Laub has made a sworn affidavit in this very case?

A. Yes.

Q. In support of objections to the plaintiff's interrogatories, in which we were seeking to find out what the subsequent-run revenue was in the City of Baltimore, and Mr. Laub made this statement under oath:

"RKO Radio Pictures Inc. does not keep any rec-
[788] ords of the total film rental derived from any particular city."

A. Now you are talking about total film rental. We do not total the film rental. I said to you that we have records of the engagement of our pictures in each theatre. That is exactly what we have. But we do not totalize them. I want to explain that, because it is important. It would require a great deal of additional work to do it, and we see no reason to do it.

Q. So that, actually, the amount of subsequent-run revenue derived from any particular area is not even carried as a separate figure on the books of your company in any way?

A. If Mr. Laub says so, it is true; yes.

* * * * * * *

[790] Q. (By Mr. Rome):—You have stated that your company is interested in the maximum amount of revenue?

A. Yes.

Q. You have also stated that if a theatre were to make a large bid, and then did not earn enough gross to pay that, that there would be adjustments that would be made?

Mr. Watkins:—He did not say that,—if they made a bid, there would be adjustments.

The Witness:—I never adjust on bids,—period,—because that is another way of taking a lower bid.

Q. (By Mr. Rome):—So that, actually, if the Crest Theatre were to have access to first-run pictures as a result of bidding, there would be no problem of having to

give it an adjustment in the event its gross did not warrant the bid that was made?

A. That is correct. I also want to point out, if it was a very disappointing performance, or engagement, sometimes you have difficulty collecting from an exhibitor. I don't mean this to make any comment about the financial integrity of Mr. Myerberg—I am sure it is perfectly fine—[791] but we do find that where a situation such as this, where a man might stretch himself out and give a large guarantee, and have a disastrous engagement, there is always the possibility of uncollectibility,—you know that.

Q. But there is no suggestion——

A. None whatever.

Q. —with regard to the Crest Theatre?

A. Certainly not. I am just talking about a general business consideration.

* * * * * * *

[795] Q. You refer to the Wichita situation, and your offer to them. Isn't it a fact that Fox had a theatre there, called the Boulevard, which was outside of the downtown area, and which, for a number of years, had access to first-run pictures?

A. I don't know much about it. I think you are right. I will say this: it has happened from time to time, in some cities, smaller cities, where an exhibitor has a first-run [796] downtown, and has another outlet, and thinks he can do better if he runs his other theatre and plays day and date, and you go along with him. It may be against your judgment, but he is your outlet, and he gives you the downtown first-run.

* * * * * * *

JOSEPH B. BRECHEEN, sworn:

[820] A. No, I went with RKO in 1931 and have been with them ever since.

Q. I gather from what has been testified here before today by Mr. Zimmerman, that you, yourself, have a great

deal to do with the handling of the first run account in Baltimore at the Town and the Hippodrome Theatres; is that correct?

A. I do.

Q. Over the years, since you have been with RKO, have you ever attempted to sell RKO products to any other exhibitor in downtown Baltimore?

A. I had no reason to sell RKO product to any downtown theatre in Baltimore. We have a very fine customer in Mr. Rappaport, and we would like to retain the status quo with him.

[821] Q. Did any other exhibitor in downtown Baltimore ever try to license a product from you?

A. Yes, sir.

Q. When before that?

A. Within the past year.

Q. Within the past year. Never before that time?

A. Not that I remember. As a result of that, competitive bidding has been instituted downtown.

Q. There has been offered in evidence here a letter sent by you to Mr. Zimmerman in which you state that the Crest Theatre is in your opinion comparable to the Town Theatre.

A. I am talking about construction and appointments when I make that comparison, and I mean that sincerely. The Crest Theatre is a very fine theatre. But in that recommendation I also said it was a neighborhood house, which it is.

Q. I take it from what you have said, if the Crest Theatre were located in the downtown area, being comparable to the Town Theatre, in your opinion, it would be, in your opinion, entitled to have access to first run product.

A. I think he would definitely be entitled to have an opportunity to negotiate first run product or bid for it.

Q. Actually there was no doubt in your mind, was there, Mr. Brecheen, whenever it came to your knowledge,

however, [822] that what Mr. Myerberg was seeking was either a day and date first run or an exclusive first run?

A. The words "day and date" was never injected into the conversation I had with Mr. Myerberg. The first discussion with me referred to first run product.

Q. But even if he had asked you specifically at that time for a day and date first run, your answer would have been the same, in refusing it?

A. Yes, sir, that is right, it would have been the same.

* * * * * * *

[825] Q. Bearing in mind, Mr. Brecheen, as you have stated it, you would prefer the downtown outlet if you could get it?

A. That is correct.

Q. Has the policy of playing these fine neighborhood houses in these various cities been a successful one?

A. It is fairly successful.

* * * * * * *

CHARLES V. GRIMES, sworn: * * *

[880] Q. Has the playing of first-run pictures in the Ambassador Theatre been a profitable operation, on the whole, for Warner Bros. Circuit Management Corporation?

A. You mean, between the two theatres?

Q. Taking the Ambassador, has the Ambassador been a profitable theatre?

A. Yes; it has been.

* * * * * * *

[883] Q. You said that the Crest, if it were to have access to first run pictures, other fine theatres located outside of the downtown area of Baltimore would also seek access to first run pictures and that ultimately the Stanley Theatre would have to close. So that actually the basis of your complaint against this attempt on the part of the Crest Theatre to get first run pictures is the fact that it would hurt the Stanley Theatre and Warner Bros. Circuit Management Company; isn't that so?

A. Mr. Rome, I said in my opinion the other neighborhood theatres—

Q. That is what I am talking about.

A. —would seek an equal run with the Crest Theatre, and that ultimately it would destroy not only the Stanley Theatre, I think it would destroy all the downtown theatres.

Q. And that is your basis against the complaint made by the efforts of the Crest; is that right?

A. Yes.

Q. In other words, what you were attempting to do or [884] would like to have done, if I follow you correctly, Mr. Grimes, is to stop any competition coming from the Crest Theatre?

A. No, sir, you do not understand me. That is not my thought at all. I think that the Crest Theatre as a 21-day house, is in substantial competition with us, but I do think that as a first run house it would be greater.

Q. And you do not want it to compete with the Stanley Theatre on first run?

A. That is correct.

* * * * * * *

ROBERT SMELTZER, sworn: * * *

[900] Q. Now, what is the advantage or advantages to you as a distributor of having your pictures shown in a theatre such as the Stanley Theatre in downtown Baltimore?

A. The Stanley Theatre is, in my opinion, the finest show case for product in the City of Baltimore.

Q. Will you keep your voice up?

A. It is an outlet for our product. We have the opportunity of wide exploitation and advertising on pictures. [901] As a matter of fact, the distribution department spends money of their own in exploiting their pictures, and we also have a control of the playing time, which includes the holidays such as New Year's, Christmas, 4th of July, Easter, and it is very advantageous for us,

the Stanley Theatre to have our show case in the downtown area in Baltimore.

* * * * * * * *

[907] Q. Now, let us assume just for the purpose of example that you were to sell Mr. Myerberg a day and date first run at the Crest, to play day and date with any theatre downtown, we will say with the Century, Mayfair or the Stanley, wherever you decided you would license your product on that day and date basis, now, as an experienced distributor in this area, what in your opinion would happen in the event Mr. Myerberg played on a day and date first run?

A. I think we would have an avalanche of protests and demands for similar treatment from the other what we call the key theatres, in these sub-run houses in the City of Baltimore. I don't think they would stand idly by and see their—these exhibitors are all very jealous of their playing position, whether he owns one theatre or owns five, and they believe that their theatre is entitled to just as [908] much consideration as any other theatre in a given city.

We have 20, I think, 25 theatres, that play on the first week of availability, and I imagine the majority of those 25 would ask for a day and date availability if Mr. Myerberg is given that.

Q. And what, in your opinion, would be the effect on the Stanley Theatre, or any other theatre downtown, playing first-run product, if that happened here in Baltimore?

A. Well, depending. The first-run theatre downtown, depending on neighborhood patronage, which I believe we all agree, and has been testified to, it would mean the elimination of the downtown theatre, total elimination of the downtown theatre. I don't think it could survive, with the limited patronage they would have in the immediate area of a downtown theatre.

Q. And, in your answer, you assume theatres like the Boulevard and Northwood and Edmondson Village, and these many other fine theatres in Baltimore, would seek to secure a day and date first-run with Mr. Myerberg's Crest?

A. They would either get it, or we would have a lot of trouble denying them. I don't see how you could deny them. I think you would have to accede to it, if their theatre is comparable, and all the factors that enter into giving a run of that kind, as it is here, whether a 21-day house, they are all comparable. They claim to be comparable as to being a 21-day theatre, and that is the reason [909] they get product in that first week after clearance with the downtown theatre.

* * * * * * *

[911] Q. Now, the situation over in Washington, from the time Crandall started, right up to the present time, you have always had common ownership between the Ambassador and the Warner, which has been played with the Ambassador?

A. That is right.

Q. And, unless you have common ownership, do you know any way in which you can control advertising, runs or clearances in any competitive area?

A. I don't know of any.

* * * * * * *

*Cross Examination.*

[917] Q. So that, actually, with regard to granting of first-run to the Crest Theatre, you did not have to take it up and did not take it up with New York; is that correct?

A. That is correct.

Q. Isn't that due to the fact that you well know that your company customarily licenses its product for first-run exhibition in the theatres located in the downtown areas of cities?

A. No; I don't know that.

Q. You don't know that to be a fact, Mr. Smeltzer?

A. No. You mean all over the country?

Q. Yes.

A. No. The only thing I could say that we had, the Stanley Theatre is our first-run theatre in the City of Baltimore, and that our product, Warner Bros. Pictures Distributing Corporation pictures, there being common ownership between the theatre and producer, I could give Mr. Myerberg a very quick answer, and told him, and he understood that there wasn't a chance for him to get first-run pictures away from the Stanley Theatre. There wasn't any question about Mr. Myerberg's——

Q. I appreciate that, but isn't it a fact, to your knowledge, that your company customarily licenses its products for first-run exhibition in theatres located in the downtown areas of cities?

[918] A. Wherever it is possible, they make every effort to do it.

Q. That is a general policy of the company?

A. Yes. No; they want to do that, Mr. Rome, because it is the best showcase for your product, in the downtown area, where you have the proper shopping facilities, and you have a chance for both matinee and night performances, your grosses; and your grosses, as a rule, are far greater in the downtown area than they are in the suburban area.

Q. I recognize that your company wishes to do that. There is no question about that, but I simply want to establish the fact that, to your knowledge, your company actually does it. That is the policy throughout the country, to your knowledge; isn't that a fact?

A. Yes; I won't argue that point.

* * * * * * *

[927] Q. If the Crest Theatre, located where it is, had been owned by Warner Brother Circuit Management Corporation, would it have been able to get access to first run pictures from Warner Brothers?

A. Had we had the Stanley Theatre downtown?

Q. Yes.

A. And had taken them out of the Stanley and put them into the Crest; is that what you mean?

Q. Would it have been able to get access to first run pictures on a day and date basis if the Crest had been owned by Warner Brothers Circuit Management Corporation?

A. Well, being our own theatre—you are applying this now to the Warner Ambassador in Washington, which is a common ownership?

Q. My question is directed solely to the position of the Crest Theatre in the City of Baltimore, located where it is, assuming that Warner Brothers Circuit Management Corporation owned it, would the Crest Theatre, under those circumstances, be able to get access to first run pictures on a day and date basis?

A. Mr. Rome, I do not think so, because we had an experience on that some years ago when we owned the Metropolitan Theatre in Baltimore and we wanted to make the Metropolitan a first run with clearance over the subruns of [928] the theatres in the City of Baltimore, and, therefore, there was such a wave of protest on the contemplated action that we just simply dropped it and forgot it. And I presume the same thing would be applicable to the Crest Theatre if we had acquired that.

Q. Isn't it a fact, Mr. Smeltzer, that the Metropolitan Theatre in the City of Baltimore actually played Warner Brothers product on first run?

A. That was the only outlet we could get, Mr. Rome, at that time, for our product. I think that was during the time that Al Jolson made THE JAZZ SINGER and we were not able to make a satisfactory deal and we had acquired the Metropolitan Theatre as our own theatre because we were out trying to acquire theatres at that time, I think, all over the country.

Q. Well, now, going back to my question with regard to what would happen to the Crest Theatre if it were

owned by Warner Brothers. I do not think I understood your answer, sir. Would you repeat it?

A. I am not positive we would play day and date.

* * * * * * *

ALEXANDER LICHTMAN, sworn:

[931] Q. (By MR. RAFFERY):—State your name for the record.

A. Alexander Lichtman.

Q. Mr. Lichtman, will you try to keep your voice up so we can hear you?

A. Yes, sir.

Q. Where do you reside, Mr. Lichtman?

A. I reside at New York City.

Q. And what is your present position in the motion picture industry?

A. Director of distribution for Twentieth Century-Fox.

[932] Q. And when did you join Twentieth Century-Fox?

A. March 7, 1949.

Q. Now, when did you first enter the motion picture business?

A. 1910.

Q. Briefly, tell us your experience.

A. Well, I started as a film salesman in 1910. I became sales manager of the Famous Players Film Company in 1912.

THE COURT:—I cannot hear you. Raise your voice, please.

THE WITNESS:—I became the sales manager of the Famous Players Film Company in 1912. That company developed into what is now known as Paramount Pictures. I was the general manager of Paramount Pictures up until 1921, when I resigned, and I went in business with another man for ourselves and formed the company called the Lichtman Corporation, and made what is known in the trade as Preferred Pictures.

I then subsequently became the vice president and general manager of United Artists Corporation and eventually its president, until November, 1935, when I resigned and I became the vice president of Metro-Goldwyn-Mayer, or Loew's, Incorporated, which is the holding company of Metro-Goldwyn-Mayer. I was there until March 1, 1949.

[933] Q. (By MR. RAFFERTY):—During your tenure with Loew's from 1937 until 1949, were you engaged in production as well as distribution?

A. From January, 1938, until March 1, 1949 I was one of the executive producers and one of the executive committee operating the M-G-M studios.

Q. In Culver City?

A. In Culver City, California, yes, sir.

Q. Will you name a few pictures that either you produced or were produced under your supervision during that period?

A. Well, there was THE WIZARD OF OZ, the THIRTY SECONDS FROM TOKIO, GREEN DOLPHIN STREET, MRS. PARKINGTON, with Greer Garson, and KISMET, with Ronald Colman, and many, many others, about 100.

Q. Now, you retired from Metro-Goldwyn-Mayer and intended to lead a life of retirement sometime early in 1949; is that right?

A. Yes, sir, I did.

Q. And how did you happen to join Twentieth Century-Fox?

A. Mr. Skouras, the president of Twentieth Century-Fox, is a life-long friend of mine and he prevailed upon me to join him and asked me to make a survey of his business because they were losing money in their production and distribution [934] business.

Q. The losses went back to 1947, I believe?

A. From 1947 on they were losing money. So, I consented to come for one year, and I am still there.

Q. Well, now, you did make a survey?

A. I did make the survey, yes, sir.

Q. Of the distribution business of Twentieth Century-Fox in the United States of America?

A. Yes, sir.

Q. And Canada?

A. Yes, sir.

Q. Now, briefly tell us what you did on the survey?

A. Well, I undertook to examine all their records of contracts which deal with exhibitors, by visiting their branches, talking to their employees and also talking to their customers or exhibitors. We also had meetings with the exhibitors, the first one in Boston, followed by one in New Haven and then in Philadelphia, and subsequently on the Pacific Coast. Then in Atlanta and New York.

[935] Q. You covered practically the whole country in that survey?

A. Yes.

Q. And personally visited it with your associates?

A. That's right.

Q. During this period of survey,—by the way, you undertook this survey immediately after joining Twentieth Century-Fox?

A. Immediately after joining that company; yes.

Q. And you were trying to find out why they were losing money on production and distribution?

A. I was trying to find out how we could increase the company's revenue.

Q. Did you meet with exhibitors?

A. Yes; I talked with hundreds of exhibitors. We had luncheon meetings, as I stated before, in exchange centers.

Q. During the course of these various meetings, you addressed these meetings and held open forums and discussed these problems?

A. Right; we did.

Q. And Mr. Rome, who was counsel for Mr. Myerberg, put into evidence Plaintiff's Exhibit 16, a trade paper called, "The Film Bulletin", dated April 11, 1949,

on page 7 of which there appears a story under the caption, "Fox [936] Meetings Forecast Changes in Old Patterns," and then he read from that trade paper.

Now, have you, since he has done that, secured a copy of that trade paper and read the article he referred to?

A. Yes; I did.

Q. Does that article substantially and correctly report the speech you made, either in New York or in Philadelphia?

A. Part of the speech. This was a reporter's report.

Q. Will you tell His Honor and the jury, as best you can remember, what you told the meeting? And, by the way, do you recognize, by that article, whether he is referring to the New York or Philadelphia meeting?

A. I think it was the New York meeting.

Q. Tell His Honor and the jury exactly what you said, in the best memory you have got of it?

A. Well, I said, as one of the means of possibly increasing the revenue for the exhibitors, as well as Twentieth Century-Fox, would be to explore the possibility of possible day-and-date runs in similar large cities, and also to explore the possibility of reducing clearance of the first-runs in the big cities, and enabling the subsequent-runs in the large cities to play the pictures earlier, and that perhaps more of them playing concurrently, or simultaneously than was then prevailing at that present time. It was early [937] in 1949.

Q. You were exploring not only day-and-date first-runs, but day-and-date neighborhood-runs?

A. That's right.

Q. And possibly the creation of more day-and-date first-runs, and possibly the creation of more and more day-and-date neighborhood runs?

A. That is correct.

Q. Were you also considering the possibility in a given situation of staggering runs, if you thought it would help your revenue?

A. Staggering runs? I don't understand what you mean.

Q. Assuming you had a situation where a neighborhood was playing on 21 days after downtown, and you had 25 of those runs; did you give any thought or consideration to moving some of them up to, say, 14 days, and keeping some at 21, and possibly creating a different setup?

A. Not at that time.

Q. Not at that time?

A. Not at that time.

Q. At that time, you were considering multiple runs?

A. That's right.

Q. After you had advanced these various thoughts, and had secured from exhibitors their reactions and whatnot, did you delegate some of your assistants to make surveys in [938] all of the large cities that you thought required surveys?

A. Yes, sir; I did.

Q. And was Baltimore one of them?

A. Yes; it was.

Q. Whom did you designate to make the survey in Baltimore and report to you?

A. Mr. Howard Minsky, who was the assistant division manager at that time, and subsequently became the division manager with Philadelphia, Baltimore and Pittsburgh; and Mr. Glenn Norris, who was then our branch manager in Washington, and is now the division manager in charge of Philadelphia, Washington and Pittsburgh.

Q. Did you receive a report from these associates of yours as to Baltimore?

A. Yes; I did.

Q. Now, will you tell His Honor and the jury the report that you got from Messrs. Minsky and Norris in regard to Baltimore on this question of multiple runs?

MR. ROME:—Excuse me, sir. Do you have a copy of that report, Mr. Raftery?

MR. RAFTERY:—Was that report oral or in writing?

THE WITNESS:—It was an oral report.

MR. ROME:—Will you fix it in time?

Q. (By MR. RAFTERY):—When you got your report, if you remember, when was it?

[939] A. Sometime in '49; I don't remember the exact date.

Q. In all probability——

A. And I got the report directly from Mr. Smith. Mr. Smith was the general sales manager, and these men reported to Mr. Smith, or one of them, Mr. Minsky, reported to Mr. Smith, and in turn Mr. Smith reported to me, as was his custom, daily.

Q. Was that the regular course of operation in your company?

A. It was a regular daily routine.

Q. By the way, Mr. Smith is no longer with your company?

A. Mr. Smith is no longer with us.

Q. Will you tell His Honor and the jury the sum and substance of the report you got through Mr. Smith from Norris and Minsky?

MR. ROME:—I object to that, as being pure hearsay as to this witness. These other persons, who actually made the report, would be better able to testify to it.

THE COURT:—You are asking him the gist of his report?

MR. RAFTERY:—The gist of the report made by his associates in the regular course of business.

THE COURT:—I will allow it.

THE WITNESS:—Mr. Smith told me that after Messrs. [940] Minsky and Norris had made a very thorough survey of the City of Baltimore, that the plan that I proposed was not practical. I asked the reasons, and they said the reasons were as follows:

In the first place, a downtown exhibitor, with whom we have been exhibiting our pictures first-run in Balti-

more for over 20 years, would not agree to playing day and date with any subsequent-run theatre. In fact they told me that the exhibitor threatened a lawsuit against us if we attempted it. That was the principal thing.

Then I asked them to survey the situation as to creating a better subsequent-run exhibition in the City of Baltimore, and they were for over a week in this city, in their attempt to do that, and they approached practically every important operator of subsequent-run theatres, and they were told by the most influential and most prominent ones, and those exhibitors who gave us the most revenue, that they did not want their conditions disturbed, they wanted to remain status quo, and did not want the exhibition condition in this city to change.

* * * * * * *

[947] Q. Now, you were out to the Crest Theatre last night?

A. Yes.

Q. That is the first time you have seen it?

A. Yes.

Q. Up until then, you had reports on it from your organization. How did you make an inspection of the theatre?

A. Not a complete inspection, but I walked down one of the aisles; I saw the theatre from the back and from the front, looked up, and the manager of the theatre pointed out the different things about the theatre to me.

Q. You were introduced to the manager by Mr. Norris?

A. Yes.

Q. And you did not meet Mr. Myerberg?

A. No; I didn't.

Q. You have never met him?

A. I never met him.

* * * * * * * *

[948] During this trial, Mr. Myerberg, on page 498, [949] testified as follows, in response to a question that I asked him:

"Fox Film has another picture coming up, DIPLOMATIC COURIER, I think. You are familiar with it.

"Q. I am not.

"A. Tyrone Power. Any time Fox Film wants an offer on that picture to play day and date or exclusive in the City of Baltimore, I will give them a $15,000 certified check, to be put up within 24 hours, either to play that picture day and date downtown, or exclusive in the City of Baltimore."

Now, on page 530, he said:

"A. No, sir; and I will return to the offer I made to you for DIPLOMATIC COURIER."

Then I said: "I do not sell pictures, I am sorry."

Now, taking into consideration that in your opinion the theatre is not suited for first-run pictures, if Mr. Myerberg were to come to you as the head of distribution of Fox Film, with a certified check for $15,000, payable to the order of Twentieth Century-Fox, with the further understanding that there would be no adjustment, if he played the picture,—what would your answer be to Mr. Myerberg?

A. I will accept the offer. I will accept it now, but I want to tell Mr. Myerberg, in all fairness, that the [950] last Tyrone Power picture, a good one, the name of it was RAWHIDE, only earned, out of 78 runs in the City of Baltimore, $14,200.

MR. MYERBERG:—I would still make that offer.

THE WITNESS:—I will take your offer. I am glad to get it.

Q. (By MR. RAFTERY):—Mr. Lichtman, in accepting that offer, do you feel you are in any way experimenting in Baltimore on that picture?

A. Not at all.

Q. You may lose your first-run downtown?

A. I am prepared to lose every run. That is more money than I will get if I played all of them, today.

Q. That is your position in answer to that challenge given to me?

A. Yes, sir.

MR. RAFTERY:—You may cross-examine.

THE WITNESS:—I want a certified check.

MR. MYERSBERG:—You will have it.

*Cross Examination.*

Q. (By MR. ROMZ):—Mr. Lichtman, you have said that you were a director of distribution for Fox?

A. Yes.

Q. Who is the president of Fox?

A. Mr. Spyros Skouras.

[951] Q. Is there a president of the board of Fox?

A. No.

Q. Is there a gentleman named Schenk connected in any way with Fox?

A. We have, yes; he is an executive of the studio in California.

Q. That is Mr. Joseph Schenk?

A. Joseph M. Schenk.

Q. That Mr. Schenk is a brother of Mr. Nicholas Schenk?

A. Yes; a brother of Mr. Nicholas Schenk.

Q. What is the position of Mr. Nicholas Schenk?

A. He is president of Loew's Incorporated.

Q. Mr. Spyros Skouras, who is the president of Fox, has a brother named George Skouras?

A. That's right.

Q. And Mr. George Skouras is the head of a circuit of theatres; isn't that so?

A. That is true.

Q. Do you know approximately how many theatres Mr. Skouras' circuit comprises, sir?

A. Not offhand.

[952] Q. It runs into a great many, does it?

A. Quite a number, yes.

Q. Mr. Skouras has another brother named Charles, has he not?

A. That is right.

Q. Mr. Charles Skouras is associated in connection with running of theatres run by Fox itself; is not that so, sir?

A. He is the president of National Theatres, which presently is a subsidiary of Twentieth Century-Fox.

Q. And how many theatres comprise National Theatres, Mr. Lichtman?

A. Approximately 500.

Q. Those theatres are spread throughout the country, are they not?

A. There are a few in the East, but mostly in the West.

Q. And a great many of those theatres are first run theatres?

A. Quite a few.

Q. Located for the most part in the downtown sections of cities?

A. Many of them, yes.

Q. You mentioned Mr. Minsky who used to be with Fox.

A. That is right.

[953] Q. He is no longer with Fox, is he?

A. No.

Q. What company is he with?

A. He is working with Paramount.

Q. And Mr. Minsky is also the nephew of a man named Kalmine?

A. I don't know all his relatives, no.

Q. Mr. Kalmine is the head of the theatre division of Warner Brothers; is not that so?

A. That is right.

Q. Now, you testified that you were at one time the vice president and general manager of United Artists and subsequently the president of United Artists?

A. That is right.

Q. At one time there was a gentleman named Sears with United Artists; is not that so?

A. He was there after I was there.

Q. Do you know, Mr. Lichtman, that that gentleman named Sears was also with the distribution division of Warner Brothers?

A. Yes, sir, he worked there before.

Q. Who is the present head of the Metro sales division of Loew's Incorporated?

A. A man named Reagan.

Q. Charles Reagan?

[954] A. Charles Reagan.

Q. And Mr. Reagan was for a number of years in the distribution department of Paramount, was he not, sir?

A. Yes.

Q. And there is also a gentleman holding a high position in Paramount named Mr. O'Shea, is there not, sir?

A. I think so. I think that is right.

Q. And Mr. O'Shea used to be with Metro at one time?

A. That is right, sir.

Q. There is also a gentleman named Schwalberg presently with Paramount Pictures?

A. Yes, sir.

Q. Mr. Schwalberg for a number of years was associated with Warner Brothers, was he not, sir?

A. I don't know.

Q. You have no knowledge of that at all, sir?

A. No.

Q. Do you know whether or not Mr. William Scully, who has to do with the sales division of Universal, was also at one time associated with the distribution department of Metro?

A. That is correct.

Q. And there was a gentleman named Blumberg, who was the president of Universal; is not that so, sir?

A. Yes, sir.

[955] Q. And was that same Mr. Blumberg vice president of RKO at one time?

A. Yes, he worked for RKO Theatres at one time.

Q. Now, you know, do you not, Mr. Lichtman, that not only does Fox own theatres, but the other so-called Big Five own hundreds of theatres located in various sections of the country; is not that a fact, sir?

A. Yes.

Q. And those theatres also are in many, many instances first run theatres?

A. Yes.

Q. And those theatres are in the downtown section of cities; is that correct, sir?

A. They own all types and kinds of theatres.

Q. But their first run theatres are located——

A. Some are and some are not. Some are in the suburbs.

Q. Fox licenses its pictures to all of those companies?

A. Not all of them. We sell pictures today theatre by theatre, picture by picture.

Q. Now, over the years hasn't it been the fact, Mr. Lichtman, that Fox has actually licensed and has exhibited its pictures in the theatres owned by Paramount?

A. Some places, yes.

Q. And by Warner Brothers?

A. In some places, yes.

[956] Q. And by Loew's, Incorporated?

A. In some places, yes.

Q. And by RKO?

A. In some places, yes.

Q. And actually Fox has received substantial amounts of money by way of film rental from those other companies?

A. Naturally.

Q. On the other hand, those other companies equally license their product for exhibition in the theatres owned by Fox; is not that so?

A. In some places they do.

Q. And the Fox theatres pay substantial sums of money to those other companies for the licensing of those pictures?

A. Depending on where they buy, what they buy, and when they buy. I have no direct knowledge of that. I have nothing to do with it.

Q. You are in charge of distribution, are you not, sir?

A. Yes. Now, you are asking me do I know what the Fox Theatre Company pays these other companies for film.

Q. Yes, sir.

A. I do not know that.

Q. Your duties in connection with the Fox would not bring you in any way in contact with that information?

A. No, sir.

Q. You know, however, that it has been found as a fact [957] in a case brought by the Government against your company, not only your present company, but the other companies with which you have been associated in the past, that each one of these distributors has as its best customers the other distributors?

Mr. Rafferty:—That is objected to, in an attempt to get in the finding from the Paramount case.

The Court:—I will allow the question. Go ahead.

The Witness:—No, I do not know that to be a fact.

Q. (By Mr. Rosa):—Are you familiar with the Paramount case, Mr. Lichtman?

A. Somewhat.

Q. Haven't you discussed it with your counsel on numerous occasions?

A. No, I have not. I have read the document, though.

Q. Have you made no attempt to revise your distri-

bution policy since the finding in the decrees in the Paramount case?

A. We have, yes.

Q. In line with that, sir, hasn't it been brought to your attention that it has been found to be so that your company has actually had as its best customer all the other distributor defendants appearing in this case?

A. No, sir.

MR. RAFFERTY:—I wish to object to this whole line, for all of the reasons I have heretofore stated.

[958] THE COURT:—I think the witness answered the question before the question was ended.

MR. RAFFERTY:—I just want an objection to the line, Your Honor. I do not want to be interrupting my friend here. I think we are getting far afield on it.

Q. (By MR. ROSE):—Mr. Lichtman, the speech that has been referred to that you made, quoted you as saying that the distributor and the exhibitor might best be served by playing a picture first run in a number of theatres simultaneously and reducing the clearance for subsequent runs, and you were further quoted as saying, "We want pictures with a large expenditure of money for advertising, and we tell the public it can only see it in one theatre. They have to go great distances, at great inconvenience in transportation and other matters." That remains the fact, does it, Mr. Lichtman, that it is inconvenient for a great many people by virtue of the transportation problems in large cities today?

A. It seems so, by the great reduction in income in some of those theatres today.

Q. And one way of remedying that would be to bring the product on first run to the theatres located in areas nearer the people, so they wouldn't have to struggle with transportation; is not that so?

A. But now we find that the revenue is so thin that even the places—I must say this so you get a clear [959] understanding of exactly what I mean and what I have

in mind. You cannot set a national policy with things of this sort. Each city is different from every other city, and you must study each situation separately, and what may apply in one situation will not work in another. So, therefore, each situation has to be studied and worked out in concert and in agreemnt with your customers, because you can have all sorts of theories as to what may be good distribution practice, but if your customers do not agree with you, you cannot accomplish it. Do you understand?

Q. I understand.

A. O. K., sir.

Q. You were also quoted as saying that "After the run in that one theatre we place the picture in mothballs for a considerable period of time before that picture reaches the fine theatre in the residential sections of these large cities. By that time the advertising is forgotten and other pictures are being announced, with the result that we are losing a great portion of the patronage which, of course, means a great many dollars to all of us."

Your views still remain the same with regard to that, Mr. Lichtman, do they?

A. Not as a blanket proposition, no. You ask me about any specific city and I will answer it if I have information about it.

[960] Q. You were speaking generally when you made this statement either in Philadelphia or New York?

A. Yes, but immediately after that I set my organization to work to make studies of each city. For example, in Philadelphia, as a result of that speech, we reduced the clearance of the Fox theatre that had first run in Philadelphia and increased the number of subsequent runs simultaneously from 9 to 18. We set up 18 different zones. Now, today, I wish I didn't have 18, because the revenue is spread too thin, and if I were to make a speech today to the exhibitors in Philadelphia I would ask them to move some of them back, and I would reduce my terms to those who would move back, because there are too

many of them running day and date today, and I tried to do the same thing in Baltimore. There are too many running day and date in Baltimore. I tried to do it Detroit. There are too many running day and date in Detroit. While in 1949, when I made that speech when business was much better, I felt that was the right thing to do.

Q. You recognize, do you not, sir, your burden is to sell picture by picture and theatre by theatre; is not that so?

A. Yes, sir.

Q. How, then, do you reconcile your obligation in that regard with your statement that you are considering the [961] over-all revenue as being spread too thin.

A. I do not understand your question, sir.

Q. Are you not failing to consider each theatre on its merits as to its right to have access to first run pictures if you consider that the total revenue derived by Fox from any particular situation is less than it has been in the past?

A. I still do not understand your question.

Q. Let me try it this way, Mr. Lichtman: You must consider the Crest on its own merits as a theatre, must you not?

A. That is right.

Q. And the fact that other exhibitors might protest has nothing whatever to do with the right on the part of the Crest Theatre as a theatre to have access to first run pictures or not; is not that so, sir?

A. No, sir, that is not so.

Q. What is your obligation, as you view it, sir, with regard to licensing or not licensing first run pictures to the Crest Theatre?

A. Well, sir, the theory of motion picture distribution from the inception of feature motion pictures, and I think I was one of the men who took part in establishing this thing nationally, was that we would have a representative

first run theatre in each of the big cities of the country, [962] the so-called show case theatres, where we would exhibit the pictures where the greatest number of people in that community would have access to that theatre. Number one.

Secondly, it would act as the exploitation point for that territory, and then we would make the pictures available, based upon the location, class, condition of the theatre, down to the point where we would make the picture available to people of all classes, because as the runs became later the admission prices usually drop also. So, the fellow having only a dime to spend would have the opportunity to see it. That has been the theory of distribution ever since I have been in the business, and that has been almost since its inception.

Q. Has there been any change of that policy over these years, Mr. Lichtman?

A. Not basically, no.

Q. So it remains a fact that the exhibition of pictures on first run remains concentrated in the downtown areas of cities, particularly the larger cities of the country?

A. That is correct.

Q. And is it the fact that no theatre in the City of Baltimore, no matter how fine it might be, would be granted access to first run pictures by your company either on an exclusive or on a day and date basis?

A. I would not say as to the fact. I just accepted the [963] deal because necessity compels me to try to get the most money today, and here is a man willing to lose money, I know he will lose money, when he pays me $15,000 for a picture. But as you say in Latin. caveat emptor, if he wants to spend his money, let him spend it.

Q. Was there any reason why your company refused to do that before?

A. Yes. And I say it is bad business now from that standpoint. I do not know, I may get the enmity of every exhibitor in Baltimore by doing this, but I am willing to take that risk, because——

Q. I am sorry, sir, I do not understand your answer to my question. My question was: Why did you not do it before, in Baltimore?

A. Because I do not consider it good business to give a theatre, located where the Crest Theatre is, first run in the City of Baltimore.

Q. But you are now willing to do it even though you consider it bad business?

A. The reason I am doing it is because they, your client, made a big bluff here, offered $15,000 for a picture in a theatre which I do not believe will gross $15,000, even if he runs the picture three weeks, so I wanted to call his bluff.

Q. Was it never brought to your attention, Mr. Lichtman, [964] that several years ago this same offer was made through Mr. Smith of your company, at which time the Theatre Enterprises, Inc., the plaintiff in this case, offered your company certified checks by way of guarantee for the licensing of pictures? Was that never brought to your attention?

A. No.

Q. Mr. Smith never discussed it with you at any time?

A. I don't recall.

Q. Now, actually, Mr. Lichtman, there came a time when Mr. Myerberg himself communicated with you directly and informed you of the fact he had been seeking to get first run pictures from your company?

A. I know that. He communicated with me, seeking first run product.

Q. And was there not enclosed with his letter at that time copies of his earlier correspondence and the correspondence with Mr. Smith in the course of which those offers had been made?

A. I don't recall it.

Q. At any rate, it never came to your attention?

A. I don't remember whether it did or not, but I do not recall it.

Q. But presumably if it had come to your attention, you would have been willing to grant the Crest Theatre access [965] at that time?

A. I do not say that I would.

Q. In these cities in which Fox has its own theatres and has licensed pictures on a day and date first run, there are also subsequent run theatres, are there not, sir?

A. Tell me what cities.

Q. In what cities you covered?

A. You cannot take cities and put them in——

Q. Denver?

A. There are a few.

Q. Kansas City?

A. Yes.

Q. Los Angeles?

A. A great many.

Q. Roanoke.

A. I don't know about Roanoke. I do not have theatres in Roanoke.

Q. But in those cities?

A. We do not have theatres in Roanoke. You said theatres with Fox.

Q. In those other cities we have just mentioned there are a number of subsequent run theatres. Am I correct in that, so I understand you?

A. Yes.

Q. And those subsequent run theatres continued in [966] business and continue in operation despite the fact there are theatres playing a first run day and date engagement; is not that a fact, sir?

A. Yes, sure.

Q. And the downtown theatres in those areas still continue in business?

A. Some of them. Some are closed. Tell me where and I will answer you specifically.

Q. Mr. Lichtman, we were talking, I thought, sir, about Los Angeles, Kansas City and Roanoke.

A. Some theatres are closed, yes.

Q. Do you attribute that to the fact there has been a day and date policy?

A. No, not necessarily. I attribute it to bad business.

Q. But there has been a general falling off in grosses throughout the country?

A. All over the country.

Q. The practice that Fox has followed in licensing its pictures first run in Baltimore exclusively to the New Theatre is one that was followed for a number of years before the Paramount case; is not that so, sir?

A. I think so.

Q. And during the period of the Paramount case?

A. I do not know. I have only been with Fox since [967] 1949. I don't know what happened before that.

Q. When you acquainted yourself with the Baltimore situation, Mr. Lichtman, wasn't that brought to your attention?

A. I was out of the distribution for 12 years. I was with M-G-M Studio for quite a while.

Q. When you became director of distribution for Fox in anticipation of your coming here, as well as having in mind the reports made to you by Mr. Smith——

A. Yes.

Q. ——did you not learn for years both before and after the years, Fox licensed its pictures to the New Theatre?

A. That is my impression.

Q. And there has never been any alteration in that policy for 20 years?

A. Yes, I think recently there has been an alteration of policy, which Mr. Norris, our division manager, can testify to more in detail or accurately than I can, because this is his job.

Q. That has occurred within the past year, sir?

A. Recently, yes.

Q. You have no personal knowledge with regard to

the fact general competitive bidding has been instituted for Fox products?

A. That is right.

[968] Q. So, theatres other than the New Theatre have access to Fox product, as well as in the City of Baltimore?

A. That is correct.

Q. That competitive bidding, however, exists only among the downtown theatres; is not that so, sir?

A. Presently, yes.

Q. Was there any thought on your part, sir, that it might extend to theatres outside of the downtown theatres?

A. I am no fortune teller. I cannot tell what may happen in the future.

Q. In those few cities in which your company is actually granting first run to theatres outside of the downtown area, is not it a fact, Mr. Lichtman, that your company has done so in order to avoid the principle of uniformity so as to prevent the possibility of evidence being obtained of conspiracy and combination in violation of the Sherman Act?

A. I have no such knoweldge of any such thing.

Q. Actually, weren't you so advised by your own counsel, sir, in connection with the city of Cincinnati?

A. No, sir, I did not consult my counsel in connection with Cincinnati. I acted upon my own initiative.

Q. Mr. Lichtman, I want to be fair with you with regard to this, sir. Your statement is you did not consult counsel in connection with the city of Cincinnati in the [969] multiple licensing in the city of Cincinnati?

A. No, I did not. I do not recall that, sir, no, sir.

Q. There has been offered in evidence here in this case, Mr. Lichtman, as plaintiff's exhibit No. 57; a copy of an office memorandum from your company addressed to Mr. H. Blackmer Johnson, from Mr. Gehring, which reads as follows:

"Note the attached which Andy Smith wrote Al Lichtman telling him of the decision we have made re-

garding the distribution of our pictures first run Cincinnati. Mr. Lichtman has asked me to have you give thought to the outline in Mr. Smith's letter and advise me, please, if you have not a legal problem involved."

Do you remember that?

A. That may be so. That does not mean that I consulted a lawyer. Mr. Gehring consulted the lawyer.

Q. It was at your request?

A. That is right. You asked me if I consulted a lawyer in connection with the Cincinnati case, but I know no recollection of it.

Q. Your statement now is you did not do it directly. It was done through Mr. Gehring?

A. Apparently, yes.

Q. Do you remember what advice you were given by [970] your counsel with regard to that situation in Cincinnati?

A. No, I do not.

Q. There has been offered in evidence, Mr. Lichtman, as plaintiff's exhibit No. 58, a copy of a memorandum from Mr. Johnson, who is one of the attorneys for Fox, is he not?

A. That is right.

Q. Which reads as follows:

"As requested"—this is addressed to Mr. Gehring, sir—"we have examined Mr. Smith's memo to Mr. Lichtman of April 6, 1951. Speaking generally, I see no legal objection to the playing policy outlined thereunder. In fact, a departure from established playing arrangements made individually by a single distributor usually appears excellent evidence of absence of conspiracy or combination."

Do you recall that now, sir?

A. I do not recall it, sir. It wasn't addressed to me, so I do not recall it.

Q. Mr. Gehring never discussed it with you?

A. I do not remember whether he did or not. I do not remember that.

Q. You recognize, do you not, Mr. Lichtman, that by the decision of your company denying access of first run pictures to the Crest up until DIPLOMATIC COURIER, you have thereby fixed the terms and the conditions under which this new $460,000 theatre is permitted to compete in the [971] motion picture industry; is not that so?

A. I do not quite understand what you mean.

Q. Your decision to deny access to the Crest Theatre to first run pictures, either on an exclusive or either on a day and date basis, has had the effect up until now, has it not, sir, of actually fixing the terms and the conditions and the manner in which this new $460,000 theatre can compete in the motion picture industry; is not that so?

A. I do not think my action had that effect, no.

Q. At least, insofar as Fox product is concerned?

A. It may be insofar as Fox product is concerned, yes.

Q. And actually, as I understand your views, sir,—please correct me if I misunderstood you—your view is that you wish to continue the operation of first run only in theatres located in the downtown area of cities; is that so, sir?

A. Yes, sir, for the present, sir.

* * * * * * *

GLENN NORRIS, sworn:

[991] Q. Did you have any conferences or discussions with Mr. Myerberg prior to the construction of the Crest Theatre?

A. Yes; Mr. Myerberg called on me sometime the early part of the year, January.

Q. 1948?

A. 1948; January, February, or March, I don't remember the exact date, and talked to me about his general idea and plans for a theatre and shopping center which, I believe, at that time he referred to as the Hill Top Theatre.

Q. Did he have any drawings or maps or blue prints at the time?

A. Yes; he had quite an elaborate set of drawings and plans that he had in mind. It didn't mean an awful lot to me, because I don't know much about the construction, and from the plans could not tell very much about what sort of theatre it might be. However, from his description, it would appear that he intended to build a very unusual and very fine theatre.

Q. Did he at that time make any statement with respect to the run of pictures that he hoped to get or expected to get?

[992] A. That he was—that the theatre was designed for first-run pictures and, obviously, a theatre of this type, in a shopping community of the type he was building, was designed for first-run pictures.

Q. Was there any statement by him at that time as to whether he intended to operate the theatre, himself?

A. Yes; his discussion with me was, while it was a general discussion, there was nothing specific, other than the fact that he was building a shopping center and theatre, and the impression on me was, certainly, it left the impression that he intended to operate the theatre, himself. However, he did indicate, during our conversation, that his primary business was that of building and construction; that he had had some experience in the motion picture business, some years previous. I did not get the impression from Mr. Myerberg that he, himself, actually intended to devote his full time to the operation of the theatre.

Q. Did you later on have any further discussions with him?

A. Yes; he called at my office one afternoon, later on in the year, probably September or October. I was in a conference at the time, and I came out of the conference and talked to him for a few minutes. He told me then that his theatre was well underway; that he expected to

have it open within a matter of weeks, a month or so, and he was [993] very anxious to know what would be available for him in the way of first-run pictures, pictures first-run in the City of Baltimore. I explained to him at the time that while he had an attractive theatre, and all of the things he had said about the theatre apparently were developing to be a fact, from what I had seen of it,—it was not completed as of the time that I last saw it,—the location of the theatre was such that, actually, it was suitable primarily, regardless of its appointments, for only a neighborhood operation, because of the location of the theatre.

He wanted first-run pictures, and wanted to continue the discussion along the lines of securing first-run pictures, or consideration for exclusive first-run.

Q. Well, now, did you state to him at that time a final conclusion as to what basis Fox would furnish him pictures?

A. I told him we would offer him pictures on first neighborhood availability, in competition with the Uptown Theatre which, in our opinion, was directly competitive with the Crest Theatre.

* * * * * * *

[1004] Q. Mr. Lchtman said he had requested that surveys be made of the large cities, including Baltimore, to determine the feasibility of instituting there either runs day and date downtown and neighborhood or a series of neighborhood simultaneous runs, and he said you and Mr. Minsky had been delegated to make the survey in Baltimore. Does that accord with your recollection?

A. Yes. As a matter of fact, such surveys as we made in Baltimore were being made throughout the entire country by the various divisional branch managers, in an effort to improve if possible the revenue from our pictures. We made quite an extensive survey in Baltimore.

Q. I wonder if you would take just a few moments and describe just exactly what you did.

A. We first analyzed the City of Baltimore from the standpoint of the possibility of establishing a multiple first run system, let us say, of multiple first run—"system" for want of a better word—our idea was, for the sake of something to work with, that we tried to establish four key neighborhood runs that might run day and date with [1005] downtown. I suppose we could have found—we did not actually find four exhibitors who were agreeable to such an arrangement. Mr. Myerberg was agreeable.

There was one, possibly two others who had not the most desirable locations. To be perfectly frank with you, had I had an open choice to select exactly the theatres that I wanted, I doubt very much if the Crest Theatre would have been one of them, because we think there are four other locations in the City of Baltimore that lend themselves much better to that type of an operation than the Crest Theatre could.

However, the Crest Theatre was one of the neighborhood theatres at that time that apeared to be interested in something along that line. We did discuss it with Mr. Myerberg. And we discused it with, I would say, all of our other customers operating first neighborhood run theatres in the City of Baltimore.

In the main, we found opposition to the plan. I am speaking now of the neighborhood theatres. It would, however, possibly have been possible to find two, three or maybe four neighborhood theatres who would have been agreeable. But the one thing we did run into that we could not get across was the finding of a downtown theatre that would run day and date with those neighborhood theatres. Therefore, as far as I was concerned, Mr. Minsky concurred [1006] with that and subsequently our other executives concurred, so far as I was concerned, in any plan, we did what everyone was doing.

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*Cross Examination.*

[1031] Q. There has been some mention, Mr. Norris, about the fact that certain theatres that played this day and date policy were in common ownership. Is it a fact, in your mind, that common ownership would more readily permit a day and date policy?

A. I do not see how it is possible to sell a day and date policy to competing theatres unless it is common ownership.

Q. In your view is one of the factors against granting a day and date first run to a theatre like the Crest the fact that it would affect subsequent run revenues?

A. Well, my position as to the Crest Theatre, its availability for first run, so far as our pictures are concerned, is that the location of the theatre is such that we are placing too many hurdles in the way of people to get out [1032] to the Crest Theatre to see the picture.

Q. There are more hurdles in the way of people going to the Crest than there are in their way to getting downtown, are there?

A. It is my opinion. It is my theory in merchandising anything, which includes motion pictures, it should be made available to the public in the manner that is most convenient for them to see it.

[1033] Q. And your view would be the same, even though the Crest were to have access to first-run product on a day and date basis?

A. Well, the day and date proposition brings up another, a different point, Mr. Rome. I think I explained yesterday, as clearly as I could, at least, the survey that we made in an effort to establish if such could be done, the type of exhibition similar to what you suggest, I think, not to the exclusion of all other theatres in the City of Baltimore in preference to the Crest, but in the interest of developing a pattern of availabilities which might improve our revenue in the over-all from the city.

Q. If I understand your position correctly, Mr. Norris, your view about the Crest Theatre turns upon the problem of location; is that correct?

A. Primarily.

Q. Does there enter into your consideration, in reaching your conclusion, any problem affecting the subsequent-run revenues that would be derived by Fox if a day and date first-run outlet were instituted with the Crest Theatre?

A. I think, if it were possible to develop a day and date arrangement with a representative number of theatres in the City of Baltimore, which would not preclude the possibility of our including a downtown run, we would be agreeable to attempting it. I think I explained that, [1034] yesterday, in the attempts we made to survey the city.

Q. Isn't it the fact that, actually, Fox instituted the multiple first-run on a day and date basis, including a drive-in theatre as one of the theatres playing day and date first-run in Cincinnati, without having a downtown theatre to do it?

A. I believe I heard—excuse me.

MR. WATKINS:—Mr. Lichtman testified to that, fully, yesterday, that they could not get a reduction in clearance. They tried it out on a 14-picture basis, and went back to the old system.

Q. (By MR. ROMZ):—I simply want to establish this witness' knowledge concerning the situation. Will you answer my question?

A. My knowledge is primarily what I heard Mr. Lichtman testify yesterday, to the effect that we were unable to sell a downtown run, and I would say, doing the best we could, in lieu of a downtown run, to sell a group.

Q. So, in your mind if there had been in the City of Baltimore a downtown theatre agreeable to playing Fox product on a day and date basis with the Crest Theatre, and perhaps two or three other theatres located outside of the downtown section, Fox would have been prepared to go ahead and grant the Crest, and those other theatres, first-run in the City of Baltimore?

[1035] If such an arrangement could have been worked out in a practical manner, yes. However, the downtown theatres feel, and I feel convinced, pretty thoroughly, that such an arangement was impossible from their standpoint.

Q. Whom did you talk with, of the downtown exhibitors who took that view?

A. All of them. I would say, with the exception of Loew's and Warner's.

Q. Who, specifically, Mr. Norris?

A. The New Theatre.

Q. You saw Mr. Mechanic there?

A. And the Hippodrome Theatre.

Q. Was it Mr. Mechanic you saw?

A. Yes.

Q. And then Mr. Rappaport?

A. Yes.

Q. Whom else did you see?

A. I don't recall any others. Yes; Mr. Schanberger, I did discuss it with Mr. Freddie Schanberger.

Q. Of the Keith Theatre?

A. Yes.

Q. Did you approach anyone else in the downtown exhibitors with regard to it?

A. No.

Q. Did you consult anyone concerning the Mayfair [1036] Theatre as to the use of the Mayfair Theatre to do it?

A. I don't recall any discussion in connection with the Mayfair Theatre.

Q. Do you consider the Mayfair Theatre as an acceptable first-run outlet in the City of Baltimore?

A. Only if another—only if neither of the other theatres are available.

Q. The Mayfair Theatre is a theatre located right next door to the Stanley Theatre?

A. Yes.

Q. And Mr. Mechanic and Mr. Rappaport and Mr.

Schanberger all took the view that they were opposed to this idea and they would not do it; is that correct, sir?

A. They all took the position, from a financial standpoint, that it was not good business to do it.

Q. They did not want the competition of the Crest Theatre, or any other theatre, coming in?

A. They did not say that; they did not mention the word "competition".

Q. What did they say?

A. That it would not be financially profitable for them to do it. They were not interested in licensing any pictures from me on that basis.

* * * * * * * *

SAM GALANTY, sworn:

[1072] Q. The letter from Mr. Josephs, which has been shown to you by Mr. Watkins, and refers to the fact that it is the policy of your company not to recognize a neighborhood house as an outlet for exhibition of your pictures on first-run, that is the policy of your company, is it not?

A. That letter so states.

Q. And that is true not only as to Baltimore but in other cities throughout the country?

A. I believe our policy is measured in the sense of each given situation. It is not possible to adopt a company that has no theatres to an over-all United States policy. We are trying to treat each situation with every consideration.

Q. Do you know of any cities or towns within your own division, Mr. Galanty, in which Columbia does license its pictures to theatres outside of the downtown area, other than the theatre in Washington, the Ontario, that has been mentioned?

A. Yes; I mentioned a few moments ago the city of Richmond, Virginia, and Roanoke, Virginia, and Norfolk, [1073] Virginia.

Q. They are unusual instances, are they not?

A. They are unusual, in that we find that our market.

Q. Your company licenses its pictures to the other distributor companies which are here, with the exception of Universal and the United Artists, in their theatres throughout the country, does it not?

A. We license our pictures to the other distributors who own theatres in various parts of the United States.

Q. And Columbia Pictures receives each year a substantial sum of money by way of film rentals for your pictures which do appear in those theatres?

A. I can only confine my statement to what we receive in the area in which my activities are confined. I would say, our returns from some of those deluxe theatres operated by other distributors is quite satisfactory.

Q. You said that although the Crest Theatre had fine appointments, and was a well-constructed theatre, its location was in a neighborhood which, in your opinion, did not show the hope of a heavy patronage?

A. That is my statement.

Q. Do you know what the population of the area of the Crest Theatre is, Mr. Galanty?

A. I do not. I have heard certain statements made as to their potential draw, and I did make it my business [1074] to make my own personal survey, and what I saw was a theatre that was located in an area that certainly did not show too much ahead, not remotely a theatre that could be classified or justified as a so-called first-run theatre.

When did you make that inspection, yourself?

A. Very shortly after the theatre had opened its doors.

Q. Have you ever been out there since?

A. Yes; on another occasion.

Q. When was that?

A. I should say, three months ago, possibly longer than that; three to five months ago.

Q. Actually, the policy of your company is such that there would be no theatre in the City of Baltimore located

outside of the downtown area, no matter how fine a theatre it might be, and no matter what it might be willing to offer by way of film rental, that your company would license first-run pictures?

A. No; I did not make that statement. I said we would prefer, wherever humanly possible, to have as our outlet a downtown theatre, particularly in a city with the importance of the City of Baltimore.

Q. You know, do you not, that, actually, the Crest Theatre, or Theatre Enterprises, Incorporated, made bids to Columbia Pictures for JOLSON SINGS AGAIN, and ALL THE KING'S MEN?

[1075] A. Those letters, I understand, were addressed directly to the New York office.

Q. They never communicated with you regarding it?

A. Who?

Q. The New York office.

A. The New York office discussed with me by phone the fact that they had received correspondence, but no copy of the correspondence was ever sent to my desk.

Q. The bids for those two pictures were substantial bids, were they not?

A. That can best be judged by the history of what has happened.

Q. You actually place your pictures in the Hippodrome or Town Theatres downtown because, as you have said, your usual practice, as phrased by Mr. Raftery, is to get the best returns you can get from the City of Baltimore?

A. We measure our returns, Mr. Rome, as I explained, beyond the actual dollar in film rental. I believe, a picture in the City of Baltimore, which is placed in the hands of a fine showman, will give us returns not only confined to the downtown area of Baltimore, but we find that success goes out with the neighborhood theatres, is better out there, and outside of the confines of the County of Baltimore, we have better success.

Q. And that is the result of the exploitation, the [1076] advertising, that flows from the downtown house?

A. A certain touch of showmanship that is applied in the theatres when Mr. Rappaport gives them his attention.

Q. If the Crest Theatre were to have access to the Columbia pictures, and play first-run on a day and date basis with either the Town or Hippodrome Theatres, in your opinion, would there by any less exploitation or publicity or advertising flowing from the two houses, rather than from just the one?

A. You are dealing with a factor that just cannot apply itself. Mr. Rappaport was not agreeable to continue to negotiate for Columbia pictures if we were simultaneously offering the picture to a neighborhood theatre. And, in my opinion, his position was proper.

Q. Mr. Rappaport did not want anyone coming into the first-run field, competing with him, as he thought; is that correct?

A. You will have to ask his reasoning.

Q. You discussed it with him?

A. His position, I explained very clearly, that he would not negotiate further for Columbia pictures if those pictures were offered simultaneously to a neighborhood theatre.

Q. Do you know what the average film rental earned by Columbia Pictures has been from the Town and Hippodrome [1077] Theatres in the last several years?

A. Those figures are available, but I do not have them here. From my memory, I could not make that statement.

Q. If I may inform you, then, Mr. Galanty, from the information furnished by Columbia Pictures on interrogatories filed in this case, during the season 1948-49, 19 pictures played in the Hippodrome Theatre at an average rental to Columbia of $1,593, and 5 pictures played in the Town Theatre and paid an average rental to Columbia

of $2,472; in the season 1949-50, 16 pictures played in the Hippodrome and paid an average rental of $3,648, while 6 pictures played in the Town Theatre and paid an average rental of $1,328; in the season 1950-51 9 pictures from Columbia played in the Hippodrome at an average rental per picture of $993, and 10 pictures played in the Town Theatre at an average rental per picture of $2,939.

Those figures, as given by Columbia, would be in line with your own recollection of the rentals, wouldn't they?

A. I don't question those figures, Mr. Rome, but I should like to call your attention that all of Columbia pictures, with all deference to our producers, are not what might be particularly termed the best product. Despite that, in those figures, the averages you have given, there are many pictures which Mr. Rappaport played first-run that were generally, they did not meet with the same success [1078] in finding a first-run market.

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GEORGE M. JOSEPHS, sworn: * * *

[1091] Q. What was the reason for according to the Crest the treatment it has been given with respect to Columbia pictures?

A. Purely our considered opinion that the Crest Theatre, being a neighborhood house in a neighborhood location, with a fairly sparse population, was not entitled to an opportunity to exhibit our pictures on first run in the City of Baltimore.

MR. WATKINS:—The witness is with you.

* *

*Cross Examination.*

Q. (By MR. ROME):—Mr. Josephs, you just said that the area of the Crest Theatre had a sparse population.

A. Well, perhaps the word is wrong. At least a population which is not dense. In other words, the area from which it would have to draw, from the information that was given to me, was not the dense area that we would like to have for a first run theatre.

Q. What information was given to you with regard to the population, Mr. Josephs?

A. No specific information as to figures except it was a residential area not very heavily populated.

Q. Do you consider a population of 100,000 people or [1092] 125,000 people enough to start a first run theatre?

A. It might be enough to support a first run theatre under some circumstances, depending upon the picture that might be exhibited there, but not necessarily to support a first run theatre for all types of product.

Q. You referred to the fact that the offer by Theatre Enterprises of $7,000 guarantee for ALL THE KING'S MEN was simply insufficient, dollar-wise.

A. We would consider it insufficient if we were considering it at all. We would consider it insufficient for a film rental for first run Baltimore.

Q. Do you know what film rental you received from first run Baltimore from the exhibition of ALL THE KING'S MEN?

A. I am not certain.

Q. According to the interrogatories that your company have answered, Mr. Josephs, Columbia actually received from the first run exhibtion of ALL THE KING'S MEN out of the City of Baltimore $7,182.52.

A. Yes.

Q. And you still consider the bid of a guarantee of $7,000 so insufficient, that you would not even consider it?

A. Well, definitely, Mr. Rome, in considering bids you cannot determine before a picture plays how much it is going to gross and how much it is going to earn. The basis [1093] of your decision with respect to any offer would be on past experience. We have earned in first run Baltimore out of the Hippodrome and Town Theatres on many of our pictures considerably in excess of $7,000.

Q. Have you been in court, Mr. Josephs, when I read to Mr. Galanty the average film rentals received from the Town and Hippodrome Theatres for the years 1948-1949, 1949-1950, and 1950-1951?

A. Yes, I heard your averages, Mr. Rome.

Q. And you still say, despite those averages, which are considerably less than $7,000, that the performance Columbia has had in the past out of the Hippodrome Theatre was such that you were able to look upon the $7,000 as so insignificant not even to give it a thought for that picture?

A. Mr. Rome, we have various classes of pictures. We have some pictures which we consider extremely important pictures. We have others that are average. We have some pictures which we do not consider have very much grossing possibilities at all. When we judge an offer made on a particular picture it is with regard to the type of picture that it is. And in arriving at a conclusion we compare the offer made with film rental we have received on pictures which we judge to be in the same general classification.

All The King's Men, in our opinion, and as proven [1094] by the final results of the picture, was one of the top pictures, best pictures that we have ever disrtibuted. It subsequently received the Academy Award, and as such in judging an offer made on the picture, we would compare it with rentals which we have received on top pictures exhibited in the City of Baltimore on first run.

Q. But all that you made on its exhibition on first run was $7,188?

A. I think that we allowed the picture to play too early.

Q. Even though these bids submitted to you came unsolicited?

Mr. Watkins:—Offers.

Q. (By Mr. Rome):——offers came unsolicited, they were not even acknowledged, were they?

A. I do not believe that they were acknowledged. We received them on the letterhead of a firm of attorneys, and we do not as a general rule acknowledge letters that we receive from attorneys.

Q. Mr. Galanty was not able to give us information other than for his particular division, Mr. Josephs, but perhaps you can tell us whether or not it is not the fact that Columbia Pictures licenses its product to the so-called Big Five in their theatres throughout the country?

A. Well, Mr. Rome, in answer to that let me say we [1095] license our product for as much money as we can get in every city in the United States, to whichever exhibitor we find is willing to license our product and pay us those film rentals.

Q. I am perfectly willing to accept that, but won't you answer my question?

A. I will be glad to do so. In many cities of the United States the Big Five, as you refer to them, have theatres and they are willing to license our product in those theatres.

Q. But you do so license your product?

A. Yes, sir.

Q. And is it not a fact that Columbia each year receives from that licensing very substantial sums of money?

A. We are fortunate that we are able to receive substantial sums of money from these theatres.

Q. But is it not a fact that the theatres of these so-called Big Five, taken collectively, actually represent your best customers throughout the country, dollar-wise?

A. I would not say that that is so, necessarily.

Q. Don't you know, Mr. Josephs, that that has been found to be the fact by the court in the Paramount case?

MR. WATKINS:—Objection.

THE WITNESS:—No, I do not know that that has been found to be the fact at all in the Paramount case.

[1096] (By MR. ROME):—These theatres owned by the Big Five distributors, which are first run, are located in the downtown sections of cities?

A. Yes, in many cities they have theatres located in the downtown sections.

Q. And you license your pictures on first run in those theatres in those cities in many, many instances throughout the country?

A. Yes, in many instances throughout the country we license those theatres, that is correct.

Q. The City of Los Angeles was mentioned. To what theatres in the City of Los Angeles do you license your product?

A. At the present time?

Q. Yes.

A. Well, at the present time our pictures are being offered on competitive bidding in the City of Los Angeles.

Q. Before the competitive bidding was inaugurated, to what theatres did you license your product?

A. Our pictures are generally licensed to the Hill Street Theatre, located in downtown Los Angeles, and the Pantages Theatre located in Hollywood.

Q. And both of these theatres are run by RKO, are they not?

A. They are.

[1097] Q. And they are about eight miles apart?

A. I believe so.

Q. Have you any idea of the population of the City of Denver, which was also mentioned?

A. I believe it is something like 300,000.

Q. Actually, Mr. Josephs, according to the census figures, according to the almanac, the population of Denver is 412,000. Can you tell me how many subsequent run theatres there are in the City of Denver, approximately?

A. From my recollection I believe that Denver probably has in the neighborhood of 25 subsequent run theatres, perhaps.

Q. And those subsequent run theatres are still in existence, despite the fact that Columbia has been playing a day and date first run policy in the City of Denver?

A. I wouldn't know if they are all in existence.

Q. These 20 theatres?

MR. WATKINS:—You said despite the fact.

Q. (By MR. ROME):—Are doing business today, their doors are open and they are showing motion pictures?

A. I imagine they are doing business.

Q. And the downtown theatres are also open in the City of Denver, showing pictures?

A. Yes, to the best of my knowledge, they are.

Q. Who is the exhibitor who has the common ownership [1098] of the theatres in Denver in which you show your product?

A. Fox Intermountain Theatres.

Q. That is connected with Fox, which is one of the defendant companies in this case; is that so?

A. I believe so. It is connected with National Theatres.

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[1100] *Cross Examination* (Resumed).

MR. ROME:—If the Court please, may I, in line with the occurrence of yesterday,—at which time Mr. Lichtman accepted the offer of Theatre Enterprises, Inc. of $15,000 for the right to exhibit the motion picture DIPLOMATIC COURIER on first run in the City of Baltimore—herewith tender to counsel for Twentieth Century-Fox a certified check of Theatre Enterprises, Inc., in the sum of $15,000 for the right to exhibit that picture on first run in the City of Baltimore.

THE COURT:—I don't know that this is the place to have an offer or sale of movies, or to have any sale.

MR. ROME:—It was simply in order to carry through with what occurred yesterday, in view of the fact that Mr. Lichtman accepted it, and he mentioned the fact that he wanted to have the check. I want to demonstrate the good [1101] faith of our client, in herewith presenting it.

THE COURT:—Mr. Watkins, do you want to say anything?

MR. WATKINS:—If Your Honor please, we are dealing with what happened back in 1948, 1949 and 1950.

THE COURT:—I thought what took place yesterday was sort of a behind-the-scenes affair and did not have anything to do with the case. I did not object to it, but I do not think present-day bargaining has anything to do with the issues in the case.

MR. ROME:—The only reason I mentioned it at all, if the Court please, is that Mr. Raftery had specifically directed Mr. Lichtman's attention to DIPLOMATIC COURIER, and Mr. Lichtman accepted the offer; and I wish to indicate the fact that we do have the check here.

THE COURT:—No doubt, the check will keep. You can take that up afterwards.

Q. (By MR. ROME):—Mr. Josephs, if the Crest Theatre had been located downtown in the City of Baltimore, would your company have granted it access to first run pictures?

A. Yes.

Q. And, if that theatre had been owned by Mr. Rappaport, located where it is now at Reisterstown Road and Rogers Avenue, and if Mr. Rappaport had requested your company to institute a day and date policy in the Town Theatre, for instance, and in the Crest Theatre, would your company have [1102] granted that request?

A. I couldn't answer that. It is hypothetical. It would have to be decided, if at all, by others. I cannot answer the question.

Q. You would have to take it up with your superiors?

A. We would have to discuss the entire situation, and the effect that it would have on other thatres located in the same area and in other neighborhood areas in Baltimore which might be involved, which might result in our having to change our entire method of distribution in the City of Baltimore,—which is a very complex problem.

Q. In any event, you would consider it?

A. We would probably consider the request.

Q. The reason I raised the question with you, Mr. Josephs, is that I gathered from your testimony that the problem of common ownership, as, for instance, the Fox Theatre in Denver, seemed to make it easier on the part of your company to grant the day and date first run; and I think we should point out the fact.

A. With regard to common ownership, there is no doubt but that it is a lot easier to distribute pictures on a day and date policy. If you are going to do it, where you have common ownership, you can control the opening date of your picture, the closing date of your picture, and your have no problem with respect to the placing of your advertising; [1103] you have one exhibitor with whom you have to deal for the placing of your advertising. All of these problems are very important in dating a picture on first run; with respect, particularly, to the closing date, we would want to know when the picture closed. To have it close in both places at the same time is very important to our subsequent problem, because of the first run closing.

Q. To your knowledge, has it happened in the city of Los Angeles, for example, that one house plays the first run day and date with another house who held the picture for a longer period of time than another?

A. No, not with Columbia pictures; we haven't had it happen.

Q. Has it ever happened with any other company, to your knowledge?

A. I would not know.

Q. You know, generally speaking, the fact that the other distributors in this action also license their pictures for the first run exhibition in the theatres located downtown in the city?

A. I do not follow your question.

MR. ROME:—Will you read the question, please?

(The question was then read by the Reporter.)

THE WITNESS:—In the City of Baltimore?

Q. (By MR. ROSE):—No; generally, throughout the [1104] country.

A. Yes; generally, first run exhibition is licensed for downtown theatres around the United States.

Q. Isn't it a fact that your decision not to grant access to first run pictures on the part of the Crest Theatre actually resulted in fixing the terms and conditions under which that theatre could compete in the motion picture industry?

A. I don't know what you mean by "terms and conditions". It did result in a decision on our part that this theatre would exhibit, or would be privileged to license our pictures, on a first sub run availability.

Q. And thereby it fixed the run clearance for that theatre at the first run subsequent availability?

MR. WATKINS:—On that picture.

Q. (By MR. ROSE):—On that picture, and on any picture that Columbia has licensed to the Crest Theatre?

A. Yes. If our subsequent availability is a certain period after the first run, every subsequent run theatre would be fixed by that plan.

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[1110] Q. (By MR. ROSE):—I hand you a letter which has been marked in evidence as plaintiff's exhibit No. 32, Mr. Josephs, from yourself, which was shown to you this morning, and ask you if it isn't a fact——

A. It was not shown to me this morning, was it?

Q. Will you look at it now, sir?

(Document handed to witness.)

Isn't it a fact, Mr. Josephs, in this letter you wrote to Mr. Galanty as follows:

"Judging from the description of the theatre as contained in this letter, this seems to be a neighborhood house and it has been our policy not to recognize the requests of neighborhood houses for first run on our product."

That is contained in that letter, isn't it?

A. That is correct.

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FREDDIE MEYERS, sworn: * * *

[1117] Q. I show you, Mr. Meyer's, Plaintiff's Exhibit 28, and since it was introduced sometime ago, it might be [1118] worthwhile reading it to the jury. It is a short letter:

"November 26, 1948

Attention: Mr. Martin

"Universal-International Film Corp.
"913 New Jersey Avenue N. W.
"Washington, D. C.

"Dear Mr. Martin:

"Pursuant to my telephone conversation of November 22, 1948, I submit the following bid for your picture 'HAMLET' to play our Crest Theatre first run, City of Baltimore.

"Theatre Enterprises, Inc. agrees to pay Fifty Percent (50%) of the first Seven Thousand Eight Hundred and Fifty Dollars, ($7,850.00) gross box office receipts, and Sixty-Five percent (65%) of all box office receipts over Seven Thousand Eight Hundred and Fifty Dollars ($7,850.00). We will also place any reasonable guarantee, the figure to be mutually agreed upon. We will also set a minimum figure determining the completion of the engagement of this picture.

"It would be greatly appreciated, since time is most important, if you would reply at once to the above.

"Very truly yours,

"THEATRE ENTERPRISES, INC.
"By
"(Sgd) Harry D. Myerberg."

Now, Mr. Meyers, I would like to ask you two questions about the form of this. He refers to submitting a bid. Is that a bid?

A. No, sir. That was no bid to me, and I so told him. [1119] If I remember correctly, I think I answered that letter. I am not sure whether it was that letter or another letter that I replied to. We were not bidding for any pictures, and told him that. When we received that letter, I don't know whether the reply is—whether our reply was to that one, or some other letter, but I know I replied to him; but which letter, I dont remember.

Q. The offer is to pay 50 per cent of the first $7,850. Is that a guarantee of any sort?

A. It is not.

Q. It is a percentage against a particular figure?

A. A picture might gross $10,000, and it might gross $7,000, and it might gross more. If it grosses a thousand dollars, you get 50 per cent of that, or $500.

Q. Did you accept this offer?

A. I did not go into any discussion with the man, because I thought the man was—I thought he was joking about it. The first thing, the man didn't know his business, frankly, when he tried to buy a highly-specialized picture like HAMLET for a neighborhood theatre.

Q. You did not think that was appropriate?

A. When we were running that, we were going to specialty theatres, that cater to special people. I would not say the intelligentsia, but I would say, special people who patronize this kind of picture in downtown theatres and, [1120] therefore, I did not take it serious. I thought he was joking, to be frank.

Q. At any rate, you did not accept the offer?

A. That's right.

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*Cross Examination.*

[1121] Q. (By MR. ROMB):—Mr. Meyers, if the Crest Theatre had been located downtown, would you have granted it access to first-run Universal pictures?

A. I say Yes; I would give him an opportunity, I cer-
[1122] tainly would.

Q. So then, actually, the only reason why it was not granted access to first-run pictures was because of its location, which you considered to be bad; is that so, sir?

A. Yes; that is so.

Q. Your company, Universal, for many years, has it not, has licensed its product for first-run in many instances to the so-called Big Five?

A. I disagree with you. In the first place, I take issue with you, and I don't like to take issue with you, because I am not a lawyer. There is no such thing as the Big Five. Let's eliminate that, right now. I heard you mention that several times. Today, we have three companies, motion picture companies, that have up to a certain time to dispose of their theatres; namely, Fox West Coast—let me say "Fox", not West Coast—but the Fox Theatres, the Warner Theatres, and the Loew Theatres. They have a certain time in which they have to divest their theatres from their production companies. So that eliminates the Big Five, completely; so there are three companies, Mr. Rome, not Big Five. I wish you would not apply that, because it is not right, as far as I am concerned.

Q. At the time that we are speaking of, back in 1948 and 1949, isn't it a fact, Mr. Meyers, that the term Big Five was a well-recognized term in the motion picture indus- [1123] try to designate Fox, Warner, Paramount, Loew's, and RKO?

A. It is not a fact, as far as I am concerned.

Q. You never heard that expression?

A. I never heard of it, and I never applied it in that sense, and I never heard of it in that sense, and I never heard of the Big Five. I heard you say that, this morning, and I was amazed.

Q. As of the time we are speaking of, back in 1948

and 1949, those five companies did own theatres throughout the United States, did they not?

A. I don't know when RKO Company was divested, and I don't know when Paramount was divested; and, therefore, I cannot give you a correct answer, whether it was 1948 or 1946. I don't know which.

Q. This divestiture was ordered, these five companies owned theatres throughout the United States, did they not, before divestiture was ordered?

A. I imagine they did.

Q. And, in your capacity as eastern sales manager for Universal, you knew did you not, that Universal pictures were licensed for first-run exhibition in the theatres owned by those five companies over the years you were with Universal?

A. Yes; we did business with all theatres all over the United States; correct.

[1124] Q. Did you specifically do business with these five companies?

A. I imagine so, along with all the other theatres. There are 18 000 theatres in the United States, or were at that time.

Q. You say you imagine so. Don't you know?

A. I wouldn't know. I was only interested in my own part of the country.

Q. That is the part of the country I am talking about.

A. The eastern part of the country, there were some theatres doing business with us, yes, with some of those people who own theatres, and also distributed pictures.

Q. And Universal, in that section of the country that came under your jurisdiction, receives very substantial sums of money each year by way of film rental?

A. I wouldn't know what the amount was. You say "substantial". I dont' know. Some money.

Q. Would you characterize it in some other way?

A. I cannot.

. . . . . .

[1127] Q. You have said that, in your opinion, Mr. Myerberg has put his theatre in an area where a man was not entitled to put a theatre. Is that correct?

A. I didn't say "no man"; there are a lot of people in our business, as well as in other lines of business—he decided to put a theatre in that area. Why, I don't know. If it was me, with the experience I had, or other people, with the experience that they have had in the theatre business, they would not have put a theatre in that area.

Q. That is because, in your experience, first-run pictures, with the rare exceptions you have mentioned here, have always been licensed for exhibition in the theatres located in the downtown areas of cities?

A. I would say Yes.

. . . . . .

[1131] Q. There is no doubt, is there, Mr. Meyers, that this letter was requesting the opportunity to license a Universal picture, HAMLET, for exhibition at the Crest Theatre on first-run in the City of Baltimore. The letter say that, doesn't it?

A. That is right; okay.

Q. And, yet, you treated it as a joke?

A. I certainly did, because I didn't think the picture belonged in that theatre at that particular time.

[1132] Q. Well, now, you thought that Mr. Myerberg, or Theatre Enterprises, Incorporated, was simply having a little fun with you, when it wrote this letter?

A. I don't know what Mr. Myerberg was doing.

Q. Do you know what the picture HAMLET earned for Universal by way of first-run in the City of Baltimore?

A. I don't remember. Would you mind refreshing my memory?

Q. Yes; I will be glad to, Mr. Meyers. HAMLET paid, the exhibition of the picture HAMLET, paid to Universal a film rental of $7,872.82 for its exhibition on first-run in the City of Baltimore.

MR. RAFTERY:—What theatre?

MR. ROME:—It was played at the Little Theatre.

MR. WATKINS:—On two additional runs there.

MR. ROME:—I am talking only about the exhibition at the Little Theatre on first-run.

Q. (By MR. ROME):—In your opinion, was that a large film rental to obtain, for Universal, for the playing of that picture?

A. For that theatre; yes.

Q. Was it a large film rental for Universal to get out of this picture on first-run in the City of Baltimore?

A. Frankly, we were a little disappointed in the results of HAMLET in the Little Theatre; yet, that is the [1133] sum of $7,872, and that is fairly good film rental.

Q. How many seats has the Little Theatre?

A. I imagine, a little less than 300.

Q. Have you any idea of the average film rental earned by Universal from the playing of its pictures on first-run availability in the City of Baltimore?

A. Mr. Rome, you cannot talk to me in terms of averages. If you want to be specific, and tell me what each picture grosses, I will discuss it; but on averages, no averages. And I will tell you why: Each picture has to be treated separately. They vary in quality, and they vary in terms; and I cannot discuss averages.

[1134] Q. (By MR. ROME):—Mr. Meyers, according to the information which has been furnished by Universal, during the season 1947-48, there were 24 pictures that played at the Keith Theatre, and earned an average rental for Universal of $2,573, and 8 pictures played at the Century Theatre, and paid an average rental of $2,497; two pictures played at the Mayfair, and earned an average rental of $365.

During the season 1948-49, 17 pictures played at Keith's Theatre, and earned an average film rental for Universal of $2,270. Seven pictures played at the Century Theatre, and earned an average rental of $1,740. Two pictures played at the Mayfair, and earned an aver-

age of $738. There was one picture played the Stanley, and earned $1,158; one picture played at the Town, and paid $750.

During the season 1949-50, 17 pictures from Universal played at Keith's, and paid an average film rental of $1,747; six pictures played at the Century, and paid an average of $1,147; two pictures played at the Mayfair, and paid an average rental of $3,348; and three at the Hippodrome paid an average of $1,275.

Now, with that information, Mr. Meyers, which I recognize, sir, you consider to be an improper approach to the problem, I want to ask you, sir, whether or not, in your opinion, the Crest Theatre's offer concerning the picture HAMLET would not have returned to Universal a comparable [1135] film rental which you have earned from the playing of your pictures in the theatres downtown?

A. All right, Mr. Rome, let me ask you this question, as to what my rights are, in answering the question. I want to know, first, whether the Court insists that I answer the question, if you use it in terms of averages. If the Court says I must answer the question, I will.

THE COURT:—I think you understand the question. If you cannot answer it——

THE WITNESS:—I do understand the question. Okay.

THE COURT:—If you can answer in some other way, if you can honestly give an answer, go ahead.

THE WITNESS:—Thank you. My answer is, I would not have obtained or earned at the Crest Theatre, upon a 50 percent, these things you call averages.

Q. (By MR. ROME):—Isn't it the fact that no matter what the Crest Theatre would have offered Universal for any of its pictures, that your company still would not have licensed it first-run pictures in the City of Baltimore, either on an exclusive or on a day and date policy?

A. I disagree with you completely. If I were still with the company, maybe I would have serviced the Crest Theatre. I don't know what I would have done. I left

the company in 1949, December 31st; but up to that time I didn't think the Crest Theatre had a chance, in fair play, unless [1136] the man wanted to burn Uncle Sam's money, that he had a chance of returning to a film company, to the Universal Film Company, any kind of money that you are talking about.

Q. Well, then, if I understand you correctly, it would follow that if Theatre Enterprises had offered a sufficiently large film rental by way of guarantee, that Universal, or you, acting for Universal, would have licensed pictures?

A. I don't know what my position would have been after 1949. I don't recall—I don't know what I would have said then.

* * * * * * *

EDWARD K. O'SHEA, sworn: * * *

[1191] Q. Now, Mr. Rome has been asking a question of a number of witnesses to this effect: Is a city of 100,000 people capable of supporting a first run theatre?

A. It certainly is.

* * * * * * *

*Cross Examination.*

12 04] Q. Isn't it the fact, Mr. O'Shea, that the reason you granted the product to the Ontario Theatre was just because, as you said, that Warner's Ambassador Theatre, a few blocks away from the Ontario Theatre, had for a number of years been licensing product from your company and playing it day and date in the City of Washington?

A. That is right. You mean was that the reason I sold Ontario?

Q. Yes.

A. No, sir. He told me he had, he thought, the finest theatre in the United States and the finest pictures he got from people all over the city and he thought he had a chance in that location.

* * * * * * *

[1213] Q. Your statement is that the fact that the Warner theatre, the Ambassador, had been playing Paramount products for a number of years and, consequently, the denial of your product to the Ontario would be obviously discriminatory, had nothing whatever to do with your decision?

A. No, sir.

Q. But isn't it a fact that that has had to do with your decision in granting the pictures in other situations, such as in Wichita, Kansas,—the fact that one of these [1214] other large companies had a theatre which had been getting the products from your company in an area outside of the downtown area?

A. I told you that Mr. Sullivan wanted a license for the two theatres. We had been playing the two theatres on pictures at the Fox Miller and Boulevard, and Orpheum and Boulevard. It was one or the other combinations.

Q. There is a letter in the case, sir, which is Plaintiff's Exhibit No. 66, addressed to Harry Hamburg from Mr. Morgan. Mr. Morgan was another one of the lawyers of Paramount, wasn't he?

A. He was in the legal department.

Q. That letter has to do with Wichita, Kansas, and the request of the Tower, which you said was four blocks from the other?

A. Yes.

Q. To get access to Paramount first run in the city of Wichita. In that letter, Mr. Morgan wrote to Mr. Hamburg, who was the branch manager——

A. Yes, and he still is.

Q. "Both Mr. Smith and myself have reached the conclusion that because we have licensed this run in the past from time to time in the Fox Boulevard Theatre, we could be accused of discriminating in favor of Fox if we do not offer a comparable theatre the same opportunity."

[1215] Do you still say the fact that these other defendants had been licensing your product in a theatre outside of the downtown area has nothing whatever to do with the decision when an independent comes along and seeks access to your product in a similar manner?

A. I say we should not be accused of discrimination.

Q. "We could be accused of discriminating in favor of Fox if we do not offer a comparable theatre the same opportunity".

A. Yes; we might have had a lawsuit in Washington. I think that is why they brought the lawyer on.

Q. So it did have to do with the fact that the Warner Theatre had access to your product?

A. Yes. And that is the only way we can license them,—if we sell Warner, to sell the Metropolitan Theatre.

Q. Actually, it remains a fact that your company has a national policy which restricts the showing of your pictures first run to theatres in the downtown area, except in these unusual instances?

A. That is not so.

Q. That is not so?

A. No. We have a national policy regarding the showing of pictures downtown. We want to show them downtown, we want to show them to the best advantage, and under the best advertising and the greatest prestige in a large area, re- [1216] sulting from that film. And we do have a national policy on that basis. We want to play the finest theatres everywhere; we believe the best results can be obtained in playing downtown, populated shopping areas.

Q. That was not my question. Perhaps I did not make it clear. My question was, Mr. O'Shea, that your company does have a national policy which limits the showing of your pictures on first run, particularly in large cities, to theatres located only in the downtown area of the cities?

A. That is the policy generally, yes. That is where we think we can get the best results.

Q. And, no matter how fine a theatre, no matter what it might be willing to offer, if it is outside of the area, it cannot get access to your pictures?

A. No; I did not say that. I did not say that. You heard a man here yesterday say that if they build another Music Hall out there, and put on a $50,000 stage show, he would be very willing to go out there.

Q. If the Crest Theatre had been located downtown, would it have had access first run to Paramount products?

A. Yes. Even with the same theatre located downtown, it would have been easier for the customers to go in there than to go out to the Crest Theatre and seek it.

Q. If Warner Bros., in addition to having the Stanley Theatre in Baltimore, owned the Crest Theatre where it is [1217] located now, would it have had access to your pictures on a day and date basis?

A. No, sir.

Q. Yet you were willing, and actually did, grant Warner first run day and date in Washington?

A. I have only been with Paramount, as you know, about four years. If you want to sell the picture to the Warner theatre, a very important downtown theatre,—they play the Metro. We sold four other pictures to Loew's Palace and Columbia.

Q. If Warner, in Baltimore, wanted to play that picture day and date, it would have been permitted to do so?

A. At the time the Crest Theatre opened? It would have been denied them.

Q. Actually, Mr. O'Shea, the national policy that you and I have been talking about was a policy that had existed in the Paramount Company before you ever came there?

A. That I don't know at all. I know these two theatres were playing day and date. If you want to ask a specific question about anything else that I know about, I will honestly answer it.

Q. I am not talking about Washington, but about the national policy on the part of Paramount, which you have described, sir, to limit the showing of your pictures first run to theatres located in the downtown section?

[1218] A. That is not the national policy at all. I said we would send out a policy that we want to play the finest theatres, the finest grossing theatres on our pictures; and we point out that we believe this picture, STREETS OF LAREDO, is as good as some other picture, they should seek out the early runs, and that this is sort of a test run to find out what the picture is worth, so that we can sell it at the proper terms.

Q. I thought we had agreed——

A. I thought we had, too.

Q. Then—that there is a national policy on the part of Paramount to limit the showing of your pictures on first run, particularly in the larger cities of the country, to theatres located in the downtown area of the cities?

A. We generally like to do that, because that is the best revenue. That is the opportunity for the picture, that is where the most people are, and that is where the best advertising is achieved by us.

Q. That is the policy that you found in the Paramount Company when you joined it? Isn't that right?

A. No, sir.

Q. Paramount had not been doing that before?

A. They had various policies. I don't know what the policy was.

Q. Didn't you make it a principle to inform yourself [1219] as to what had been done in Paramount?

A. I could see the policy.

Q. And the policy had been the same?

A. No; it was different. A policy is liable to change next week, or next month. You are talking about what I found when I got there.

Q. That is correct.

A. It was as I outlined,—to get the finest theatre downtown, the best located theatre, the best one to play it.

Q. You are not suggesting that you are the gentleman who instituted the policy for Paramount?

A. No.

Q. So it had been there before you joined the company?

A. Parts of it.

Q. Isn't that also the policy that had existed in Metro when you were with Metro?

A. Metro had their applicable policy. I would prefer that Metro discuss their policy.

Q. Speaking of the time when you were with Metro and Loew's Incorporated, wasn't it also true in that company that it licensed its pictures for first run exhibition,

as a national policy, in theatres located in the downtown sections of cities?

A. Yes,—the finest theatres they could get. Is there any law against that?

* * * * * * *

JOHN F. MURPHY, sworn: * * *

[1274] Q. (By MR. ROME):—Mr. Murphy, your duties cause you to have to do with all Loew theatres that are known as out of town theatres, meaning out of the city of New York theatres?

A. That is correct.

Q. That is, throughout the country?

A. That is correct.

Q. How many theatres are there included in that category?

A. About 65.

Q. Can you tell me how many theatres Loew's has in New York City?

A. I am not sure, but I think they have about 60. I am not sure.

Q. Are the 65 theatres that come within your jurisdiction located in any particular section of the country?

A. No, sir.

Q. How many of those 65 theatres are first run theatres?

A. Most of them are. I would say all but six.

Q. And how many of those theatres that are first run are located in the downtown sections of cities?

A. I would say all of them that are first run are located in the downtown section.

[1275] Q. Do you buy or book pictures that play in those houses? What products do you play?

A. I play whatever I can buy.

Q. Do you buy pictures from all the other companies?

A. I would say that we do generally,—except, for instance, we may play Paramount pictures possibly in 6 towns of the number I operate.

Q. It is true, isn't it, that you actually buy or license pictures in some of your situations from every one of the

companies involved here? I do not mean to say by that, Mr. Murphy, that you play the products of all 8 companies in any one house; but, in the 65 theatres, the products of all companies are played?

A. I might buy some product from all companies.

Q. But, actually, in the 65 theatres they return very substantial revenue to the distributors, do they not?

A. Yes.

* * * * * * *

[1282] Q. Mr. Murphy, may I direct to your attention, sir, the fact that Loew's Incorporated has answered interrogatories in this case in which it is stated as follows:

"State year by year the total income"—the total income—"received by the Loew's Valencia Theatre during the years 1948, 1949 and 1950, excluding admission taxes.

"Answer. For the year 1948, $136,836.77; for the year 1949, $125,457.00; for the year 1950, $118,505.84."

Would those figures tie in with your own knowledge of the gross of the Valencia Theatre?

A. Gross receipts?

Q. Gross receipts.

A. That is right.

Q. And that is the kind of gross revenue you have in [1283] mind when you say the Valencia Theatre is a superior producer of revenue to the Crest Theatre; is that correct, sir?

A. I don't say that, and I don't see your point at all, because you are comparing two entirely different things. The Crest Theatre is a suburban theatre operating with maybe two or three changes a week, second run pictures. The Valencia Theatre is a theatre sometimes plays a picture six or seven weeks, the same picture.

Q. It plays that picture six or seven weeks because it is producing revenue; is not that a fact?

A. That is right.

Q. Yet despite the fact it may play a picture for six or seven weeks, its total revenue, for instance, for the year 1949, was $125,457?

A. That is right. Naturally as you play the picture the gross goes down.

Q. The Valencia played its pictures at regular admission prices?

A. That is right.

Q. Have you any knowledge of the gross revenue earned by the Crest Theatre from the playing of pictures on first subsequent run at first subsequent run admission prices?

A. With two or three changes a week.

Q. With as many changes a week as it used?

A. Yes, you said 122,000?

[1284] Q. That is correct, Mr. Murphy.

And you would still be of the opinion that despite the gross earned by the Crest Theatre on its subsequent run, as contrasted with the gross earned by the Valencia on its first run at first run admission prices, that you would not be willing to take the Crest Theatre and play it first run even if it were to be given to you rent free?

A. Absolutely, I would not.

Q. You have also testified, Mr. Murphy, that in your opinion every theatre in Baltimore is in substantial competition with the Century; is that correct, sir?

A. That is right.

Q. And, consequently, I take it that one reason you were opposed to the possibility of the Crest having access to first run pictures is that in your opinion that would constitute a competitor for the Century Theatres; is that correct?

A. If every theatre in Baltimore is a competitor and the competitor plays the same run as I have, naturally they take something away from you.

Q. I am drawing your attention now directly to the Crest Theatre. The reason why you oppose first run for the Crest Theatre is that in your opinion it would be in competition with the Century Theatre and would possibly hurt the gross of the Century Theatre?

[1285] A. The reason that I feel the Crest Theatre should not be sold first run is that I buy at the Century Theatre

an exclusive right. I pay a lot of money for it with clearance. That is what I buy. That is the only thing a picture is worth; the only value a motion picture has is how new it is, and anything that affects that makes my run less desirable, anything that affects that.

Q. And, consequently, if I follow you, Mr. Murphy, your view is that you do not want anyone else having that new picture?

A. That is right.

Q. I see.

A. Because I pay for an exclusive run. That is the only thing I have to sell.

Q. Are there within your supervision, Mr. Murphy, any drive-in theatres that are owned by Loew's?

A. No.

Q. Isn't it the fact, however, Mr. Murphy, that there have been a large number of drive-in theatres erected around in different sections of the country which had done excellent business despite the fact that they have no matinee patronage whatever?

A. There are a lot of drive-in theatres that do excellent business, that is right.

Q. And they have no matinee patronage whatever; is not [1286] that also the fact?

A. Yes. They play to an entirely different clientele. Your drive-in people, they are not even normal picture-goers, they are a lot of people not going to pictures at all. They are people who may be cripples or maybe the mother did not like to put her shoes on when she went out, or they couldn't find a baby-sitter. Those are the type of people you generally get at drive-in theatres. You generally get some nice people, too, but generally it is a new type of audience.

Q. Your testimony is that only cripples and old ladies who don't like to take their shoes ——

A. I did not say that. Whole families sometimes go who normally do not go, because of their peculiar family conditions.

Q. Isn't it a fact the drive-in theatres do not usually

have the same kind of transportation facilities which downtown theatres have?

A. That is right. Drive-in theatres are specialized audience. They have their own peculiar audience.

* * * * * * *

JEROME ADAMS, sworn: * * *

[1328] Q. Isn't it a fact, with regard to the playing of Metro pictures first-run in the City of Baltimore, Mr. Adams, that at least recently Loew's product has not gone exclusively to the Century Theatre in the City of Baltimore downtown?

A. With rare exception, until recently, Loew's pictures went exclusively to the Century Theatre.

Q. But now, in the recent months, there has been a change in that?

A. Yes, sir; there has been.

Q. And, consequently, despite the fact that Loew's Incorporated has its own theatre, the Century Theatre, playing first-run in Baltimore, theatres other than Loew's, owned by Loew's, now have access to Loew's product?

[1329] A. That is true.

Q. Downtown first-run?

A. Downtown first-run; that is right.

Q. What was the reason for that change?

A. It was brought about by a request made by Mr. Rappaport, for his Town and Hippodrome Theatres, for an opportunity of bidding for first-run Baltimore. The request was granted.

Q. Had there ever been a similar request from any other exhibitor in the past?

A. From a downtown exhibitor, not to my knowledge; no.

Q. No one playing first-run downtown had ever sought to license a Loew picture?

A. Not to my knowledge; no, sir.

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WILLIAM F. RODGERS, sworn:

[1339] Q. What is your opinion as to the day and date run at the Crest Theatre, of your Metro pictures playing day and date with the Century Theatre?

A. Well, in the first place that would be suicide for the Century.

Q. Will you elaborate on that?

A. Well, in the first place, I do not know who so testified, but I could not help but agree with him that there are other theatres in the City of Baltimore that in my opinion have better facilities, better located, to play on such a run, and if you did it for the Crest Theatre, I don't see how you could deny doing it for other theatres.

The consequence is you would probably have and no doubt likely would have the same unsatisfactory condition as it related to first run as you now have in so many theatres playing the first second run in a city.

Q. Too many in your opinion?

A. Well, it affects the business, but then with the result that a majority of the theatres in Baltimore have complained very bitterly about the fact they have not made enough money, or they are losing money over these last few years, which is largely due, in my opinion, to the number of theatres that are playing simultaneously on a second run basis, so that if a family is disposed to go to their [1340] favorite theatres or one of their favorite theatres over the weekend, there is only one picture playing there in so many theatres, with the result that they do not go but once which I have always contended is one of the most contributing reasons for the falling off of any motion picture attendance. You witnessed here what was testified to by our manager this morning, that you play in two theatres simultaneously but the gross receipts were a little bit more but our returns were less.

* * * * * * *

[1342] Q. By the way, Mr. Rodgers, there has been some testimony here that you sell Metro or somebody has licensed multiple run in other cities other than Baltimore. Are you familiar with those cities, such as Los Angeles?

A. Yes.

Q. Well, briefly tell us about Los Angeles.

A. In Los Angeles we have usually licensed our pictures, but only in two localities, both what I should say would be separate cities. We release only downtown to Loew's State Theatre and the other one we lease our pictures [1343] in Hollywood. They are separate and distinct localities, all with their individual shopping areas, which I have heard spoken of here, as separate communities entirely. People from Hollywood rarely, if ever, go to downtown Los Angeles, and I think there might have been an exception once or twice where we might have leased pictures in Culver City, which is quite removed, away from downtown, and is not a part of the City of Los Angeles, but we discontinued that, too, so we are confined to two.

Then in our own case we have owned two theatres in Boston, one in the downtown section and another again, in a different community entirely, called the Back Bay section of Boston, where we own both theatres, and we have played them day and date, but it is not uncommon for the theatre in the Back Bay section to outgross the theatre downtown, but those are the only two with the possible exceptions of small communities around the country. We may have a few of those where it is just as convenient for the people to go to the outskirts as to downtown. It does not apply in a large city.

Q. Are there any situations you have talked about in any way comparable with the condition you have talked about in the Crest Theatre and the Century?

A. None.

[1344] Q. All things being equal, what is your preference, to show a picture first run in a city the type of Baltimore?

A. My personal experience has been, I seek the place that can give us the greater return, and I have generally found over a long experience there is only one place you can get it dependably, and that is downtown.

* * * * * * *

[1344] Q. (By Mr. Rome):—Mr. Rodgers, can you tell us, sir, how many theatres Loew's Incorporated has owned or owns [1345] presently in various sections of the country?

A. How many theatres we own?

Q. Yes, sir.

A. Well, I can't tell you offhand how many we own, but I believe we operate somewhere in the neighborhood of 125 or 130 in the United States.

Q. And the greater part of that 125 or 130 are your own theatres, are they not?

A. We lease them if we do not own them, yes.

Q. And in those theatres it is the fact, is it not, to your knowledge, sir, that the other distributors' pictures appear?

A. Oh, I imagine so. I have nothing to do with the Theatre Department, but they could not survive on our pictures alone, I don't believe.

Q. And you know, also, sir, do you not, that Fox owns theatres in various sections of the country?

A. I don't know just what the corporate set-up is of Fox, but they have an organization called The National Theatres that is in some way identified with Fox, but to what extent, I do not know.

Q. And they own theatres in many sections of the country?

A. Yes. They operate many.

Q. And that is true, is it not, of Paramount and RKO? [1346] A. I don't think Paramount own any theatres any more. I think they are operated entirely separately from the Paramount Producing and Distributing Company, so I have been told.

Q. But until that recent change, Paramount owned a number of theatres?

A. Yes.

Q. And that was also true of RKO?

A. Yes, sir.

Q. And also true of Warner's, was it not?

A. Yes, sir.

Q. And you know, do you not, sir, that Loew's pictures have played in all of those theatres, not in each instance, not in every theatre?

A. To a varied extent, yes.

Q. And Loew's has received very substantial revenues by way of film rental by the exhibition of its pictures in those theatres?

A. Not always. I would not say substantial, no.

Q. But in dollars amount it has been a very large sum?

A. No, I would not say so.

Q. Could you give us some idea of the amount, Mr. Rodgers, from your experience?

A. I only know I do not sell RKO theatres in very many places, so I would not consider their returns to us [1347] substantial as compared to some smaller independent circuits.

Q. Can you give us some idea of the amount of the film rental that you have received over any particular period from RKO, sir?

A. I have been out of touch with the business, that is, directly, within the last six months. I have been away most of the time and I am not familiar with what they are now doing, but I do not think our revenue with RKO over a period of time is very much more, as a general thing, than $100,000 or $150,000 in the course of a season.

Q. Isn't it a fact the theatres owned by Loew's are in many instances first run theatres?

A. In many instances, yes.

Q. And those first run theatres are all located, are they, sir, in the downtown sections of cities with the exception of this theatre in Back Bay Boston you mentioned?

A. I don't know of any exceptions.

Q. And is it also the fact, to the extent of your knowledge, sir, that the theatres owned by the other companies that have just been mentioned, are also first run theatres in many, many instances located in the downtown sections of cities?

A. Well, these other companies that you have mentioned have many, many more theatres than we operate and they also have many more smaller operated theatres, I believe, than they [1348] do large operated theatres. They

may be first run, but in very small towns, but they have very many small theatres, which we do not have.

Q. But those theatres to which Loew's has licensed its pictures for first run exhibition, in most instances, to your knowledge, have been in the downtown sections of cities, have they not?

A. Where we license them first run in an area, yes.

[1349] Q. In your opinion, following what you have said concerning the effect on the Century Theatre, I take it your view would be, Mr. Rodgers, that if theatres out of the downtown areas would get first-run picture access, that the revenues derived by Loew's from exhibition of those pictures in the theatres of Fox and Warner's, and so on, would be considerably curtailed?

A. I think, definitely, it would, for many reasons, one that I explained to you a little while ago, and then another reason. These theatres here, that are now playing, for instance, second-run pictures, if they moved up to first-run, we would lose that second-run revenue. Never mind the fact that they would not be able to pay as much, I don't think, as the first-run, in our present system; but we would lose a run in the transaction, which would be very important.

Q. With the exception of the situation in Boston and the city of Los Angeles, has Loew's Incorporated ever experimented so as to confirm your view that theatres outside of the downtown areas are incapable of paying large rentals that Loew's requires?

A. I never had any occasion to experiment, because we usually knew, by playing a number of pictures, what are the percentage of grossing possibilities of theatres, and what the grossing possibilities of the theatres in their present position are, and what are the possibilities of the [1350] theatres that are playing first-run. I did not believe that a company like ours could afford to experiment, considering the cost of productions that are made on our lot.

Q. And then, if I follow you, Mr. Rodgers, when you speak about your experience over many years leading you to this conclusion, what you had in mind, sir, was the fact

that the experience of subsequent-run theatres, first-subsequent-run theatres, led you to conclude that they could not pay the kind of rentals you need on first-run?

A. That is true, because I have seen them move up for a period of time, where a fellow feels he ought to play day and date with another theatre, and you move him up 7 or 14 days, and his gross receipts don't always go up, but others go down.

Q. But you have no experience with regard to theatres outside of the downtown area having access to first-run?

A. Do you mean have I ever experimented, instead of playing first-run, that I would play with a number of neighborhood theatres first-run?

Q. One or more neighborhood theatres; yes, sir.

A. I haven't had that. I have never experimented, to my knowledge, on that.

Q. You have referred to the fact that if the Crest were to have access to first-run pictures with other theatres as good or even better than the Crest, in the City of [1351] Baltimore, they would also seek access to first-run pictures, and that the ultimate result would be suicide for the Century Theatre, downtown?

A. Or any other downtown theatre.

Q. Has your company ever received any request from the operator of any other theatres in the City of Baltimore, other than the Crest, for access to your pictures on first-run?

A. Not to my knowledge, with the exception of, I believe, the Hippodrome Theatre asked for our first-run pictures, sometime ago.

Q. But you have had no request from any other theatre outside of the downtown area?

A. No, sir; not that I know of.

Q. And, in your view, that anticipated demand by such other theatres would lead to the same unsatisfactory condition that you found to exist with regard to a large number of first-subsequent-run houses. In your view, is there any possibility, in the City of Baltimore today, for any new exhibitor coming along and entering the field of

exhibition on a first-subsequent-run in the City of Baltimore, without further aggravating this condition that you refer to?

A. Oh, yes; I should think he could come in, if he has a logical spot to come in, and he builds a theatre, he may competitively bid with the man that was there, or he [1352] might be substantially removed from existing theatres that would merit day and date, but more likely it would be, from my limited knowledge of the city, it would be more likely that he would enter into active competitive bidding with the theatre in that area.

Q. And, in your opinion, that access to pictures largely turns upon the ability to pay on the part of the exhibitor; is that right?

A. That is, generally speaking, true; yes.

Q. Did your company ever attempt to find out what the ability to pay of the plaintiff in this case was, with regard to getting access to Metro pictures on first-run, either exclusively or day and date in the City of Baltimore?

A. You are referring to the Crest Theatre?

Q. Yes.

A. No. We would not have made any effort to experiment in that case, because, as I say, it has been a custom of our company to play our own product first-run in our own theatres. That is the reason we have the first-run theatres and, generally speaking, we built the first-run theatres many years ago for the reason that, in some cases, we could not get an outlet in every case, so we built our own theatres to play our own pictures first-run.

Q. Is that situation changed now by reason of the fact that Metro, as Mr. Adams and yourself have testified, [1353] is now permitting theatres other than the Century Theatre in downtown Baltimore to get access to first-run?

A. I have been told that the Hippodrome, I believe, or the Tower, has competitively bid with Loew's for one, two, or three pictures; but it all has been since I gave up my particular position as general sales manager, and I am not fully acquainted with it, so I couldn't even testify on it.

Q. You said the Tower. I believe you meant the Town?

A. Yes; the Town.

Q. So, you are not prepared to voice any opinion with regard to the change in policy on the part of Loew's to grant access to theatres other than the Century, downtown, and what effect that would have upon the opportunity accorded the Crest; is that correct?

A. I would not testify to it; no, sir, because it all has been since I have given up my responsibilities.

Q. You recognize, though, Mr. Rodgers, that the obligation of Loew's Incorporated is to license its product theatre-by-theatre?

A. Oh, my, yes; and we do.

Q. And, consequently, the fact that some other theatre other than the Crest, located outside of the downtown area, might come along and equally seek access to its product, has no real bearing or ultimate bearing on the right to be [1354] accorded the Crest as such, to the right to have access to your pictures?

A. None whatsoever, except, morally, I would feel obligated, if I was in the chair of general sales manager, and had granted such a request to the Crest, and someone else asked me, from another section of Baltimore, I would have to think a little fast to be able to deny it.

Q. But each theatre must stand on its own merits?

A. Definitely.

Q. The practice of Loew's Incorporated with regard to the licensing of its pictures, which you have referred to, the preference for the downtown outlet, is a practice that has existed for many, many years; is that right?

A. As far back as I can recall; yes.

Q. Are you familiar with the fact that Loew's Incorporated, in answering interrogatories addressed to it by the plaintiff in this case, stated as follows:

"It is the policy of Loew's Incorporated not to license its feature motion pictures for first run exhibition in any city on a day and date basis in a downtown theatre and in a suburban theatre. It is also the policy of Loew's Incorporated to have the first run exhibitions of its feature motion pictures in a city of the size and importance of Baltimore take place in a downtown first run theatre."

[1355] A. That is the intent and the object of our company; yes, sir.

Q. And that represents a long-standing policy of Loew's Incorporated?

A. I would say so, with minor exceptions, in small towns, but nothing like Baltimore, except on the two exceptions I made.

Q. Within your own experience, Mr. Rodgers, would you say that policy is also the policy that has been followed and practiced by the other distributors?

A. That, I could not answer, because I could not attempt—it is all I can do to follow my own business, and I don't know exactly what other companies do. I do know our own case. There were times when we might have played day and date a picture here and there in two downtown theatres, but we abandoned that many years ago.

Q. And, from your own statement addressed to Mr. Raftery, and to the Court here, with regard to the way in which this plan has grown up over the years in the entertainment industry, you know, do you not, that the product of all these companies is habitually licensed for first run exhibition in theatres in the downtown areas?

A. That would be the general objective; yes, I should think so.

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## COLLOQUY RE PARAMOUNT CASE.

[1378] THE COURT:—Oh, well, I am not talking about time element now; I am just asking you whether these questions are not involved. One of the arguments of the plaintiff is that, the basic argument, is that the jury should infer, and the plaintiff wants me to instruct the jury that they should consider whether, even though there is not only no admission of any getting together, nevertheless, the uniformity of their conduct may amount to a getting together, and the clearances are involved. I am just trying to see whether—in a minute, I will make my point a little clearer, but I just wanted to see whether you are not forced to agree that,

broadly speaking, those four statements are statements of questions that are involved in both cases.

* * * * * * *

[1398] THE COURT:—It is a reasonable inference, from the uniformity of performance on the part of all the defendants in the way they act as to the downtown theatres *versus* neighborhood theatres, and with respect to first-run pic- [1399] tures, day and date pictures. From that conduct may be inferred an agreement in restraint of trade. Now, I am not saying whether that is right or not, or whether the jury will be impressed with it, but that is his theory of the case.

* * * * * * *

[1406] THE COURT:—Well, I think you cannot go that far, but I think that the plaintiff is entitled to a reasonably broad construction of this very clumsy language of the statute, in view of the very broad nature of the Paramount decision and the decrees which have followed from it.

Now, it seems to me that if Mr. Rome is correct in his construction here of this clumsy language, or at least inadequate, inartistic language in the statute, it means this, that if the Government were prosecuting the defendants at the present time with respect to this period which is here in question, and could show that there was a conspiracy—of course you have got to show that, that is basic, and the absolute condition precedent—and could show that whereas in the Paramount decision and decrees first run requirements or failure to give first run certain clearance, all of those things were involved, if they could show that what was being [1407] done or had been done during the period that is here in question, was actually done with intent to monopolise the theatre business, then I think that is all the Government would need to do, the parties would be estopped from saying that they have not been ordered to refrain from that kind of thing by the Paramount decree.

That is your contention, isn't it, Mr. Rome?

MR. ROME:—Yes, sir.

THE COURT:—If that is true, it seems to me under the

language of the statute I have got to give the plaintiff the right to call the jury's attention to this decree and state that it is prima facie evidence, explaining that even though it is prima facie evidence it does not amount to anything, it has not force, no probative value unless they find a concert of action and unless they find that the adoption of this first run method and any other clearances involved were unreasonable under the given circumstances.

Now, that is all it comes down to, and it seems to me that the Court is required to let the jury have that decree before them with that explanation, just as Judge Chestnut had it before him when he considered the Windsor case.

Now, that seems to me that I am required to do that. We may call it a close case in view of the fact we are dealing with the case which arose without doing as Mr. Rome points out. I cannot exclude this, it is in the case, that [1408] one or more of the defendants' witnesses say this is a long practice and that antedated the decree. He also points out that the Crest Theatre was actually set up and correspondence had with respect to getting first run before the final decrees in the Paramount case were signed. All of those things seem to me to bring out the provisions of Section 5 of the Act. It may be a twilight zone case, but I feel that I should acquaint them of that.

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## ARGUMENT OF COUNSEL RE REQUESTS.

[1432] Mr. Raftery:—Number 6 strikes us, Mr. Rome, as simply being an abstract statement of law. It is not anything that will be helpful to the jury.

The Court:—Probably not.

Mr. Rome:—Sir, with regard to that, I think it is of moment because there has been language coming from my friends on the other side during the course of the case with regard to questions directed to their witnesses: "Did you ever agree?" "Did you have any consultation or anything of the kind?" [1433] And, of course, as Your Honor knows, the burden of proof with regard to establishing conspiracy has been considerably lightened now, and it doesn't have to

have actual agreement or simultaneous action, and it was to that end that this No. 6 was directed.

THE COURT:—I will give some word of explanation to that.

Now, turning to 10, I don't think 10 or 11 or 12 are appropriate as worded, to be granted. The defendants in this case have the burden of attempting to explain away inferences of conspiracy, which the Court says you may infer from a uniform course of conduct. That is a construction, in condemnation of the defendants' right away, running all through this, it seems to me, a great many of these, Mr. Rome, are, it seems to me, condemning the defendants and exonerating the plaintiff. I have put this all in a very neutral way.

The defendants, you do not need to have direct proof of the conspiracy if you find that there has been a concert of action. We believe you will find that from a uniform course of conduct, something like that.

[1434] Then, 11, "The uniformity of policy on the part of Defendants in this case of first unanimously denying the Plaintiff access to first-run motion pictures, even though Plaintiff," and so forth. Is evidence which supports strongly the inference of concert of action.

I won't go that far. I will tell them they must weigh all the facts and circumstances and then determine whether or not they think any uniformity they might find is indicative of concert of action.

MR. ROME:—I understand Your Honor with regard to No. 10, Your Honor will not——

THE COURT:—I am not suggesting that, no.

MR. ROME:—What I had in mind is the problem of the burden being upon the Defendants of explaining it. I have no insistence upon the language as such.

THE COURT:—I think all that is to be said on that point is that you may infer from that, from such uniformity of action you may find that that indicates concert of action. If that action is in restraint of trade, as I will define that to you, then you will find the Plaintiffs made out a case of conspiracy. I think these are too disjointed.

Take 12, "The past proclivity of these Defendants to unlawful conduct violating the anti-trust laws, as found by the Supreme Court of the United States in an action brought by the Government, may be considered by you in reaching your decision in the present case since the conspiracy charged [1435] by the Plaintiff here is identical in scope and nature to one of the conspiracies, the existence of which was condemned by the Supreme Court."

I will not grant that. I have explained how I am going to explain the Paramount case, but I will not explain it in that language, because I do not think that is sufficient. I am going to explain what the broad issues were, as you have them on the brief, with a slight amendment, and use that as an explanation.

* * * * * * *

[1436] THE COURT:—We are now down to 13. "The words 'restraint of trade' in the Sherman Act are to be construed as including 'restraint of competition.' The requirement of the law as established by the Congress is full, free and untrammelled competition in all branches of interstate commerce in order to secure equality of opportunity."

That may be a little broad.

MR. RAFTERY:—The sentence ended "in all branches of interstate commerce in order to secure equality of opportunity." It may come within the cases. You see, practically all of these are actions in which the United [1437] States of America was a party, with the exception of the Goldman case, which we are not in accord with, I assure you, but the first four are all Government cases where the Government is seeking to protect the public.

MR. ROME:—Mr. Raftery may not be in accord with the Goldman case, sir, but all these defendants here sought *certiorari* from the Supreme Court, which was denied, and that case included the words "in order to secure equality of opportunity."

THE COURT:—What case is that taken out of?

MR. ROME:—The Goldman case, the last one, 150 Fed.

2d, 738, 744. That is the case in which Judge Parker, of the Fourth Circuit sat.

MR. RAFFERTY:—"In order to secure equality of opportunity." That isn't the purpose of the Sherman Act. You are completely eliminating the individual. You may have a man who is a great genius and a man who is a bad businessman.

THE COURT:—I think it is misleading.

MR. ROME:—Sir, I would like to press that, "equality of opportunity" is at the heart of this case. The Crest Theatre was asking for equality of opportunity in getting access to first run pictures.

THE COURT:—If you stop there I do not think that is a fair statement, because there are other circumstances which may justify their not being given that opportunity. [1438] It is like saying that the Declaration of Independence, "all men are declared to be free and equal," but what do you mean by that? They really aren't. They start with an opportunity, but there may be conditions which interfere with their becoming free and equal. And you have that situation possibly here. I am not blaming you gentlemen but it is very difficult for the Court, I find, sitting with the jury, to make it clear to counsel that while the Court does not disagree with a lot of requested instructions, it does not feel that it is necessary to give them everything you request, because they are disjoined from explanation and understanding alone, they are probably not sufficient. So, I think the best way is for me to point out wherein I am going to grant substantially what you ask, and wherein I do not feel I can grant any one or more of the instructions, and then leave it to you to seize the opportunity after I have made the charge, to object to it and ask me further to clarify it. Otherwise, we would have to go into a committee on style in order to get any agreement on prayers.

Now, No. 14. That is an example of what I said. I think that that, while it is all right, but when it sticks out like a sore thumb, it is not further explained. "The public interest is as much concerned with the improper control of

the interstate market for the single city of Baltimore as for the country as a whole."

[1439] The public interest here is not involved except as the Supreme Court has said A must not treat B in a way which is contrary to public interest. This reads more like a criminal docket.

No. 15. I think No. 15, as a bald statement, is all right.

* * * * * * * *

[1439] THE COURT:—17. I do not think it should be granted.

[1440] Now, I say that for the reason that the second sentence is more an argument on behalf of Plaintiff. "No such operator can reasonably be expected to survive in the competitive field of the motion picture industry unless he is given a fair opportunity to license pictures distributed by these defendants."

It stops there because "a fair opportunity" has to be defined so carefully by other things that the Court has to say that I do not think any such instruction like that ought to be granted by itself.

Then similarly 18, "Under all the evidence in this case you may conclude that the Plaintiff's Crest Theater has all of the necessary qualifications, including size and equipment."

Mr. Rome, I think you sort of misconceive the function of a judge in his instructions to the jury. If I were going to give them a running narrative of this whole case, which I do not intend to do, and this would tie in some further discussion of the picture, and so forth, that may be all right, but it is up to the jury to determine whether it is entitled, by reason of all these things, to have first run pictures.

MR. ROME:—That is right, I agree with that, sir. What that request was designed to do was to point out to them their function with regard to that fact and that they could conclude——

[1441] THE COURT:—I will state it a little differently.

19, I think, is all right.

MR. RAFTERY:—Before you leave 18, Your Honor, the

word "location" is one of the most controversial facts in the case. We have submitted some requests based on it. I think practically every witness of importance called by the Defendants told what a terrible location the Plaintiff's theater had, and that was one of the primary reasons for not licensing pictures out there.

THE COURT:—Well, I think 19 is all right. There is not only one factor, but it is the important factor.

MR. RAFTERY:—That is the point. These reasons, to minimize the importance of location, while not important as expressed in the evidence, is mentioned because of its terrible location and its short drawing.

THE COURT:—I think, as I pointed out, running all through these, it is perhaps an unconscious turn on the part of Mr. Rome to write another brief for Plaintiff. I find that in the Defendants' instructions, too.

MR. RAFTERY:—Is it not when in Rome, do as the Romans do?

THE COURT:—No. 20. There is a definite instruction. I cannot give that. "Under all the evidence in this case you must conclude that the Plaintiff has made sufficient efforts to obtain first-run feature motion pictures from the [1442] Defendants."

I cannot tell them that the Plaintiff has. Maybe they will think the Plaintiff has. That is a factual question.

21. I think 21 is substantially all right. I shall not use exactly the same words.

I think 22 is all right. However, instead of saying that it would also be proper, it is your duty to consider. Well, "You are also to consider."

MR. RAFTERY:—Well, of course, that thing is so contrary to the facts. I think Your Honor has got a question of fact to submit in this morning's exhibit which Your Honor contributed so much to, 63 per cent of the first run features shown downtown Baltimore were shown in independent theaters as against 37 in theaters owned by distributors. Now, we think a construction on that fact for the jury, instead of saying that these companies like Universal, Columbia and

United Artists, who own no theaters anywhere, would be influenced—"to unlawfully favor the theater of Defendants in a situation such as Baltimore" when the evidence is over here on the board.

[1443] THE COURT:—Well, I think I will say they are to consider the chart, giving something like 22, and then telling them to look at the chart.

MR. ROME:—The reason for these points, it is based on the evidence in the record, that these theatre-owning defendants deal with the non-owning defendants throughout the country, and consequently it is not only Baltimore to be considered, but the fact that these people seek and get advantage throughout the rest of the country. The mere fact that there are only two distributors owning theatres in the City of Baltimore is of no moment. For instance, in the other case, there was no evidence that a distributor owned a theatre in the area involved.

MR. RAFTERY:—The Milgram case is an interesting thing. Mr. Rome, in his statement, reiterates the Milgram case, but Mr. Rome and his firm represented these theatre folks up there, and was practically on the same side as the defendants; and here he is arguing that Milgram case is a strong case.

I say that "22" is a wholly improper, and an instruction should be based on the evidence as it applies to Baltimore only. We are not interested in discriminations out in Pittsburgh, if there are any. It is Baltimore. Nor is there any evidence in this record on these discriminations as to any place, not even Baltimore, but what we think, and [1444] I agree with Your Honor a hundred per cent, it is impossible, when you take these little paragraphs, without having them in a narrative, like a charge usually is,—and I am only warning Your Honor that it is our contention, and I think we have proved it, that Baltimore is the only place where we have an issue; and the overwhelming weight of the evidence is that the independent theatres get just the same treatment as the others.

THE COURT:—I think it is proper. It is in the case.

A great many of these defendants, being nationwide in their distribution and production, I think something substantially equivalent to that, but not quite in that language, is proper.

I think "23" also is substantially all right.

I am hurrying through these, because it is getting very late. I assume you have read them over, as I have. I would not be doing this if I had not studied them carefully. Of course, I have forgotten a few of the items. I haven't made notes of all of the things.

I think No. 24——

MR. RAFTERY:—No. 23, there is no evidence at all here—in the last sentence on the top of the page—I have no quarrel with the first sentence.

MR. ROME:—It is a statement of the plaintiff's claim, sir.

[1445] THE COURT:—I don't think that is improper. I do not say that I will put it that way, but it is a correct statement, I think, of one of the plaintiff's claims.

MR. RAFTERY:—The evidence that is in the record is all on the chart. The only first-run pictures, 75 per cent of the playing time at the Stanley was consumed by Warner pictures which, Your Honor, as I pointed out, we had a perfect right to do. The balance of the time was used up in 18 Paramount pictures, and there are only two other pictures played during that period. In other words, he has no complaint that we have favored the Stanley Theatre.

THE COURT:—This claim may be entirely without any support in the evidence, but it is just a claim he makes, and that is what he has made. I don't think we have time to go into whether or not it is a sound claim, Mr. Raftery.

"24", I think, is a substantially correct statement. I won't give it all in that language. It relates to the alleged conspiracy.

MR. RAFTERY:—But what he is saying here is that there is some evidence to the effect that Warner Bros. Circuit Management, and Stanley, and Loew's at the Century, had a substantially better opportunity to obtain product than the opportunity afforded the plaintiff. I do not just see that,—no evidence.

THE COURT:—"25" is an attempted statement of the [1446] law. I do not think it is incorrect. Similarly, "26".

MR. RAFTERY:—I will tell you where it is wholly incorrect. No. 25 says, "a union or combination of an exhibitor with a distributor in a program which restrains or limits the competition that may be offered by the owner of a theatre equipped to compete on first-run may constitute a violation of the antitrust laws". Every contract a distributor makes with an exhibitor for the exhibition of a picture on any run restrains trade.

THE COURT:—They say it may constitute a violation.

MR. RAFTERY:—Oh, well, there is no one who has ever held that the making of one contract between a supplier and a user——

THE COURT:—It doesn't say "one contract".

MR. RAFTERY:—That is what he says here,—"a union or combination".

THE COURT:—And he is not talking about one contract. He is using it in a general sense.

MR. RAFTERY:—And it further in no way protects Warner's absolute right to sell their own theatre.

MR. ROME:—I want to address myself to that, because there is no absolute right on the part of Warner's to sell their own theatre. That came up once before, and I attempted to point out that, although there is language in the decree that must be read in the light of the earlier [1447] mandatory language, that these defendants are enjoined from setting clearance for theatres not in competition—we claim the Crest is not in competition, it is so far away, that it is capable of playing day and date. It is a question for the jury. They have no absolute right to put their own pictures into their own theatres; and, as a matter of fact, these defendants have testified that recently, at any rate, in Baltimore, Loew's pictures and Warner's pictures, at least Loew's pictures, are going to other theatres than to the Century Theatre.

THE COURT:—As I understand, they have an absolute right only to put it in their own theatres—or, I will strike that out, and put it this way: A, if B has his own theatre

in Baltimore, can put his own pictures only in his own theatres, if he keeps them there; but if he starts putting them out to C's theatre, and to D's, and to E's, then he has to be careful lest he is not also affording F's theatre the same treatment, if it can be shown that F is on a parity with C, D and E. That is the law.

MR. ROME:—I would agree with everything Your Honor said, except the very first portion, which says A can put his own pictures in his own theatre. That is all right, if A is enjoined from granting any clearance to any theatres not in substantial competition. If it is the Century Theatre, if it is not in substantial competition [1448] with the Crest, then Loew's has no absolute right.

THE COURT:—You have to show me—I haven't read anything in a case which says, if I have a theatre, or motion picture theatre in Baltimore, and I have my own pictures in my own theatre, I just cannot take them there?

MR. ROME:—That is taken from the provisions of the decree, itself.

THE COURT:—That is all tied up with the other situations. They say you cannot do it, because it appears that you are not confining it just to them, or that you are in conspiracy. You are helping others who are not confined to just that. That is my understanding of the law. I do not find anything in any accredited case that says that a man—that would be just taking a man's property away from him.

MR. ROME:—I don't mean to pretend, Your Honor, that that would be the net effect of the thing, but that is one of the reasons why these defendants were required to give up their exhibition business and to separate it from production and distribution.

THE COURT:—That was because they were all in concerted action. But, in the case I have put, do you mean to say that if you have a theatre in Baltimore, or Buffalo, or anywhere else, and you have what you think are a lot of good pictures for your own theatre, that the Paramount case says [1449] you cannot play them except in your own theatre?

MR. ROME:—I respectfully submit, sir, that the Paramount case says it as to these defendants, because it is a punishment put on them for their violation of the law.

THE COURT:—But I am not going to give an instruction which does not make it clear that if the practice, if exercised, is devoid of any conspiracy to hurt the Crest Theatre, if it is devoid of that, they could do that all they wanted. That is all this amounts to. I am not going to confuse the jury with a lot of refinements of the law that do not have any application.

What number are we to, now?

MR. RAFTERY:—No. 26, Your Honor. It only suggests that you may not—this wholly illustrates three phases of the antitrust laws; and, in our Instructions 3, 4, 13, and 14, if read in conjunction with this, you may be able to get something out of it.

THE COURT:—No. 27, I think, will not be granted.

MR. ROME:—May I respectfully suggest that one of the things that has been amply borne out by the testimony in this case is that all the defendant-distributors have a policy applicable not only to Baltimore but anywhere throughout the country.

THE COURT:—Well, Mr. Rome, I think all I can say is, as I read this as it stands, what you have given me as an [1450] instruction, it is incomplete and not sufficiently accurate, standing by itself; and that is why I have marked it as one I will not grant. The principle which I understand you are trying to bring out, I will try to develop in other language.

MR. ROME:—Thank you.

THE COURT:—No. 28.

MR. RAFTERY:—That is something they have up in the 3rd Circuit. We object to that. There is no evidence here of any kind on that.

THE COURT:—I think there is evidence. That question was asked of two or three witnesses. I am sure it was asked. They had knowledge. They must have had it.

MR. RAFTERY:—No, sir; a flat denial.

MR. ROME:—I submit, and I can point out in the record, that these defendants testified they knew of the existence on the part of all the theatre-owning defendants to license their pictures for exhibition in the downtown houses.

THE COURT:—I think it would be rather absurd if they did not. They would not be on the job if they did not.

MR. RAFTERY:—All of them testified about the preferred way of distributing pictures, to get first-run downtown, and that they knew, generally, everybody in the business preferred it. It is an economic simple axiom.

MR. ROME:—You claim it was denied?

[1451] MR. RAFTERY:—In the form you have put it here.

THE COURT:—That is just a restatement of one of the issues, No. 29.

MR. RAFTERY:—No. 29, we object to that.

THE COURT:—Yes; I will not grant it in that fashion. Nor will I grant No. 30.

MR. ROME:—As to No. 30, the evidence is that all of the defendants did deny first-run, and they granted the first-subsequent-run, which resulted in the——

THE COURT:—It is more than that. This reads as though that was the first and original and continuous manner in which they got around granting it, when the defendants' testimony is that they simply had never done it anywhere before, under like circumstances, and that they did not do it for the Crest, and they gave what they thought they were entitled to give in relation to all of the circumstances.

Now, my difficulty with a lot of these requested instructions is the manner in which they are phrased; and you will have to leave it to me. Of course, you do not have to accept as correct what I do; but if we didn't treat it this way, I would have to ask counsel to write my charge for me.

Now, the rules do require—and, I think, properly—that the Court shall tell counsel what it intends to do in the way of instructions, and give them a reasonable [1452] opportunity to object; but we cannot have the objections so minute and meticulous that we will spend hours over it, when you have a right to bring these points up, if you are not satisfied with what I put in.

In other words, to add to what I have said, I probably will not give instructions on a number of what I call the minutiae of the case, and you have a right to object to that. I probably will still feel that it is unnecessary for me to put them in, to tell the jury about them; but you have a right to enumerate them; and, if I won't put them in, to take exception. But that remains to be seen, after I have delivered my instructions. And what I said, therefore, applies to Nos. 31 and 32.

In No. 32, there is no substantial competition between the plaintiff Crest and the first-run. That is a basic question of fact in the case.

No. 33, the mere fact that some competition may exist between the Crest Theatre and the downtown first-run theatres, and so forth, has no bearing on the real issue in this case, which is whether a general system of clearance, uniform in that if carried out, and so forth, is a lawful restraint upon commerce. You have evidently taken pieces of very good English language, out of cases that may be very sound. But I just cannot put that into my instructions.

[1453] Well, I think No. 34 is sort of an essay, and I am not disposed to grant that.

Of course, No. 35:—"The president of the plaintiff corporation who was the active operating executive managing the Crest Theatre * * * "—I do not instruct a jury as to the financial responsibility, or anything else, about the plaintiff or defendant. It is for the jury to consider all of those factors. That is all I tell them about the plaintiff's or defendants' position.

* * * * * * *

[1457] Now, No. 40.

MR. RAFTERY:—No. 40, if you read it literally, he is asking you to direct a verdict and tell the jury to go out and estimate the damage.

THE COURT:—I think that is too broad.

MR. ROME:—Sir, I do not want to labor the point, in view of Your Honor's indicated ruling on the thing, but it

has never been our intention to ask for such a point until the testimony in the case from these defendants developed in the manner it did; and it is because of the fact that every one of them has admitted to the existence of a national policy, and they knew of the policy over a number of years. [1458] THE COURT:—You are asking for a directed verdict, now.

MR. ROME:—I think the testimony in this case can properly support it.

THE COURT:—I cannot grant it.

Now, No. 41.

MR. RAFTERY:—And that is another statement——

THE COURT:—That is not sufficiently extensive. I have already covered that. I have also covered No. 42.

Now, on No. 43, I would not grant that in that language, because, again, it is in effect—it is worded too much in favor of one side.

Now, No. 44.

MR. RAFTERY:—That is another directed verdict. You must reach a verdict for the plaintiff——

MR. BERENHOLTZ:—If you find——

THE COURT:—Well, I think, if Mr. Rome means that the plaintiff must receive the verdict, if the jury finds what is said in the first part of "44", plus the other factors which are necessary to find, and that it was done by a concerted action——

MR. ROME:—That is included in the very last wording of No. 44.

MR. RAFTERY:—No. The joker in that is: "conscious parallel action". That is a 3rd Circuit term not recognized [1459] generally in this Circuit. However, the main objection, if you look to the second line: "was fairly entitled"—under our system, that is not the antitrust law.

We submit, Your Honor, if you will look and make a note to look at our 12th, 13th and 14th instructions which we have prepared and set forth, we think that is the instruction the Court should give.

THE COURT:—Very well.

MR. ROME:—Sir, Mr. Raftery keeps deriding the 3rd Circuit rule on the "conscious parallelism", but that language was based on the Milgram case, which was affirmed by the Circuit Court of Appeals for the 3rd Circuit; and, again, these gentlemen sought *certiorari* from the Supreme Court, raising that very point, and *certiorari* was denied.

MR. RAFTERY:—Judge Chesnut, in the Windsor and Walbrook cases, affirmed in this Circuit, are entirely different on that point.

MR. ROME:—On the contrary, there is no difference between Judge Chesnut's ruling and the ruling in the 3rd Circuit.

THE COURT:—I think we can speed up here a little. I have read carefully, before the hearing today, Nos. 45, 46, 47, 48, 49 and 50, and I think all of them are, as stated, not appropriate to be granted. They may express something, some points which I think, if they had not been [1460] covered by other prayers we have gone over, I think they are probably appropriate, and they are sort of double-talk on what we have been over, and I think it would be futile to take them up one-for-one.

Now, No. 51.

MR. RAFTERY:—That is equally bad. I know Your Honor is going to charge the jury as to the credibility of witnesses, and the weight to be given.

THE COURT:—I think they suggested too much.

MR. RAFTERY:—They single it out. It is a sore thumb, and is contrary to the facts put in evidence.

THE COURT:—No. 52, I think is likewise too isolated and broad.

MR. ROME:—Excuse my interruption, but may I go back one minute to No. 48: That, in our minds, has importance by reason of the fact that it states something which has not been referred to elsewhere, and that is where the restraint of trade results, the fact that these defendants came along and denied that they intended a restraint of trade, and deny that they intended to enter into a conspiracy, is of no moment if, in fact, the restraint does result.

MR. RAFTERY:—That is not the law. The law is simply, if restraint results, as the result of a conspiracy, you may violate the Sherman Act.

[1461] THE COURT:—I think it could be covered by telling the jury that they had to take into account the testimony on both sides.

MR. ROME:—Excuse me. I think it goes a little beyond that. As Your Honor has stated, if restraint does result, I think the jury is properly to be instructed that they may disregard the protestations of the defendants that they did not intend to conspire.

THE COURT:—You think it is sort of like the case of crossing-accidents, where the testimony is the man said he did not see the train, and the weight of the testimony was that it was two yards away from him. I do not think that is this case. I think, where there is a contradiction in the testimony, all the Court can do or say is, "Who do you believe is telling the truth?"

MR. ROME:—I was relying on the last sentence, which says the ordinary rule of law applies here,—"You may disregard such testimony, because persons must be held to have intended the necessary and direct consequence of their acts, and cannot be heard to say the contrary."

THE COURT:—I am not sure that that is the situation here.

Now, I am down through No. 52. No. 53, the same reasons, I think, apply.

Nos. 54, 55. No. 56 is all right. It is a very [1462] broad statement.

MR. RAFTERY:—I think we might be able to cure the badness in it, if at the end of the subject it was inserted: "on some run". In other words, when a man owns a theatre, he has the right to expect some pictures.

THE COURT:—I think it is rather broad.

MR. RAFTERY:—If you add the words, "on some run", it does not mean he is entitled to first, second or tenth run, but he is entitled to get some pictures.

THE COURT:—Yes. I think No. 57 is all right. Of

course, again, it has to be taken in the light of the rest of the instructions about what is restraint of trade.

MR. RAFTERY:—The thing that is bad in that, is the fifth line, "an arbitrary system of clearances". What he is trying to say is whether it is created as part of a conspiracy.

THE COURT:—Yes.

MR. RAFTERY:—That is the test. Someone may think it is arbitrary, and, if done separately and individually, it is not violative of any law.

* * * * * * *

[1463] THE COURT:—I think No. 59 cannot be granted, as written,—"Where a number of motion picture distributors engage in a consistent course of conduct directed toward a common end, it may be presumed that they do so as a result of a tacit or explicit agreement or understanding between themselves". We have already been over that point. I have already said how I am going to cover that.

No. 60, I think is probably substantially correct. "The fact that he could obtain motion pictures for exhibition on subsequent runs and so operate his theatre as a subsequent run motion picture theatre does not prevent the actions of the motion picture distributors and those with whom they combine and conspire from being in violation of the Sherman Act".

MR. RAFTERY:—That is a point. As written now, you cannot follow it.

[1464] THE COURT:—No. 61, I think, should not be granted.

MR. ROME:—Sir, that has been one of the reasons given, for instance, Fox in this case, in its answer to interrogatories, said they would not give the Crest access to pictures, because they had a satisfactory customer.

MR. RAFTERY:—Downtown.

MR. ROME:—Downtown. And that has also been in evidence from some of the other defendants, and I think the jury should be instructed, Your Honor, that that policy of preferring customers has been used by these defendants in the past.

THE COURT:—You can argue that, but I do not think I am going to give you that in the instructions.

MR. RAFTERY:—Windsor and Walbrook support Your Honor in that position. It is 4th Circuit law.

THE COURT:—I think No. 62 is a correct statement of the law. I do not know that I have to give them that, in this case.

MR. RAFTERY:—That is contradicted in the Dipson case, and contradicted in the right of Loew's and Warner's to license their own pictures to their own theatres. He is trying to say it is a conspiracy, if Warner licenses its pictures to the Stanley Theatre.

THE COURT:—You may have such a thing.

MR. RAFTERY:—I do think, under Section 5, [1465] which Mr. Boyd read to Your Honor, that decree gives Metro or Loew's the absolute right, without restriction, for a 3-year period to license their own pictures to their own theatres, irrespective of the decree. Warner's has the same right, under the next section; and what he is trying to do is overcome that by saying you can have a combination and conspiracy, if that is all you have. In other words, they lead up to the——

THE COURT:—I do not think it is sufficiently descriptive. Similarly, I do not think No. 63 can be granted, because that, Mr. Rome, again, does not take into account the right of the other side with respect to first-run, and whether this is competition or not. It is not adequate, and it is too incomplete.

MR. ROME:—All this point has to do with is getting access to product. Here, the defendants, as we see it, and it is our contention, have denied access to product.

THE COURT:—I cannot grant it in that shape.

Now, nor 64, nor 65, nor 66.

I think No. 67 is substantially all right.

MR. RAFTERY:—We have stated that accurately in our No. 40. If you put a note on No. 40, the second sentence, for instance, if he stopped right after the first sentence, there would not be any quarrel with him. He is asking you to tell the jury they are to divide by 3, and a [1466] lot of other

stuff. Then he has this stuff about the will of Congress concerning the punishment of those who are guilty of violating the law.

MR. ROME:—I appreciate Mr. Raftery's tremolo, but I suggest that that is exactly the net effect of this text there. There is no dispute about the fact that the trebling of damages is punishment.

THE COURT:—I think it is substantially correct.

Now, I do not want to shorten the discussion unduly on the rest of these, but my study of them yesterday indicates to me, for substantially the same reasons which I have already announced in rejecting so many of the requested prayers, and for these same reasons, all of these from No. 68 on to the end, appear to me either to be superfluous or incomplete, or have already been covered.

MR. ROME:—Sir, I would ask Your Honor to consider those points which have to do with the Paramount case. I have attempted to frame points here that would embody to the best of my poor ability, sir, the kind of thing I contemplate is meant by the Emich case, with regard to instructing the jury as to the net effect of the Paramount case, and we have attempted in this relatively small number of points to set forth the fact that these defendants have had certain things adjudicated against them in the Paramount case.

THE COURT:—I am going to try to cover that very [1467] much more briefly, when you introduce the decrees, and in a brief statement in my charge, and if you do not think that covers it, you can object.

* * * * * * *

## DEFENDANTS' REQUESTS.

[1471] THE COURT:—I think No. 14 is substantially all right.

MR. ROME:—There is one point with regard to No. 14, and that is the definition which is pointed out again in the Milgram case, where these defendants have a common problem, and meet it locally, in the same way. That is one thing. But where they erect or acquiesce in a national policy, which is applicable throughout the country, that is different; and the very fact that here, where they have an admitted policy

engaged in by these defendants everywhere throughout the country, that makes it a different situation.

THE COURT:—Gentlemen, you will have to leave it to me to see whether I put that properly.

* * * * * * *

[1475] No. 21, I think, is correct.

MR. ROME:—There, they are limiting the element of proof to direct proof only, and excluding circumstantial evidence. They say, "If you find from the evidence that there is no direct proof". We do not have to have direct proof.

THE COURT:—I think they are right, there.

MR. RAFTERY:—I am willing to cross out the word "direct", and add the word "sufficient", and make it read, "If there is no sufficient proof".

THE COURT:—I think you are right, on that.

I think No. 22 is correct. Part of it is quoted right out of——

MR. ROME:—The only point I would ask Your Honor to include with regard to that, is that the plaintiff is entitled to opportunity, along with other exhibitors, and that the defendants cannot conspire to exclude the plaintiff from access to the proper run.

THE COURT:—Well, I will try to cover that.

I think No. 23 is not properly grantable, as it stands.

MR. RAFTERY:—That is the wording in the Westway [1476] case, and was affirmed as late as 1951, in the Fanchon-Marco case, that any distributor acting independently, and not in concert or conspiracy, has the right to select its own customer. The Windsor case said it again, in this Circuit, and it is a fundamental thing in ordinary American business. Everybody who deals in exclusive articles, like an automobile dealer, or Johnson & Murphy shoes, may select a given customer in an area, and that is it. And we say, we can, if we act separately and independently, we can elect to sell our pictures to any theatre, providing we do not combine or conspire with anybody.

THE COURT:—I think the same applies to No. 24. "If

you find from the evidence that each of the defendants in licensing its pictures for first-run exhibition in Baltimore endeavored to select that customer which would ultimately yield it the greatest revenue, having due regard for its past business relations with the customer, the skill and character of management of the theatre, the size, location, equipment and drawing power of the theatre, then you should find for the defendants on the first cause of action."

MR. RAFTERY:—I think that is absolutely correct.

MR. ROME:—There should be added, with regard to No. 23, that, morally, there is no duty on the defendants—excuse me, there is a duty on the defendants to treat all exhibitors fairly, and that the exhibitors have a right to [1477] equality of opportunity in access to run.

THE COURT:—That will be covered by other parts of the charge.

* * * * * * *

[1478] MR. ROME:—I was attempting to inquire whether Your Honor was taking the position that even though the Crest Theatre was not in substantial competition with Loew's Century Theatre, or Warner's Stanley Theatre, that, nevertheless, it would not have the right to have access to product day and date with those two companies?

THE COURT:—I think that is the law; yes.

* * * * * * *

[1570] THE COURT:—Gentlemen, I have given some further consideration to the question of burden of proof, and as a practical matter it probably becomes somewhat academic. I want to do my best to give the right instructions with respect to it, and I have attempted to outline what I think is the correct way to tell the jury the situation or the status of the pleas in the Paramount case in this case, and in that connection I think it is appropriate to make it very clear to the jury what is the correct interpretation that they must give, or what they must find with respect to the burden of proof, that is, upon which side it rests and when.

From a further consideration of the matter, I am dis-

posed to the view that plaintiff's counsel is correct in saying that there is a separation of the burden of proof, that there are two phases of it, and when it comes to the matter of clearances, the burden of proof is upon the defendants; but, of course, the basic burden of proof, that is to include conspiracy in restraint of interstate commerce, rests throughout the trial upon the plaintiff.

I think, Mr. Rome, that is what you have been contending for?

[1571] MR. ROME:—It is exactly that, sir. Thank you.

THE COURT:—I think the contrary position is tenable, and as you know, I thought so from the first, and I think it is very plausible to say that the language in that section of the decree, or one of the decrees which talks about the burden with respect to clearances being upon the distributors, it is quite plausible to say that that relates to a situation such as we have in the decree, because in that decree they are talking about a past event, that where there has been an allegation or a representation that the decree has been violated, that is to say, where the parties are in contempt of the order, then the burden of proving the reasonable clearance, as set forth in the order, has been shifted to the distributors. But I think, perhaps, a more reasonable interpretation is to say that that is not only, of course, true with respect to the Paramount situation, but where you are required or permitted, or where plaintiff is allowed to use the Paramount decree as *prima facie* evidence in a case of the present kind, it seems to me to make more sense, to be more reasonable to say that if there is conspiracy to restrain trade unreasonably, that is restraint of interstate commerce, as I shall attempt to define it in the rest of my charge. I think it is more reasonable to say, then, that the plaintiff should have the benefit of the broader interpretation of that language about the shifting [1572] of the burden of proof.

* * * * * * *

[1611] MR. BOYD:—Now, one more thing: the very first paper in this case, in this file of documents, the official papers in the case, is the bill of complaint. You will find

that it was filed in the District Court of the United States for the Eastern District of Pennsylvania, at least the District Court in Philadelphia.

I do not challenge the plaintiff's right to file his case in Philadelphia, whatever. Whatever reasons he may have had, he had the right to file a suit there, whether it was because he thought distance might lend enchantment to his theatre, and it was better for a Philadelphia jury to pass on this, or for whatever reason he had to do it, and I don't challenge it; but there happens to be a further rule that was invoked in this case, and it was invoked by the defendants, that where the convenience of the parties and the interests of justice require, then the case can be sent from the court in which it was filed to some other District Court; and that is what happened in this case. And it happened in this case over the vigorous opposition of the plaintiff, and at the request of the defendants, their request that the case be sent here to Baltimore to be tried, where they were perfectly willing to risk the disposition of this case to a Baltimore jury. And that is what I am quite willing to do.

* * * * * * *

[1654] MR. ROME:—They have made mention of the fact in this case that it was filed in Philadelphia. It is perfectly true, this case was originally filed in Philadelphia; but I do think Mr. Boyd should in all fairness point out to you the fact that when this case was transferred down here from Philadelphia, the Court in its opinion ordering the transfer said there is very grave doubt that the case could ever have been brought originally in the City of Baltimore, because of the intricate details of jurisdiction. So that [1655] the curiosity of the law was, even though we could not start here originally, the Court in Philadelphia recognized that under a statute of Congress, it could be transferred here; and when it was transferred here, we came here, and never sought to appeal that order transferring it down here. And I should have supposed that ordinary fairness would have led Mr. Boyd to point that out to you, in discussing the problem at all.

* * * * * * *

[1657] THE COURT:—Mr. Foreman and Members of the Jury, it now becomes the duty of the Court to instruct you on the law of this case. As you have learned from your experience in other cases, I think, you, as the jury, are the sole judges of the facts, and anything which the Court may say in the course of these instructions about the facts, or any inferences which it may draw or may appear to draw, also any remarks with respect to the facts which the Court may have made or any inferences which it may have drawn or may have appeared to draw in the course of the trial,—none of that is in any sense binding upon you. It is for you, and you solely, to determine the issues of fact, as you may find them, after applying the rules of law which the Court will give you, and which must govern you in the case. The rules and principles of law which the Court will give you are binding upon you.

This has been a somewhat protracted, and perhaps it has seemed a somewhat tedious case. Of course, all of us, at some time or another take delight in seeing a motion picture. So, perhaps it makes the minds a little more disturbed if we talk so much about motion pictures but do not have any display of them.

I think it is appropriate for the Court to say to you at the very outset,—because it should assist you in your application of the law to the facts as you may find them [1658] that there are really only three basic questions that you have to decide in this case, and they are the following,—this being, under the Anti-Trust laws of the United States, a charge of conspiracy by the defendants against the plaintiff. The first and most basic question is: has there been such a conspiracy? In a few moments I shall define conspiracy to you, and, of course, go into more detail by way of illustration of the principles of law as applied to the facts of the case, or some of them, at least. But that first and simply stated question, which you must bear in mind at the very outset, is: has there been a conspiracy against the plaintiff in the operation of its Crest Theatre?

If you should find, after applying the principles of law,

which I will give you in a moment, to the evidence as you find it, that there has been no conspiracy, then, that ends the case. So, there is only one question, then.

If, on the other hand, you should find that there has been a conspiracy, then you still have two questions to consider: (1) Even assuming that there has been a conspiracy, has it been the proximate cause of actual, and not merely speculative, damages to the plaintiff within the period here in suit, which is from February, 1949, until March, 1950? If you answer that second question that there has been actual, and not merely specu- [1659] lative, damages that plaintiff has proved as the proximate result of the conspiracy, the third and last question is: what is the amount of that damage that you find from the evidence?

Those are the three broad, basic, fundamental questions that underlie the case. They are not difficult, technical questions, as I trust you will see from the more detailed instructions that I will now give you in connection with explaining the law as you shall apply it to the facts. I shall not, in the course of these instructions, attempt to give you in any detail at all a narration of the facts. I may refer to certain parts of the testimony, certain of the facts that have been asserted by either side, or by both sides, which you may think are of minor importance, and they may be facts which, in your deliberations, you may think do not have as much weight as some other facts. I shall not in any way attempt to cover the testimony in the case, first, for the reason just explained, that, in any event, it would not be of any control upon you and you would not be required to adopt anything that the Court might say about the facts, or any inferences that the Court might draw, and, secondly, that being true, I think it would be tedious and unnecessarily wearisome to you for the Court to do so. You will have access to the transcript of the testimony, which has already been written [1660] up, if you want to refresh your recollection on it after you retire to your room. You will also have access to all of the exhibits, which you may peruse again as and when you may see fit to do so.

To be somewhat more specific with respect to these principles that must control you in considering these basic questions which you have for decision,—three at most,—I instruct you that this action is brought under the Anti-Trust laws of the United States, known as the Clayton Act and the Sherman Act, and is brought by plaintiff, a Maryland corporation, to recover damages, from eight defendant companies, under two causes of action, which plaintiff claims to have suffered during the period from February 26, 1949, the date of the opening of its, the Crest, theatre, up to March 20, 1950, the date of the filing of this suit, which was originally brought in Philadelphia but was transferred to this jurisdiction on defendants' motion, for convenience of the parties, such being permitted since the suit might have been brought originally in this Court.

The suit is based upon two causes of action, $250,000 damages being claimed under the first cause of action, and $52,000 under the second cause of action. The more precise grounds of these two causes of actions or claims I will explain to you in a moment.

[1661] Plaintiff also asks for a permanent injunction prohibiting such of the defendants as are engaged in the business of distributing motion pictures from imposing clearances on pictures in favor of theatres in downtown Baltimore over plaintiff's Crest Theatre, located in the northern part of the city, near the intersection of Reisterstown Road and Rogers Avenue.

I instruct you that the term "clearance", in the motion picture industry, means the period of time stipulated in license agreements, between distributors and exhibitors, which must elapse between showings or runs of the same picture within a particular area or in specified theatres. Plaintiff's complaint, that is, what the plaintiff claims here in his bill of complaint, alleges that the following seven defendants distribute motion pictures for exhibition in theatres in Baltimore City, namely, Paramount, Loew's, RKO, Fox, Universal, United Artists and Columbia; that the eighth defendant, Warner, operates the Stanley Theatre in down-

town Baltimore, and that defendant Loew's operates the Century and Valencia Theatres, also in downtown Baltimore, and that, in addition to these theatres in the downtown section of the city operating first run, there are five other downtown theatres, namely, Keiths, New, Mayfair, T[illegible], and Hippodrome, operated by persons or companies other than [1662] parties to this present suit.

Plaintiff is the operator of the Crest Theatre, as I have already said, located in the outer section or the northerly section of Baltimore, at or near the intersection of Reisterstown Road and Rogers Avenue. Plaintiff claims that this theatre is properly located and adequately equipped for exhibition of first-class motion pictures on first run; that it has attempted to obtain first run pictures for exhibition at the Crest, but that the defendants have failed and refused to license any pictures to it on first run, and that since February, 1949, it has been operated on first so-called neighborhood run,—that is, approximately 21 days after first run downtown Baltimore showing,—day and date with other suburban as well as neighborhood theatres, and that it has been discriminated against in licensing first neighborhood runs with respect to film rental.

As you have heard many times stated in the course of the testimony, these two expressions are very common in the motion picture industry,—"first run" and "day and date". "First run" means just what it says in a few words. It is the first time the particular picture is shown. "Day and date" relates to a contemporaneous showing at the same time with one or more other showings somewhere else.

[1663] This suit was originally brought against ten companies, but two of them, Warner Bros. Pictures and Warner Bros. Circuit Management, are no longer involved in this proceeding. I mention that only parenthetically. You will see their names in the original pleadings. All eight defendants now involved in this case deny all of the allegations in plaintiff's complaint which in any way charges any wrongdoing on the part of any of the defendants.

As you have heard from the testimony, the Crest Theatre

is located about six and a half or seven and a half miles from the downtown theatres in Baltimore. However, in the immediate area of the Crest, at the time its construction began, there were a number of well-established neighborhood theatres, all of which plaintiff claims are in direct competition with its theatre, specifically, the Uptown, Avalon, Ambassador, Pikes, Forest, Gwynn, and Pimlico. When the Crest was completed, its builders leased it to Theatre Enterprises, Inc., which is the complaining company in the present case, that is, leased it on a month-to-month tenancy, which continued until some time in January, 1951, when the theatre was sold to the present plaintiff for approximately $413,000.

Plaintiff contends, as you have seen, that the defendant distributors in the present case could have licensed pictures to play first run at the Crest on 21 days clearance [1664] over all of the theatres above mentioned, that the pictures, while playing at the Crest, could play first run in one of the seven downtown theatres above mentioned, and in many other theatres located in Baltimore City that are not situated in the immediate area of the Crest, specifically, theatres like the Senator, Belvedere, Northwood, Edmondson Village, Towson, and Linden, with similar clearance licenses to each of the theatres. The justification claimed by the plaintiff for this is that the Crest is not in competition with theatres in downtown Baltimore.

So much by way of a brief statement of the undisputed background and situation in the case, and then a statement of the claims made by the plaintiff.

Now, members of the jury, I instruct you that the Anti-Trust laws, under which this suit is brought, provide that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, is illegal, and they authorize any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust laws to bring suit for three-fold damages. The corporations which are defendants in this case are persons within the meaning of these Acts of Congress. All three phases of the motion picture

business involved in this case, namely, first, production, second, distribution, and, third, exhibition, [1665] constitute a part of interstate commerce within the meaning of these Acts of Congress.

I further instruct you that, in spite of the broad language of the law as I have given it to you in brief form, these Anti-Trust laws, while forbidding monopolies in restraint of trade, have not been construed as forbidding every restraint of trade, but only those restraints that are unreasonable concerning all articles or commodities in interstate commerce.

We have now reached the point, therefore, when it is necessary to consider what is a conspiracy within the meaning of these Anti-Trust laws?

I instruct you that a conspiracy is an agreement, express or implied, between two or more persons to do an illegal act, or to do a legal act in an illegal manner. It is a combination by two or more persons to accomplish an unlawful purpose by joint or concerted action. An unlawful conspiracy may be, and often is, formed without simultaneous action or agreement on the part of the conspirators.

There are two kinds of evidence, therefore, that you have in cases of this kind and which you have in this case, namely, direct and circumstantial evidence. Direct evidence is evidence which if believed proves the existence of the fact in issue, without any inference or pre- [1666] sumption. Circumstantial evidence is evidence which, without going directly to prove the existence of the fact, gives rise to a logical inference that such fact does exist. Both kinds of evidence may be of equal probative value; and, in arriving at your verdict, you are to consider all of the evidence, both direct and circumstantial.

The mere fact that plaintiff has seen fit to join a number of parties as defendants, I instruct you, does not, of course, mean that all or any of them are liable to the plaintiff, unless their liability is proved according to the rules of law on the facts as I am now giving you those rules of law.

Plaintiff's claim must be judged separately as to each defendant, and the position of each defendant must be judged

on its own merits. This is especially true wherever the facts to sustain the nature of the charge made or offense asserted differ with regard to one defendant from those regarding all or some of the remaining defendants. You will recall from the testimony that that is the situation with respect to one or more of the defendants in the present case. I shall allude to that a little more specifically later on.

Each defendant, therefore, is entitled to individual consideration of the evidence, as applied to it, to determine whether that particular defendant participated [1667] in any combination or conspiracy. No defendant is to be prejudiced in your minds merely because it has been named by the plaintiff, along with others, as a defendant in this case.

I further instruct you that it follows from what has just been said that you may, on the evidence, find a verdict in favor of one or more defendants, even though you may also, on the evidence, find against one or more of the other defendants.

The plaintiff in this case, I instruct you, as in other civil cases of this kind, has the burden of proving the essential elements which entitled it to recover. And in this case the plaintiff, as to each of the alleged causes of action, has the burden of establishing that a conspiracy existed among these defendants, or some of them, to violate the Anti-Trust laws and so suppress independent competition, and, further, that the plaintiff was damaged by such a conspiracy. Those elements the plaintiff has the burden of establishing by a fair preponderance of what you may find to be the credible evidence. In other words, members of the jury, in this case, as in all ordinary suits between individuals or corporations, if A sues B, the law says that A must sustain the burden of proving what he claims; and that burden must be sustained to the jury's satisfaction by the weight of the credible evidence as the [1668] jury finds it.

Parenthetically, I might contrast the situations which you have learned from your experience in criminal trials. In criminal cases, the burden of proving the guilt of the accused rests upon the Government, and, in order to convict, that

burden must be sustained to the jury's satisfaction beyond a reasonable doubt. In civil suits of this kind the burden necessary to be sustained by the moving or claiming party is met if it is supported by what the jury finds to be the weight of the credible evidence.

I instruct you that plaintiff's first cause of action—I have explained already that there are two separate grounds for plaintiff's suit, called causes of action—relates to alleged loss of what we may abbreviate as first run business. Before plaintiff can recover on this first ground or cause of action, I instruct you that it must establish to your satisfaction, by the weight of the credible evidence, first, an agreement, combination, or conspiracy to unreasonably limit the licensing of first run pictures to certain exhibitors, to the exclusion of plaintiff and the Crest Theatre; second, that, as a direct and proximate result of so doing, the plaintiff has been injured in its business; and, third, that the damages to its business are capable of reasonable ascertainment from the evidence in the case, and are not merely [1009] speculative or conjectural damages. If the evidence fails to establish to your satisfaction any one of these elements, I instruct you that, then, your verdict must be for the defendants on this first ground or cause of action. If the evidence as to any one of these essential elements is so evenly balanced that you cannot determine upon which side the preponderance or the greater weight thereof lies, then I instruct you that your verdict must be for the defendants on this first cause of action.

Now, turning to the second cause of action, I instruct you that in order for plaintiff to recover on it, which relates to alleged loss of what we will abbreviate as the second run business, plaintiff must establish, first, an agreement, combination, or conspiracy on the part of the defendants to restrain trade in the licensing of pictures to the Crest Theatre by unreasonably discriminating against that theatre; (2) that, as a direct and proximate result of so doing, the plaintiff has been injured in the business of that theatre; and (3) that the damages to that business are capable of reasonable ascer-

tainment from the evidence in the case, and are not merely speculative or conjectural.

As you have heard from the testimony, plaintiff asserts that the Crest Theatre has been unreasonably discriminated against on three grounds, in connection with [1670] this second claim or cause of action: first, that on first neighborhood runs, Crest was charged more than other neighborhood theatres, that is, the license charges per picture have been higher. The defendants, as you have heard, deny that there was any such difference charged. Secondly, plaintiff asserts that at least one of the defendant companies discriminates against Crest by giving to Loew's own Parkway Theatre seven-day runs of its own pictures prior to letting the Crest show the pictures. Defendant Loew's admits this, but has introduced evidence to the effect that it treats all other neighborhood houses in exactly the same way that it treats Crest in this respect, and also relies upon the right,—which I instruct you is its legal right—to show its own pictures in its own theatres exclusively, as and when it sees fit. In other words, members of the jury, on this latter point, to clarify it, I instruct you that if a man has a theatre of his own and he has pictures of his own, he can show those as and when he feels like it, in his own theatre, just like if you have a grocery store, or any other kind of a store, and if you grow crops or raise anything, you can sell it in your own place. But if, in addition to doing that, you sell some of your products to others, then, of course, you begin to enter the field wherein it may give rise to charges of discrimination. The third assertion of plaintiff in connection with this [1671] second cause of action, based upon subsequent run business, is that Crest should be given clearance over other neighborhood houses. Defendants admit that all of the defendants do not give exactly the same clearance to Crest as to all other neighborhood houses; but defendants claim that such variations as they have testified to as being made, are reasonably justified and are not prejudicial to Crest, and that there is no conspiracy in any of this, as indicated, they claim, by lack of, rather than the existence of uniformity of action.

If the evidence fails to establish to your satisfaction, by the weight of the credible testimony, any one of these elements that I have just referred to, then your verdict must be for the defendants on this second cause of action. If the evidence as to any one of these essential elements is so evenly balanced that you cannot determine upon which side the preponderance or greater weight thereon lies, then, I instruct you,—just as in connection with the first cause of action—your verdict must be for the defendants on this second cause of action. And since, as the result of the explanation just given you, the plaintiff asserts these two separate causes of action, you must consider the evidence separately as to each and determine whether or not the plaintiff has sustained the burden of proof, as I have explained it to you, with respect to each [1672] cause of action.

If, from all the evidence, you believe that the defendants acted independently and without any illegal concerted action, then whatever harm may have been visited upon plaintiff is merely one of the hazards implicit in our competitive system, and your verdict must be for the defendants.

I further instruct you, members of the jury, that proof of conspiracy requires more than mere suspicion or conjecture. There must be direct proof of conspiracy, as I have defined it to you, or circumstantial evidence sufficiently strong as to give rise to an inference of conspiracy. The burden of proof, as I have explained to you, rests upon the plaintiff. If there was no common purpose and no uniformity of conduct between any one defendant and any of the other defendants, you may consider those facts in determining whether that defendant entered into any combination or conspiracy with any of the other defendants. It is not enough that there has been created in your minds some doubt or suspicion as to the conduct of the defendants; the plaintiff must produce proof of such a nature as carries a conviction to your minds, such as would influence you in the conduct of your own business or daily affairs. The character of the proof must be such as you would be willing to act upon and base [1672] a judgment upon in the disposal of important matters.

The similarity of the business practices of certain of the defendants does not necessarily lead to the conclusion that they were in a conspiracy. If you find that such similarity results from nothing more than a common business solution of identical problems in a competitive industry, the similarity of conduct would not require the conclusion that a conspiracy actually existed. Each of the defendants has a right to license its pictures by licensing successive runs thereof and to grant reasonable clearance between each of the successive runs. Clearance is granted to protect the right of the licensee in the run granted; and a reasonable clearance is not a violation, I instruct you, of the Anti-Trust laws. It is only an unreasonable provision that is a violation. But where the clearance granted is unreasonable, in either time or extent, or where it is granted as a part of an arbitrary system of clearances, or where it is granted for the purpose of suppressing competition, the granting of such a clearance becomes a violation of the Sherman Act, which is one of the Anti-Trust Acts on which, as I have explained, this case is based.

Without regard to the period of clearance, the licensing of pictures for exhibition on different successive days is considered by this industry, as you have heard [1674] testified here, essential in the distribution of motion pictures; and either a license for successive days or one providing for clearance permits the public to see the pictures in later exhibiting theatres at lower admission prices, so that each class of the public may have the opportunity of seeing motion pictures for progressively reduced admission prices.

I may refer at this point to what the testimony has disclosed in relation to some of the costs: that the cost of each black-and-white print of each motion picture varies from $150 to $300, depending upon the length of the picture, while the cost of the technicolor prints varies from $600 to $1,200, depending upon the length of the picture; that many of the bookings in the lower admission theatres are for less than the cost of the print. So, the exhibitions would be confined to the higher admission price theatres unless a

method of successive runs, with reasonable clearances for the protection of the earlier runs, be used in the industry.

I further instruct you that each distributor, acting individually, has the right to grant or withhold clearance as between theatres which are in substantial competition. Plaintiff asserts the Crest Theatre is not in competition at all with downtown Baltimore theatres. Defendant asserts, however, that these theatres are in [1675] very substantial competition with the Crest and other neighborhood theatres.

In considering whether the defendants acted independently in granting or withholding clearances in licensing pictures for exhibition at the Crest and in its competitive area, you are to consider the manner in which each company did the licensing. If you find from the evidence that there is no proof of any conspiracy, as I have defined it to you,—if you also find that the defendants did not license in the same manner,—you should find for the defendants.

No theatre, I instruct you, has the absolute right, as a matter of law, to demand from a motion picture producer or distributor the right to priority in runs. It is the right of each distributor, acting independently, to select its customers. Therefore, the plaintiff has no absolute right to demand exhibition rights for first run of any of the pictures of any of the defendants. So, plaintiff has no absolute right to obtain a license to exhibit any motion picture distributed by any defendant on first run in the City of Baltimore.

If you find from the evidence that each of the defendants, in licensing its pictures for first run exhibition in Baltimore, endeavored, entirely independently, to select that customer which would ultimately yield it [1676] the greatest revenue, having due regard to its past business relations with the customer, its skill and character of management, the size and character of its equipment, and the drawing power of the theatre, then you can find for the defendants on the first cause of action, that is, the one with respect to this claim of right to first run preference, or at least day and date with downtown.

I instruct you that the location of a motion picture

theatre is one of the important factors to be considered, along with many other factors, in determining its suitability for exhibiting pictures on a first or an early run, some of the other factors being the seating capacity, the admission prices charged the patrons, the facilities which it provides for the comfort and convenience of the patrons, and the size and character of the neighborhood from which the particular theatre draws the major portion of its patronage, or is likely to draw it.

As you have heard from the testimony, Loew's, one of the defendants, had a stock interest in a corporation operating the Century, the Valencia and the Parkway theatres. During all of the time here in controversy, Loew's had a right, as a distributor, to prefer its own theatres, as I have explained, as customers in licensing its own pictures. The fact that Loew's did license its pictures for first run exhibition in its own theatres, rather than for first run [1677] exhibition in the Crest Theatre, is not, in and of itself, proof of any conspiracy or any illegal action by Loew's.

You are further instructed that Loew's had the right to license its own pictures in its own Parkway Theatre fourteen days after first run downtown and ahead of other theatres, and its action in so doing was not, in and of itself, proof of any conspiracy or any illegal action by Loew's.

Turning to Warner Bros., it is in the testimony that Warner Bros. Circuit Management Corporation, which is one of the companies that was dismissed from the case, owns and operates the Stanley Theatre. Warner Bros., and its affiliate, Warner Bros. Distributing Corporation, during all of the time in controversy here, had a right to prefer its own theatre as a customer in licensing its own pictures for exhibition in the Stanley. The fact that Warner Bros. did license its pictures for first run exhibition in its own Stanley Theatre, rather than for first run exhibition in the Crest Theatre, is not, in and of itself, proof of any conspiracy or any illegal action by Warner.

The defendants Columbia and Universal are engaged in the business of producing and distributing motion pictures,

as you have heard from the testimony. These defendants do not engage in the business of exhibiting pictures.

[1678] Defendants Paramount and RKO are engaged in the business of producing and distributing motion pictures. Since about December, 1949, Paramount has not been engaged in the business of exhibiting motion pictures, and since about December, 1950, RKO has not been engaged in that business.

Defendant United Artists is engaged only in the business of distributing motion pictures produced by other parties. It does not engage in the business of exhibiting pictures.

The plaintiff urges, in support of the charge of conspiracy, that, as a result of concerted action, the defendants refused to sell the plaintiff first run pictures. If any defendant so refused, pursuant to its own business judgment, and if such defendant was acting independently and not in a combination or a conspiracy, such defendant was within its rights in so refusing. In other words, the preference of one exhibitor over another is not, in and of itself, a combination in unreasonable restraint of trade. It is natural for a distributor not to be prone to substitute unknown customers for proven ones.

As I have instructed you, members of the jury, in order to establish a right to recover, plaintiff in the present case must show, (1) a conspiracy in restraint of trade that is unreasonable, as I have defined it to you, [1679] in relation to the motion picture business; (2) injury directly caused to its business by such unreasonable restraint.

The law further provides, I instruct you, that if any of the acts prohibited by the Anti-Trust laws which are alleged to have damaged the plaintiff have previously been established against these same defendants by a decree obtained by the United States Government, in either a criminal or a civil, that is, an equity proceeding, under these Anti-Trust laws, then the plaintiff may, in aid of its present case, rely upon such judgment or decree previously obtained by the Government, in proving the existence of the prohibited acts to the extent that the law provides that such previously obtained judgment or decree is *prima facie* evidence against

the defendants in a suit of the present nature brought by the plaintiff against them,—that is *prima facie* evidence, not conclusive evidence, as to all matters involved in the present case that were decided by the previous decree.

I instruct you that in the previous equity suits between the Government and these same defendants, which have been referred to as the Paramount case,—you will recall I allowed the decree in that Paramount case to be introduced in evidence by the plaintiff,—I instruct you that in that case, which was a suit between the Government [1680] and the same defendants, which was decided and covered by the decrees in that case, these same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become *prima facie* evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only *prima facie* evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibitions from the plaintiff, or have conspired to restrict plaintiff to clearances which are unreasonable.

If you find that the plaintiff has sustained this burden of proving a conspiracy as just defined, then, I instruct you that, by virtue of the terms of the decrees [1681] in the previous equity suit, which form part of the evidence in this case, the burden of proving the reasonableness of the failure to give the plaintiff first run exclusively or day and date, that is, questions of clearance, as well as the failure to give

it any other clearance such as would be reasonable, rests not upon the plaintiff but upon the defendants.

I will just summarize that again. I told you earlier that the burden of proof in this case, just like in all civil suits, generally speaking, rests upon the moving party; and if A sues B, the law says that A must prove his claim in order to recover. That is true in this case, as I have explained. But, by reason of the fact that what we may call the broad issues involved in this case were involved in the Paramount case, there is a statutory provision which allows those issues, insofar as they may have a bearing upon the issues in a particular case like this, to become *prima facie* evidence; and, if you find, as a result of your examination of those decrees, that, as respects clearances, these defendants, or any of them, have given unreasonable clearances, it is not necessary for you to find that the plaintiff has proved that, but the burden of showing that they are not unreasonable shifts over to the defendants.

I might explain that a little more in A-B-C [1682] language in this way: a court order, which is called a decree for the purposes of this kind of a case, is obtained against certain parties,—let us say in a trademark case—that they can only use a certain label or words in a certain way, and the party that was originally aggrieved thinks that label has not been followed out, but that a label in violation of the court's order has been used; so the parties can be brought into court; and then the burden is on that party who has used the new label to show that he is within the order of the court and is not in contempt of it. That, I think, explains somewhat the only really technical point of law that exists in this case.

I instruct you, members of the jury, that if you find from the evidence that the plaintiff was not acting in good faith in submitting offers for the right to exhibit pictures on first run in the Crest Theatre, then the rejection of such offers is no evidence of unlawful conduct on defendant's part. If the plaintiff was acting in good faith in submitting these offers, you should consider the financial condition of the

plaintiff, the gross receipts of the Crest, and the ability of the plaintiff to pay the film rental offered.

Even if you should find from the evidence that the defendants combined and conspired in unreasonable restraint of the plaintiff, as I have defined combination [1683] or conspiracy and unreasonable restraint, if you also find that the plaintiff was injured in its Crest Theatre business as a direct and proximate result of such illegal act, nevertheless, the plaintiff's right to recover must be limited to actual damages, that is, damages that you find have been sustained in the period alleged by the plaintiff, namely, from February, 1949, to March, 1950, in an amount which can be determined with reasonable certainty from the evidence, and only from the evidence. The plaintiff is not entitled to damages which are merely speculative, remote or uncertain.

If, after applying these rules which I have given you to the weight of the credible evidence as you may find it, you should find that the plaintiff has been damaged actually, then the rule you must apply in measuring such damages is the amount of additional gross income which you find plaintiff would have realized from the operation of the Crest Theatre during the period here in question, had the defendants not combined or conspired unreasonably to restrict plaintiff in obtaining defendants' pictures, less such additional reasonable operating costs that you may find plaintiff would have incurred in showing the additional or different runs of pictures.

Lastly, I instruct you that the amount of your verdict, if you should find a verdict for the plaintiff, [1684] should be limited to plaintiff's actual damage, in the sense that it should be based, and must be based, upon the extent to which plaintiff's business has been damaged, as above explained. You do not first find the amount of actual damage and then treble it, and then report the trebled amount as your verdict. That would be wrong, because, as a matter of law, under the statute, your verdict in a suit of this kind, if there is a verdict for the plaintiff, is trebled not by the jury but by the Court. I refer to that treble feature in closing lest you may

not heretofore have fully understood its application to this case. It is a matter for the Court to apply, and not the jury.

Now, members of the jury, in closing, you may refresh your recollection from the figures, as well as from all other physical exhibits that have been introduced in this case relative to the alleged losses by the plaintiff, and the testimony which has been introduced by the defendants, on the other hand, purporting to indicate that there has not been any such loss.

Just as I have refrained from going into any of the real details of the testimony with respect to conspiracy and other features of the case, I shall not detain you by attempting to analyze these schedules of alleged losses.

I think I have covered all of the essential principles of law that are involved in the case, and I trust [1685] I have made sufficient allusion to some of the facts in order to illustrate the application of those principles of law to the facts as you may find them. Therefore, I will not go into them any further.

You will have access in your jury room, as has been explained, to all of the exhibits, also the transcript, the official writing-up of every word of the testimony, which is indexed, if you care to examine it.

The Baliff will now be sworn, unless counsel want to make any statements with respect to any exceptions to the charge.

MR. ROME:—We would like to, Your Honor.

THE COURT:—Are they lengthy?

MR. ROME:—To some extent, yes, sir.

THE COURT:—Have you any to make, Mr. Watkins?

MR. WATKINS:—Yes, Your Honor. There is one on which I think we will all agree; but the other one I think should be made out of the presence of the jury.

You referred to the claim for damages in the first cause of action as $250,000. The figures were transposed. The claim is $205,000.

THE COURT:—You are correct about that. It is $205,000.

If you have some exceptions to make, I will hear you out of the presence of the jury.

[1686] Meanwhile, members of the jury, you may retire to the jury room. If there be any additions or corrections to be made, you will be asked to come back.

(The Jury then retired to consider its verdict.)

[1687] THE COURT:—Mr. Rome, you might give me, just in outline, if you can, what you object to; and I will rule on it. Then, if you want to elaborate on it, if I do not grant the exception, you may do so by dictating it more at your leisure to the Court Reporter.

MR. ROME:—The first thing, sir, is with regard to your statement concerning the fact that the suit was originally brought in Philadelphia, and your statement to the Jury that it might originally have been brought in this Court.

THE COURT:—I understand so. That is what I understand is the basis of the Court's opinion. That has nothing to do with the merits of the case, anyway.

MR. ROME:—We think it might be prejudicial to the plaintiff.

THE COURT:—I do not see how it is possible. Let me have the opinion, Mr. Clerk.

I will say this to all counsel, that I am not disposed to spend another afternoon going over a lot of little things which you would like to have in the charge. I will announce now that I am not disposed to put anything more into the charge, unless I can be convinced beyond a reasonable doubt that I have made an error. If I have omitted something that I did not think was necessary, I shall not put it in.

[1688] MR. ROME:—In that opinion, sir, it is stated there is grave doubt whether the suit could have been originally brought here.

THE COURT:—I am prepared to stand on the statement that, apparently, it could have been brought. It seems to me to have fitted in within the statute which is quoted by Judge Grim that, "for the convenience of the parties, and in the interest of justice, the District Court may transfer any civil action to any other District or Division where it

might have been brought." And he allowed it to be so transferred, presumably for the reasons that are in the statute.

I think it comes with ill grace for you to make any point of that now. You did not stress that. You stated in your argument, I think, that you did not make any point of that.

We will not spend any more time on that.

MR. ROME:—May I say just one word about that, sir? I do not want Your Honor to think that I do something in ill grace. The fact that Judge Grim points out there——

THE COURT:—What has that to do with the case? I might properly not say anything about it. But you mentioned it, and I did not want to leave the Jury up in the air about the Philadelphia case.

[1689] MR. ROME:—I mentioned it only because Mr. Boyd brought it up at the tail-end of the case; and I think it prejudices the plaintiff.

THE COURT:—I can't, for the life of me, see how it can be prejudicial to anyone. The jury does not have anything to do with the jurisdiction. They sit on the case as it comes to them. That is the law.

MR. ROME:—May I have an exception?

THE COURT:—Oh, yes. You may have exceptions to all of them.

MR. ROME:—You made reference to the fact that seven of the defendants so distribute. Actually, there are eight distributing companies. Warner Bros. Pictures Distributing Corporation is a defendant, and is one of the companies.

THE COURT:—I don't think that makes any difference, if I made that slight error. I brought them all in under the same general ground of conspiracy, whether they are producers, exhibitors, or distributors. One of them is segregated. That is what I tried to point out. If I have not quite correctly interpreted the facts, that is not binding upon the defendants, anyway.

Motion overruled.

MR. ROME:—May I have an exception?

THE COURT:—Yes.

[1690] MR. ROME:—You said Warner Bros. Circuit Management Corporation is no longer in the case.

THE COURT:—That is what I was told. I have it here that Warner Bros. Circuit Management Corporation is out of the case.

MR. ROME:—Excuse me, sir; but I believe there is an error with regard to that. It was Warner Bros. Pictures, Inc., which was not served, and is out of the case. Warner Bros. Circuit Management Corporation is very much in the case.

THE COURT:—Do you admit that I made a mistake in the name?

MR. WATKINS:—Yes, Your Honor.

MR. RAFTERY:—The only thing is that we want to be sure that, if we admit, as we have to do, your instructions as to Warner's right to license its own theatres has the same bearing and effect.

THE COURT:—No; I will not add a thing to what I have said, except, if I have made a mistake. And I thought I was very careful, when the parties gave the name, to mark out the right ones. If I marked out the wrong ones, I shall tell the Jury that I used the words "Warner Bros. Circuit Management" as being out of the case, but it ought to be "Warner Bros. Pictures, Inc."

MR. ROME:—Yes, Your Honor.

[1691] MR. RAFTERY:—It is not on the Reporter's copy. It is on the record, I believe, as "Warner Bros."

THE COURT:—They were never served; that is, Warner Bros. Pictures was never served?

MR. RAFTERY:—That is right.

THE COURT:—Then, the statement was made that another Warner Bros. was out of the case. I know somebody made the statement.

MR. RAFTERY:—I think Mr. Watkins, in his argument, made at the close of the plaintiff's case, said, in effect, that Warner Bros. Circuit Management Coproration, so far as the evidence is concerned, is out of the case. There has been no proof, because they do not distribute any pictures.

THE COURT:—Are you agreed, that is, are both sides agreed that where I said there were eight in the case, I should have said there are nine?

MR. RAFTERY:—That is right, Your Honor. Your Honor stated, in ruling on the instructions——

THE COURT:—Well, wait until I finish with Mr. Rome.

MR. ROME:—I would like to except to those portions of your remarks to the Jury which had to do with the legal right of Loew's Incorporated and Warner Bros. Distributing Corporation to put their own pictures in their own theatres.

THE COURT:—Motion overruled.

[1692] MR. ROME:—May I have an exception, if You Honor please?

Your Honor also said the Crest had sought clearances over other neighborhood houses. Actually, sir, that situation came up only with regard to not having to play day and date——

THE COURT:—That is a factual question. If I misinterpreted the evidence, I will not change that.

Motion overruled.

MR. ROME:—And Your Honor will allow me an exception?

Your Honor also said that similarity of action does not necessarily lead to the conclusion of conspiracy; and you said, also, that if there was a common solution to common problems on the part of these distributors, there would be no conspiracy.

THE COURT:—That is what I understand to be the law; and I so instructed the Jury.

MR. ROME:—I would like an exception to that, if Your Honor please.

THE COURT:—Very well.

MR. ROME:—Would Your Honor be kind enough to hear me for just a moment?

THE COURT:—No. We have been all over this Everything in the charge was discussed almost into the [1692-A] night, *ad nauseam*, almost I think you might say.

MR. ROME:—Your Honor, without attempting to burden

you further with remarks, I would like to except to that portion of the charge in which you made the statement to the Jury that the Crest claimed that it was not in competition at all with the downtown theatres. That has never been the contention made by the plaintiff, sir.

THE COURT:—Well, not in substantial competition?

MR. ROME:—That is correct, sir.

THE COURT:—You want me to say "not in substantial competition"?

MR. ROME:—That is correct, sir.

THE COURT:—Very well, I will do that.

MR. ROME:—Your Honor also said, with regard to the distributors having the right to disprove the charge of past relationships existing between themselves and some other exhibitors, that they had been found in the past to have used the satisfactory customer method——*

THE COURT:—Motion overruled. Every one of these points, like the last one, was thoroughly argued, and I told you what I was going to do in the charge.

MR. ROME:—And may I have an exception?

THE COURT:—Yes.

MR. ROME:—Your Honor also said that, with regard to the right of Warner and Loew's putting their own [1693] pictures in their own theatres, that that is not, in and of itself, proof of conspiracy. But I would request to charge Your Honor that it may be proof of conspiracy, along with the other facts.

THE COURT:—I did not say it might not be. That is why I put in "in and of itself".

MR. ROME:—May I have an exception?

I would also like to except to that portion of the charge with regard to Warner and Loew's, since, in no event, did Your Honor make any reference whatever to the fact that

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* Plaintiff contends this is an erroneous report of counsel's statement. It should read:

"Your Honor also said the distributors have the right to regard the past relationship existing between themselves and some other exhibitors, but they have been found in the past to have used the 'satisfactory customer' method * * *".

even though these distributors might have some right to put their own pictures into their own theatres, there would be the element of day and date and the prohibition in the Paramount decree, on the part of these distributors in granting clearances to theatres not in substantial competition.

THE COURT:—Motion overruled.

MR. ROME:—And Your Honor will grant me an exception?

We also request, with regard to your statement to the Jury, concerning the fact that the factual situation in Baltimore was not raised in the Paramount case, that the Jury be advised that there was no necessity on the part of the Government to prove the factual details with regard to that situation but that, on the contrary, the Government [1694] need not do that, and the Jury might still conclude that the evidence in the Paramount case is to be *prima facie* evidence.*

THE COURT:—Motion overruled.

MR. ROME:—An exception, if Your Honor please.

Your Honor also spoke with regard to the fact that the Jury should consider the impact of the Paramount case solely on the basis of the decree that had been offered and received in evidence.

THE COURT:—The decree, as I explained it to them. That is all they had before them.

MR. ROME:—That leads to certain other exceptions that I would ask for with regard to specific requests for instructions contained in our requests submitted to you, which we believed should be given to the Jury with respect to specific aspects of the Paramount case.

THE COURT:—Motion overruled.

MR. ROME:—An exception, if Your Honor please.

We request an instruction to the Jury with regard to the fact that they can reach their own measure of damages, regardless of what the plaintiff may have introduced by way

* Plaintiff contends that this is an erroneous report of counsel's statement. It should read:

"* * * * and the jury should still consider that the evidence in the Paramount case is to be *prima facie* evidence."

of damage formulae, so long as it is a reasonable approximation of the loss suffered by the plaintiff.

THE COURT:—I did not say they could reach their own if they did not hew to the testimony. They do not [1695] have to adopt the figures given by the plaintiff, or by the defendant, or by anybody; but they can't pull it out of the air.

Motion overruled.

MR. ROME:—That is my point, sir, that they need not adopt the plaintiff's figures.

THE COURT:—I think I made it amply clear.

Motion overruled.

MR. ROME:—An exception, if Your Honor please.

I would also request a further instruction to the Jury with regard to the fact that there need not be any mathematical exactness with regard to the measure of damages, so long as there is a reasonable basis of approximation.

THE COURT:—I think I said practically that.

Motion overruled.

MR. ROME:—An exception, if Your Honor please.

I would also request an instruction to the Jury regarding the adverse inference to be taken from the fact that the defendants might not have called responsible executives of the various companies whose testimony was available on the subject

THE COURT:—Motion overruled.

MR. ROME:—An exception, if Your Honor please.

With regard to the rest, sir, they have to do [1696] with our specific written requests; and, since I understand Your Honor is intending to overrule our requests for them, may I at least repeat them or give copies of them to the Reporter so that they may appear in the record?

THE COURT:—Very well.

MR. ROME:—And Your Honor will grant me an exception?

THE COURT:—Oh, yes. Bring it up later on.

MR. ROME:—These are the exceptions that I refer to.

The Plaintiff excepts to that portion of the charge in

which the Court told the Jury that plaintiff's claim had to be judged separately against each Defendant, and that each defendant was entitled to individual consideration since the Court has ruled in the Paramount case that these defendants were to be treated collectively.

Plaintiff excepts to that portion of the charge of the Court which stated that the distributors have a right to license their pictures for successive runs as that permits a system of progressively reduced admission prices, thus enabling the public to have access to the pictures at the reduced admission prices. The grounds of exception is that this statement, standing alone and without relating it to the claim of the plaintiff, namely, that if they were accorded access to first run films it [1697] would not in any way eliminate the system of successive runs and progressively reduced admission prices to the public, is not a fair and accurate statement of the issue. Furthermore, this right on the part of the distributors must be stated in relation to their legal obligations with respect to the plaintiff and any others similarly situated.

The Plaintiff excepts to the charge of the Court dealing with the subject of locations of theatres being one of the important factors in considering whether or not it is entitled to have access to pictures on first run, and that other factors are to be considered such as seating, age, admission prices, comfort, convenience of patrons, size and character of neighborhood of patronage from which it is expected to draw. The reason for this exception is that these factors are important primarily in respect to a demand for a first run exclusive in the City and are not the determining factors with respect to a demand or request for first run day and date with a theatre or theatres located in the downtown area.

The Plaintiff excepts to the charge of the Court in which it attempts to state what the plaintiff's claim was, where the Court said substantially the following: "That the plaintiff could have played pictures in its Crest Theatre on first run with clearance in favor of all the threatres in this immediate area, and the same thing [1698] could be done in a number of other areas. Plaintiff says that other theatres in its im-

mediate area would also be entitled to the same right." This does not correctly state the plaintiff's position because it stated that it wants the opportunity for first run in its area, recognizing at the same time, however, that other theatres in its immediate area which are adequate and suitable for first run would have a like opportunity, and that the distributors could either institute competitive bidding or competitive negotiations, and whichever theatre in its area was the winner, that theatre, whether it be the Crest or some other theatre, would then be entitled to clearance against all of the other theatres in its immediate area and with which it is in substantial competition.

Plaintiff excepts to that portion of the Court's charge to the Jury in which he likened the distribution of motion pictures to the operation of a grocery store or any other commercial enterprise, the reason being that the defendants in the present case produce and distribute by far the greatest number of desirable feature motion pictures, without which it is impossible for an exhibitor to operate a first run theatre successfully.

The Plaintiff excepts to that portion of the Court's charge on which it was stated that if the defendants simply reached a common solution for common problems that [1699] there would then be no conspiracy, since even a common solution to common problems if extended so as to result in a nation-wide policy may, in itself, be violative of the antitrust laws.

The plaintiff excepts to that portion of the Court's charge to the Jury in which it spoke of possible bad faith on the part of the plaintiff in submitting offers for pictures and spoke further concerning certain criteria which the defendants may apply in considering those offers, the reason being that there is no legally sufficient evidence in the record from which the Jury could find or infer bad faith on the part of the plaintiff.

The Plaintiff excepts to the refusal of the Court to charge the Jury in accordance with plaintiff's requested instructions numbered 9, 10, 11, 12, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 30, 31, 33, 38, 39, 42, 44, 47, 48, 49, 52, 54, 55, 60, 61, 63, 64,

65, 66, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 93, 94, 95.

Plaintiff excepts to the charge of the Court on the grounds that it selected various contentions of the defendants for discussion almost exclusively, without giving the correlated contentions of the plaintiff in respect to the individual detailed subject matters discussed by the Court, thereby laying undue emphasis on the defendants' [1700] contentions.

The Plaintiff excepts to the Court's charge to the Jury because it did not fairly state the issues in the case nor did it direct the Jury's attention to the real issues in the case in a fair and impartial manner.

THE COURT:—Do you want to say something, Mr. Watkins?

MR. WATKINS:—I want to except to Your Honor's failure to grant the request for an instructed verdict.

THE COURT:—You did that at the close of the plaintiff's case, and at the close.

MR. WATKINS:—The others consist of a series of objections in connection with the Paramount case. I will just dictate that to the Reporter afterwards, if Your Honor thinks that would be better.

THE COURT.—What, in outline, are they? Just give me a general summary.

MR. WATKINS:—The general summary is that Your Honor indicated to the Jury that they might find that the Paramount decree is *prima facie* evidence with respect to all matters involved in the present case, recited in the previous decision. It is my contention that the matters before the Jury in this case were not decided in the previous case. You left to the Jury to decide what matters were. My objection is to the failure of Your Honor to specify to them [1701] exactly what matters were involved in the Paramount case.

THE COURT:—I couldn't tell them, and I don't think I am required to tell them. I don't think anybody knows, unless they read the testimony, everything that was decided. I said that in the Paramount case it was found, previous to the opening of the Crest Theatre, that these defendants had

conspired together in unreasonable restraining of trade in violation of the antitrust laws,—these same laws involved here,—in restricting to themselves first runs and in establishing certain clearances in numerous places throughout the United States.

I think that is just about as specific as a trial court, in a case of this kind, could possibly go. I couldn't take the Jury all over the United States. The decrees are all that are required to be put in or all that may be put in, plus a reasonable explanation of what the decrees were intended to cover.

Now, this is about the third time that I have been over this, I guess, or really the fifth. When I went over this very statement that I have read, and read in my instructions, this morning, as I recall it, nobody made any objection to this on this ground. You had ample opportunity to do it. Nobody made any objection on this ground. Of course, I know you were objecting all along to letting those decrees in at all; but this is the first [1702] time I have heard coming from the defendants the thought that if the decrees were going in, this was not a sufficient outline of the decrees and the effect to be given to them.

Objection overruled.

Mr. Watkins:—I except to that portion of the charge in which Your Honor instructed the Jury that the decrees were *prima facie* evidence in the present case of what the defendants had done in Baltimore, the ground being this, that the decrees themselves do not disclose that the defendants, in Baltimore, had done anything.

The Court:—I did not say that they disclose what they had done in Baltimore.

Mr. Watkins:—Then, my note is in error.

The Court:—Here, I think, is almost the exact language that I gave. I will begin again and go over the part I just gave.

"I instruct you that in the previous equity suits between the Government and the same defendants, which was decided and covered by the decrees in that case, these same defend-

ants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States."

[1703] Now, I am quite sure the following was given practically verbatim: Thus, these proven facts, I instruct you, become *prima facie* evidence in the present case,—the proof of facts which I have just stated. But I had not said a word about Baltimore. ——"which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only *prima facie* evidence" in support of that claim.

MR. WATKINS:—I seem to have it reversed.

I except to that portion of the charge Your Honor just read, on the ground that what the defendants may have done in Baltimore was not comprised within the Paramount case.

I except to the portion of your charge in which you instructed the Jury that if they found violations with respect to clearance, then the burden of proof of reasonableness of clearances rests upon the defendants. I am simply preserving my exception.

Of Course Your Honor understood, I am sure, that those exceptions were taken on behalf of all defendants.

THE COURT:—Oh, yes. Of course, there is bound to be some confusion. You had originally, as I understood [1704] it, three Warner Bros. Companies. Is that right?

MR. WATKINS:—Yes.

THE COURT:—Only one of them has gone out? Is that right?

MR. WATKINS:—Yes, Your Honor; that is correct.

THE COURT:—Warner Bros. Pictures, because never served?

MR. WATKINS:—That is correct.

THE COURT:—Therefore, when I said that two had gone out, it ought to be only one had gone out?

MR. WATKINS:—Yes, Your Honor.

THE COURT:—And the other thing which I will tell the Jury, raised by Mr. Rome—I suppose the Jury knows it, anyway; but I will tell them that the claim of the plaintiff is not that the Crest is in no competition with the downtown theatres, but that it is not in substantial competition.

Ask the Jury to come back.

[1705] (Further instructions to the Jury.)

(After the return of the Jury to the courtroom, at the direction of the Court, the following occurred:)

THE COURT:—Members of the Jury, counsel have called my attention to the fact that I made two erroneous statements as to facts. I am not sure that they would in any sense mislead you, but, lest they might, I will now correct them.

I think I stated that two of the defendants had been omitted from the suit, or the trial here. That was in error. There has been only one; and that is Warner Bros. Pictures. It is a little confusing, because there are three sets of Warner Bros., or three Warner Bros Companies. The only company that has been omitted from this list of ten defendants is Warner Bros. Pictures, and it was omitted because service was never had upon them. So, where I said eight defendants, it ought to have been nine.

Then, members of the Jury, my attention has been called to the fact that I was not accurate in saying that the plaintiff company claims it is in no competition with the downtown theatres. What I understand plaintiff really says, or the claim it makes, is that the Crest is not in any substantial competition with downtown theatres.

You may now retire to your deliberations.

[1706] (After the Jury had returned to the courtroom for the purpose of rendering its verdict, the following occurred:)

THE CLERK:—Members of the Jury, have you agreed on your verdict?

THE JURORS:—We have.

THE CLERK:—Who shall say for you?

THE JURORS:—Our Foreman.

THE CLERK:—For whom do you find upon the issues joined, the Plaintiff or the Defendants?

THE FOREMAN:—We reach a verdict in favor of the defendants, as to all of the defendants.

THE CLERK:—As to all of the defendants?

THE FOREMAN:—Yes, sir.

THE CLERK:—Members of the Jury, harken to your verdict as the Court has recorded it. Your Foreman saith that you find for all defendants upon the issues joined. And so say you all?

THE JURORS:—We do.

THE CLERK:—Verdict recorded.

* * * * * * *

## PLAINTIFF'S REQUESTS.

9. Uniform participation by competitors in a particular system of doing business, where each is aware of the others activities, the effect of which is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the antitrust laws.

*William Goldman Theatres, Inc.* v. *Loew's, Inc., et al.*, 150 F. 2d 738, 745 (C. A. 3, 1945);
*Milgram* v. *Loew's, Inc., et al.*, 192 F. 2d 579, 583, 584, (C. A. 3, 1951) cert. denied April 21, 1952).

10. The defendants in this case have the burden of attempting to explain away the inferences of conspiracy which the law says that you may infer from their uniform course of conduct.

*Goldman Theatres* v. *Loew's, Inc., et al.*, 150 F. 2d 738 (C. A. 3, 1945);
*Milgram* v. *Loew's, Inc., et al.*, 192 F. 2d 579, 584 (1951) cert. denied April 21, 1952.

11. The uniformity of policy on the part of defendants in this case of first unanimously denying the plaintiff access to first-run motion pictures, even though plaintiff offered to pay high guaranteed film rental, and then

unanimously granting plaintiff subsequent run pictures, is evidence which supports strongly the inference of concert of action and conspiracy on the part of the defendants.

*Milgram* v. *Loew's, Inc., et al.*, 192 F. 2d 579, 583 (C. A. 3, 1951) cert. denied April 21, 1952.

12. The past proclivity of these defendants to unlawful conduct violating the anti-trust laws, as found by the Supreme Court of the United States in an action brought by the government, may be considered by you in reaching your decision in the present case since the conspiracy charged by the plaintiff here is identical in scope and nature to one of the conspiracies, the existence of which was condemned by the Supreme Court—concerted action to fix a uniform system of runs and clearances.

*Milgram* v. *Loew's Inc., et al.*, 192 F. 2d 579, 584 (C. A. 3, 1951) cert. denied April 21, 1952.

* * * * * * *

14. In arriving at your verdict it is immaterial that the motion picture business in Baltimore, Maryland, may be a very small part of the industry as a whole. In principle, and within the intendment of the Sherman Act, the public interest is as much concerned with the improper control of the interstate market for the single city of Baltimore as for the country as a whole.

*White Bear Theatre Corp.* v. *State Theatre Corp.*, 129 F. 2d 600, 605 (C. A. 8, 1942);
*United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 225 n. 59 (1940);
*William Goldman Theatres, Inc.* v. *Loew's, Inc., et al.*, 150 F. 2d 738, 744 (C. A. 3, 1945);
*DeLuxe Theatre Corp.* v. *Balaban & Katz Corp.*, 95 F. Supp. 983, 986 (N. D. Ill., E. D., 1951);
*Milgram* v. *Loew's, Inc., et al.*, 192 F. 2d 579, 586 (C. A. 3, 1951) cert. denied April 21, 1952.

15. The fact that the distributor defendants may or do own the pictures that they distribute does not relieve them from the obligation of licensing or rent their pictures in such manner as will not result in a violation of the provisions of the Sherman Anti Trust Act.

*Interstate Circuit, Inc. et al.* v. *United States,* 306 U. S. 208, 227 (1939).

16. The defendants in this case produce and distribute by far the greater number of the better or most sought after motion pictures distributed in the United States.

*Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30, 36 (1930);
*Interstate Circuit, Inc. et al.* v. *United States,* 306 U. S. 208, 214 (1939);
*United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 180 (1944);
*White Bear Theatre Corp.* v. *State Theatre Corp.,* 129 F. 2d 600, 603 (C. A. 8, 1942);
*William Goldman Theatres, Inc.* v. *Loew's et al.,* 150 F. 2d 738, 741 (C. A. 3, 1945);
*Gittone* v. *Warner Bros. Pictures, Inc.,* 30 F. Supp. 823 (E. D. Pa. 1939) reversed on other grounds 110 F. 2d 292;
*United States* v. *Paramount Pictures, et al.,* 66 F. Supp. 323, 334 (S. D. N. Y. 1946) affirmed in 334 U. S. 131 (1948).

17. All operators of first-run motion picture theatres in the United States are dependent upon the defendants in this case for the supply of pictures necessary to keep their theatres in operation. No such operator can reasonably be expected to survive in the competitive field of the motion picture industry unless he is given a fair opportunity to license pictures distributed by these defendants.

*White Bear Theatre Corp.* v. *State Theatre Corp.,* 129 F. 2d 600, 603 (C. A. 8, 1942);

*William Goldman Theatres, Inc.* v. *Loew's, et al.*, 150 F. 2d 738, 741 (C. A. 3, 1945);
*Gittone* v. *Warner Bros. Pictures, Inc.*, 30 F. Supp. 823 (E. D. Pa., 1939) reversed on other grounds 110 F. 2d 292;
*United States* v. *Paramount Pictures, et al.*, 66 F. Supp. 323, 334 (S. D. N. Y. 1946) affirmed in 334 U. S. 131 (1948).

18. Under all the evidence in this case you may conclude that the plaintiff's Crest Theatre has all of the necessary qualifications including size, equipment, appointments, management, location and access to potential patronage for successful use as a first-run feature motion picture theatre in the City of Baltimore.

* * * * * * *

21. In arriving at your verdict it is proper for you to consider, among all the other aspects of the case, the fact that five of the defendants own a large number of theatres located in various parts of the United States, and that all five of these defendants supply each other with a substantial number of feature pictures for use in the theatres owned or operated by each of these five defendants.

22. It would also be proper you you to consider whether or not the fact of this theatre ownership would be likely to influence the non-theatre owning defendants, in the distribution of their pictures, to unlawfully favor the theatre-owning defendants in a situation such as Baltimore where an independent seeks to enter the exhibition business.

23. In arriving at your verdict in this case it is proper for you to take into consideration the fact that the defendant Warner Bros. Circuit Management Corp.

and the defendant Loew's, Incorporated both operate first-run theatres in the so-called downtown area of the City of Baltimore in which they exhibit on first-run not only their own pictures but also pictures produced and distributed by other defendants. It is the plaintiff's claim that one of the real reasons for the refusal of the defendants to license their first-run pictures to the Crest Theatre was the mutual desire on the part of all defendants to benefit Warner and Loew's in their first-run exhibition activities in the City of Baltimore in return for similar favored treatment for themselves in other parts of the country.

24. In this case one of the questions with which you are concerned is the question whether or not the defendants, or any of them, entered into an unlawful combination with respect to the motion picture distribution and exhibition business in the City of Baltimore or acquiesced in such practice knowing that each of the other defendants would likewise do so, but in arriving at your verdict it is proper for you to consider the facts in evidence pertaining to the business relations of the defendants in other parts of the country, and to give effect to those facts insofar as you may believe that they tend to show that the defendants, or any of them, have between themselves an understanding, express or implied, to give to Warner Bros. Circuit Management Corp. and Loew's Inc. in Baltimore a substantially better opportunity to obtain product than the opportunity afforded the plaintiff.

*Holmes* v. *Goldsmith*, 147 U. S. 150, 164 (1893);

*Williamson* v. *United States*, 207 U. S. 425, 450 (1908);

*Morris* v. *United States*, 112 F. 2d 522, 527, 528 (C. A. 5, 1940) cert. denied 311 U. S. 653;

*United States* v. *Vehicular Parking Ltd., et al.*, 52 F. Supp. 751, 754 (D. Del. 1943).

25. A union or combination of an exhibitor with a distributor in a program which restrains or limits the competition that may be offered by the owner of a theatre equipped to compete on first run may constitute a violation of the antitrust laws.

*United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 183 (1944);
*William Goldman Theatres, Inc.* v. *Loew's Inc., et al.*, 150 F. 2d 738, 743, 744 (C. A. 3, 1945);
*Bordonaro Bros. Theatres* v. *Paramount Pictures*, 176 F. 2d 594 (C. A. 2, 1949).

* * * * * * *

30. The decision of the defendants in this case to deny the Crest Theatre first-run pictures was effectuated through the device of clearance whereby the Crest Theatre was required to wait a period of 21 days or longer after the first-run exhibition of the defendants' pictures had terminated before being itself able to license such pictures. The system of clearance thus imposed upon the plaintiff's Crest Theatre was uniformly adopted by all of the defendants.

31. The Supreme Court of the United States has unqualifiedly condemned as violative of the antitrust laws any system of clearances which has acquired a fixed and uniform character and which is made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade.

*United States* v. *Paramount Pictures*, 334 U. S. 131, 146 (1948).

* * * * * * *

33. The mere fact that some competition may exist between the Crest Theatre and the downtown first-run theatres in the City of Baltimore has no bearing upon the real issue in this case which is whether a general

system of clearance, uniform in that if carried out it would deny first-run pictures to every theatre located outside of the downtown area of a city with the object of eliminating first-run competition by such type of theatre, is a lawful restraint upon commerce.

*Milgram* v. *Loew's Inc., et al.*, 94 F. Supp. 416, 422 (1950).

* * * * * * *

40. Under all the evidence in this case you must return a verdict for the plaintiff in such amount as you estimate the plaintiff's loss to have been.

* * * * * * *

42. The purpose of the antitrust laws of the United States is to secure equality of opportunity for all persons within our economy. That purpose is thwarted if group power is used to eliminate or discriminate against a competitor who is equipped to compete.

*William Goldman Theatres, Inc.* v. *Loew's Inc., et al.*, 150 F. 2d 738, 743 (C. A. 3, 1945).

* * * * * * *

44. If you believe in this case that the plaintiff's Crest Theatre was fairly entitled under our system to access to first run pictures, either on an exclusive or a day and date basis, then, since it is undisputed that it was denied access to first run pictures, you must return a verdict for the plaintiff against some or all of the defendants if you find that such denial was due to concerted action, joint acquiescence or conscious parallel action.

* * * * * * *

48. As respects statements made by some witnesses for the various defendants that they did not join a conspiracy or combination to restrain competition, I charge you that you may completely disregard such testimony if you find that a necessary and direct consequence of the

acts of these defendants in denying first-run pictures to the Crest Theatre resulted in a restraint of competition in the exhibition of first-run pictures in the City of Baltimore. You may disregard such testimony because persons must be held to have intended the necessary and direct consequence of their acts and cannot be heard to say the contrary.

*Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 243 (1899);
*United States* v. *Ready Co.*, 226 U. S. 324, 370 (1911);
*United States* v. *Patten*, 226 U. S. 525, 543 (1913);
*United States* v. *Masonite Corp.*, 316 U. S. 265, 275 (1942).

49. In deciding whether or not to believe the testimony of the witnesses called by the defendants to explain their reasons for denying first-run pictures to the Crest Theatre, you should give consideration to the fact that the defendants made important policy decisions, concerning the right of a theatre located outside of the so-called downtown area to exhibit first-run pictures, without having made any serious attempt to test the validity of those decisions. You may conclude, therefore, that the opinions of the defendants with regard to these matters were purely conjectural.

*Milgram* v. *Loew's, Inc., et al.*, 192 F. 2d 579, 585, (C. A. 3, 1951) cert. denied April 21, 1952.

* * * * * * *

52. I charge you that the fact that the defendants have advanced substantially the same reasons for identical, equivocal actions is of itself sufficient evidence from which you may infer guilt on their part.

*Milgram* v. *Loew's, Inc., et al.*, 192 F. 2d 579, 585, (C. A. 3, 1951) cert. denied April 21, 1952.

* * * * * * *

54. An act harmless when done by one alone may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy and may be prohibited or punished if the result be hurtful to the public or to the individual against whom the concerted action is directed, and while defendants in the instant case, acting alone and in the absence of conspiracy, might refuse to license the showing of motion pictures first run in the Crest Theatre for the reasons defendants have assigned here, they cannot, when acting together in a conspiracy or by conscious parallel action to dominate the first-run exhibition of motion pictures, explain away that conspiracy by testimony of normal processes of competition or by comparison of their theatres with that of plaintiff.

*Milwaukee Towne Corp.* v. *Loew's Inc.*, 190 F. 2d 561 (C. A. 7, 1951) cert. denied 96 L. E. 228.

55. The mere size of the business of these defendants is in itself an earmark of monopoly power, since size carries with it an opportunity for abuse. The fact that the power created by the size of these defendants has been utilized in the past to crush or prevent competition is potent evidence that an illegal purpose or intent attends the monopoly power as held by these defendants.

*United States* v. *Swift & Co.*, 286 U. S. 106, 116;
*United States* v. *Aluminum Company of America*, 148 F. 2d, 416, 430;
*United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 174 (1948).

* * * * * * *

60. The fact that he could obtain motion pictures for exhibition on subsequent runs and so operate his theatre as a subsequent run motion picture theatre does not pre-

vent the actions of the motion picture distributors and those with whom they combine and conspire from being in violation of the Sherman Act.

*Charge of Court in Applebaum* v. *Paramount* (D. C. W. D. S. Div. Miss. 1951).

61. The system of preferring old customers has been used by these defendants in the past as a ready excuse for a fixed system of runs and clearances and was to that extent unlawful.

*United States* v. *Paramount Pictures*, 85 F. Supp. 881, 898 (1949).

* * * * * * *

63. A motion picture distributor is not justified in preferring a customer with whom it has done business in the past to a new customer, where the new customer offers an equal or better opportunity for the exhibition of the motion picture distributor's films in the community, and is willing to offer equal or better terms to the distributor for the exhibition of its films.

*Charge of Court in Applebaum* v. *Paramount* (D. C., W. D., S. Div., Miss. 1951).

64. A motion picture distributor is not justified in giving preference in the exhibition of its films to a theatre in a community which is part of a chain or circuit of theatres, over an independent theatre, where the independent theatre offers an equal or better opportunity for the exhibition of the films, and the operator of the independent motion picture theatre is willing to meet the terms asked by the motion picture distributor for the leasing of its films for exhibition in that community.

*Charge of Court in Applebaum* v. *Paramount* (D. C., W. D., S. Div., Miss. 1951).

65. A motion picture theatre obtains no vested right in the early-run exhibition of motion picture films by virtue of the fact it has exhibited motion picture films on an early run in the past; but on the contrary, if a new motion picture theatre in the same community offers an equal or better opportunity for the early-run exhibition of motion picture films, and the operator of such new theatre is willing to meet the terms asked by the motion picture distributor for the early-run exhibition of those films, then the motion picture distributor is under a duty to give the operator of the new motion picture theatre an opportunity to exhibit those films on an early run either on an exclusive or day and date basis.

*Charge of Court in Applebaum* v. *Paramount* (D. C., W. D., S. Div., Miss. 1951).

66. The licensing of motion picture films for exhibition by any method upon any run in any theatre in any manner other than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others, is an illegal practice within the meaning of the Sherman Anti-Trust Act.

*Charge of Court in Applebaum* v. *Paramount* (D. C., W. D., S. Div., Miss. 1951).

* * * * * * *

69. In considering the power which these defendants have exercised over the distribution and exhibition of motion pictures as a result of their vast theatre holdings I charge you that you must consider them collectively in that regard rather than independently or individually.

70. These defendants have been found by the court in the Paramount case to have brought about an actual ex-

clusion of independents from the first run field approximating in the aggregate 70% of the first run theatres in the 92 largest cities of the country of which Baltimore, of course, is one.

71. The power possessed by these defendants to fix runs and clearances has been found by the court not only to have existed but actually to have been exercised by these defendants so as to bring about the exclusion of independents who were or wished to be competitors in the first run field.

72. Although these defendants claim the right for themselves to decide what theatre shall be accorded first run pictures or to decide what clearance should be granted a particular theatre, I charge you that in reaching your decision in this case you should bear in mind as an important point that these same defendants have been found guilty of abusing their discretion in making these same decisions as a consequence of which they have been found guilty of violating the antitrust laws.

73. The history of the motion picture industry and the notorious past proclivity on the part of these defendants for conduct which has been violative of the antitrust laws are such that the court has hitherto recognized a strong temptation on the part of these same defendants to continue their same illegal distribution practices.

74. By reason of their theatre holdings all over the country it has been found to be a fact by the court that the best customers of each of the big five defendants were ordinarily one or more of the other defendants.

75. The defendants here have all been convicted, in a suit by the government, of conspiring to fix uniform runs and clearances and of imposing unreasonable clearances.

76. The theatre owning defendants, Warner, Paramount, Fox, Loew's and R.K.O. have all been convicted of

engaging in the fixing of runs and clearances in order to limit the competition which independent exhibitors could give to the theatres owned by these defendants.

77. In the same suit it was adjudicated that the clearances and runs fixed illegally by the defendants have frequently worked to the disadvantage of independent exhibitors trying to compete with theatres owned by the defendants or by large circuits or other favored exhibitors.

78. In the same suit it was adjudicated that the clearances and runs fixed illegally by the defendants frequently worked to the disadvantage of exhibitors trying to break into the field with new theatres and compete with exhibitors who were old customers of the defendants.

79. It was adjudicated in the same suit that all the defendants had failed to live up to their legal duty of licensing motion pictures solely on the basis of the merits of the theatres involved, but had instead for various reasons discriminated against some exhibitors in favor of others in the runs and clearances granted their theatres.

80. The decree in the case of United States *v.* Paramount, *et al.*, which has been introduced here, constitutes *prima facie* evidence that the defendants were guilty of the wrongful conspiracies and conduct which have just been stated to you. This means that unless the defendants have introduced credible evidence sufficient to convince you to the contrary, you must accept as true that the defendants engaged in the conspiracies and illegal conduct as aforesaid.

81. The Court instructs the jury that if it finds that the Crest was not in substantial competition with the theatres located in the downtown area of Baltimore City and that the Crest requested an opportunity to license pictures day and date with those theatres located in the downtown

area, and that the distributor or distributors refused so to do, then the jury should find a verdict for the plaintiff in the first cause of action. The jury is further instructed that it is not necessary for both theatres to be under common ownership to be entitled to play day and date; further every distributor is legally bound to license pictures only on a picture by picture basis and theatre by theatre basis which means that it is illegal to consider whether an exhibitor operates only one theatre or more than one theatre as a condition of licensing it pictures.

* * * * * * *

83. I charge you that the distributor defendants are under a duty to license their product picture by picture and theatre by theatre without discrimination in favor of affiliated theatres, circuit theatres or others.

84. In so licensing their pictures the distributors may not take into consideration other than the particular picture and consequently may not withhold a particular opening date because of some supposed overall effect flowing from the playing of other pictures.

* * * * * * *

90. I charge you that as a general principle the farther a theatre is from a focal point the less competition it represents to a theatre at the focal point and the less justification there is for clearance between those pictures.

* * * * * * *

93. The distributors have the burden of establishing the reasonableness of the clearance imposed on the Crest.

[fol. 304] APPENDIX TO BRIEF OF APPELLEES

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Testimony

HARRY D. MYERBERG,

Cross-examination.

Mr. Raftery:

Q. Mr. Myerberg, on the first day of your examination, in response to Mr. Rome's questions, you told us about a conversation you had with Mr. Benson of Paramount in regard to the Paramount Theatre at Kansas City. Do you remember that testimony?

A. Yes sir.

Q. Now, will you tell us what that was? I missed part of it.

A. It is in the deposition there, sir. You can read it.

Q. Now, what was the conversation?

A. The conversation was to the effect the Paramount Theatre, the Neumann Theatre, at Kansas City, had played Paramount pictures on exclusive first-run and was located out of the downtown area, and Mr. Benson told me at that time he knew about that.

Q. Now, you also said you had the same conversation with Mr. Brecheen, and told him about the Paramount Theatre in Kansas City.

A. Yes, sir, that is correct.

Q. And they told you they knew all about it but that was a horse of a different color, or something to that effect?

A. Yes, but later I found that wasn't a fact. I was mistaken in that situation. It was Fox in Kansas City that was playing day and date with downtown, as I understood it. Although I had a recollection of Paramount doing that, I cannot seem to substantiate that.

Q. As a matter of fact, the Paramount Theatre in Kansas City, instead of [illegible] way out in the country——

A. Where is the Neumann Theatre, sir?

[fol. 305] Q. At the corner of 12th and Main.

A. I was mistaken, I understood that was a fact.

* * * * * * *

Q. Let us go to Washington. Yesterday you moved the Ontario Theatre from Columbia Road to Connecticut Avenue; is not that correct?

A. I did not move it. Connecticut Avenue slipped out instead of Columbia Road.

Q. But you are thoroughly familiar with that situation?

A. I would not say that I am thoroughly familiar with that situation, but I know where Columbia Road is. I know the theatre, I know the area around there fairly well. I will not say that I know it completely, but I know enough about it to know how to get there and what surrounds the theatre.

Q. You testified yesterday that Fox was selling its pictures exclusive first-run to the Ontario Theatre, that is, exclusive first-run, Washington, on competitive bidding basis; is not that right?

A. Either competitive bid or competitive negotiation, yes, sir.

Q. And what was the picture you told us that was playing there or just finished playing there at the Ontario Theatre?

A. The new picture based on the life of—SONG IN MY HEART.

Q. The life of Jane Frohman?

A. Jane Frohman, yes.

Q. One of Fox's biggest releases; right?

A. Yes, sir.

Q. And a very successful picture?

A. Yes, sir.

Q. Would it surprise you if I were to suggest to you that the picture SONG IN MY HEART has just finished playing for four weeks at Loew's Palace at downtown Washington on an exclusive first-run?

A. Yes, sir, it would, because the information came from the operators of the Ontario Theatre.

Q. You have been in touch with the operators of the Ontario Theatre?

A. Yes, I have. I know them and have talked to them. I have talked to them a number of times and with others, too.

[fol. 306] Q. And you contemplated calling them as witnesses in this case?

A. Yes, we did.

Q. Now, you do not dispute the fact that SONG IN MY HEART has just finished playing at Loew's Palace Theatre, did you?

A. If you say so, sir, I will take your word for it.

* * * * * * *

Mr. Raftery:

Q. Mr. Myerberg, in your request for first run, day and date with downtown for exhibition at the Crest, you were seeking the same run from each of the eight distributors? Isn't that right?

A. I was seeking the right to play their pictures on that run, yes, sir.

Q. You were seeking the same uniform run, insofar as each of the eight was concerned—first run day and date?

A. First run day and date, or first run exclusive, depending upon how the distributor wanted to sell me films.

Q. You were seeking the same from each of the eight whether first run day and date or first run exclusive? Is that right?

A. I was requesting a right, to permit access to their films, yes, sir.

Q. First run?

A. First run day and date, or first run exclusive. That is correct, yes, sir.

Q. You were seeking uniformity as to that, anyway? Isn't that a fact?

A. I was asking each of them, yes.

* * * * * * *

Q. Now, Mr. Myerberg, in seeking the uniform matters from each of these distributors, you were not seeking to enter into any conspiracy with any of them, were you?

A. I couldn't enter into a conspiracy with myself, Mr. Raftery.

Q. I asked you if you were trying to enter into a conspiracy with these defendants?

A. I was one person seeking a uniform thing, as you say, from all of these people. I don't see how I could enter into a conspiracy on that.

* * * * * * *

[fol. 307] Q. Mr. Myerberg, when you went into the neighborhood where the Crest Theatre was located and opened up that theatre, or started to, that corner was a vacant piece of property from Rogers Avenue down to the white house which is immediately south of your theatre? Is that right?

A. Yes, sir.

Q. And crossing the road, on Reisterstown Road, there was also a vacant piece of property where now you have a lunch wagon and a used car lot?

A. Well, there is a used-car lot and a restaurant over there, yes, sir.

Q. At the time you started up there, the lunch wagon or restaurant was not there, was it?

A. No. There was commercial property directly opposite us, and houses behind that.

Q. But the property on Reisterstown Road, in the rear of the gas station corner, was all vacant?

A. I would say on the side of the gas station, between that and the next street was vacant.

Q. Going down Rogers Avenue towards the Ambassador Theatre, on the right, how far from that corner is the Western Maryland railroad crossing?

A. I have never checked it, but I would say between three-tenths and five-tenths of a mile.

Q. Immediately west of the railroad crossing, on the right, on Rogers Avenue, what was there then and what is there now in that locality?

A. At that time, I think it was vacant land; now, there are homes.

Q. On the right-hand side of the street, immediately adjacent to the railroad crossing, is a fairly large patch of woods that was there then and is there now?

A. No, sir, not a fairly large tract of wood. I think there is some right-of-way that the railroad owns there, and almost up to the railroad, and I would say almost within a couple of hundred feet, there are homes.

[fol. 308] Q. Now, I think we are confusing each other.

A. I am talking about the north side of Rogers Avenue, west of the Western Maryland Railroad tracks.

Q. Isn't it a fact the first thing, then, is the cemetery?

A. No, the cemetery adjoins the houses I was just speak-

ing of. That is still farther west, and the cemetery has a frontage on Rogers Avenue of, I would say, between 300 and 500 feet. I have never checked it.

Q. Well, there is a large cemetery there?

A. There is a large cemetery there, but I do not think a very large one, a new cemetery, put there in the last year or two, maybe three. I don't know how long it has been there.

* * * * * * *

Mr. Boyd:

* * * Mr. Rome's letter of November 1st, sent from his Philadelphia office to the Paramount Pictures, was the first one, which has been marked Defendants' Exhibit 7; and I will read Defendants' Exhibit 7:

"November 1st 1949

"Paramount Pictures Inc.
"Times Square
"New York 18, New York

"Gentlemen:

"We have been retained by Theatre Enterprises, Inc., of Baltimore, Maryland, which operates the Crest Theatre at Reisterstown Road and Rogers Avenue, Baltimore. As a result of our study we have become fully acquainted with the efforts that have been made during the past year to obtain access for that theatre to your first run pictures, and also with the failure of those efforts.

"It occurs to us that, without at least experimenting with the exhibition of your pictures in the Crest on first run, it is not possible to say fairly and with justification that such a policy would be unprofitable for you. On the contrary, it would seem that the extraordinary growth of the area near the theatre, with its increasing population and expanding business enterprises, coupled with the unique facilities of-
[fol. 309] fered by the Crest itself actually present an incomparable outlet for your product and hence a source of revenue far superior to any presently available to you in Baltimore. We are confident that experience would soon prove this to be true.

"We are aware that first run theatres are more usually in

the so-called downtown shopping districts but we suggest that there is nothing inherent in the industry or in the law that precludes a theatre not so located from access to first run product so long as other determining factors are duplicated. Thus, when a theatre is of adequate size, unquestionably suitably equipped and properly managed, in a thriving community from which it can draw on a large population, when it can charge the same admission price and pay comparable and potentially even greater film rentals, it is our belief that such a theatre is entitled to access to first run pictures. Certainly it is reasonable to request an opportunity to demonstrate whether or not this contention will be borne out by experience. In this fashion what has become a longstanding and troublesome difference of view could be readily resolved to the satisfaction of all.

"We urge you most earnestly to consider this suggestion in a favorable light. To experiment in this way cannot possibly react to your detriment since our client stands ready to bid competitively for your product and, indeed, to offer any reasonable guarantee you deem appropriate. On the other hand, if we are correct your company will have another outlet in the City of Baltimore, and one which is generally conceded to be the finest and most modern theatre in the State.

"Your reply at an early date will be appreciated.

"Yours very truly, (Sgd) Edwin P. Rome."

Now, in order to have the reply to that letter, I will read Defendants' Exhibit 8, which is a letter from Thomas P. Gibbons, of Paramount Pictures Incorporated, Times [fol. 310] Square, New York, addressed to Mr. Rome. "Re: Crest Theatre, Reisterstown Rd. Baltimore, Md.", as follows:

"Gentlemen:

"Reference is made again to your letter of November 1st in the above matter.

"Your opening paragraph indicates that you have made a study of and are acquainted fully with the facts of this controversy. In light of this, we feel that it will be unnecessary to review them other than to mention again that the Crest is situate in a suburban area more than six miles

from downtown Baltimore and has a seating capacity of approximately 1650.

"The request made in behalf of your client, together with a few others of like nature, have necessitated the re-examination of basic economic principles on which the well being of all branches of the motion picture industry are founded. We have approached the problem presented with the idea of being ready and willing to accommodate ourselves to a basic change in the economics of the industry if good business judgment should warrant our taking such action.

"You suggest and urge that we conduct an experiment and play our pictures first run in the suburban Crest Theatre. In the second and third paragraphs of your letter, you advance several reasons why you feel that such an experiment should be made. Your argument would seem to assume that there is something improper in our conduct in licensing, and preferring to license, our pictures for first run exhibition in a large downtown theatre, instead of in a suburban house; that the downtown first run exhibitor has lost his right to protect his investment; that Paramount, as a distributor, has no right to distribute its pictures in such manner as it believes will best serve both its own and the public interest and that it should experiment as you suggest. We cannot concede the soundness of this argument.

[fol. 311] "We have considered your suggestion and carefully reviewed all of the facts and factors involved. After due consideration, we have to advise that our prior decision remains unchanged; that it shall continue to be our policy and in the exercise of our sound business judgment, we feel the interests of both Paramount and the public will best be served by the continued exhibition of our product first run in the large theatres situate in the downtown business and shopping areas of a city, rather than in a theatre located in a suburban area, as is the Crest.

"There are several factors which enter into consideration and seem to indicate that the above decision is the correct one. That large first run theatres are situate in the downtown business and shopping areas is not the result of accident, but rather due to the careful consideration of various business factors, such as location, transportation, the audience, exploitation and prestige, among others.

"Every community, whether it is a city, town or village, has a hub, which is the center of all activity. The city of several millions, such as New York, has its Broadway and the village of a couple of thousand has its Main Street, but whether it is Broadway, or Main Street, it constitutes the center of activity to which all persons come sooner or later for various purposes. In the large cities and towns the large first run theatres are located in the very heart of these centers where are to be found the great masses of the population.

"All highways are designed to reach and all public transportation, subways, trolleys and buses lead to these centers of population.

"The audience of the downtown house represents a cross-section of the population. Some of the patrons come by auto or cab, others by subway, bus or trolley, still others on foot. It is comprised, at one time or another, of the amusement seeker and of the business man or woman, the resident and the transient.

[fol. 312] "The large first run downtown theatres are operated under a very sizable overhead such as rental, extensive advertising, the maintenance of large staffs, etc. The operators of these theatres are willing to pay large film rentals. In order to enable them to carry the burden of such an operation, they must and do attract large audiences. The fact that the large first run theatres are situate in the centers of activity where are to be found the great masses of population is valuable not only from the standpoint of attracting first run patronage, but of even greater value from the standpoint of achieving wide spread publicity and prestige for a picture so as to arouse the interest of potential theatre goers where they will see the picture either on first or subsequent run. The industry recognizes that word of mouth exploitation is a most valuable factor in attracting patronage. The audience at the large first run downtown theatre carries the message as to the entertainment value of the picture being exhibited to the far reaches of the city and beyond. This leads to the building up of both revenues and public consciousness of the value of the picture which benefits in turn not only the distributor but also all exhibitors who show the picture on a later run.

"Lastly, our experience over a long period of years has

convinced us to our complete satisfaction that suburban theatres could not possibly yield the revenue which large downtown theatres return on first run exhibition. In considering your request, our Sales Executives have weighed carefully the grossing possibilities of your client's theatre in light of its previously demonstrated earning capacity. On two separate occasions heretofore, your client made two very extravagant guarantees for the first run exhibition of two of our pictures. In order to justify the guarantees, the Crest would have had to increase its business some twelve and one-half times. Our Sales Executives feel that the amount of the increase involved is totally disproportionate to the actual possibilities. They feel further, based upon their many years of experience, that it is unfair to ask them to conduct the experiment which you urge when all factors [fol. 313] are so definite and clear cut as to indicate only one possible result, namely, a loss not only to Paramount but also to your client.

"In view of what has been said above, we have to advise that we must refuse your request for our product for exhibition first run in your client's Crest Theatre.

"Yours very truly, (Sgd) Thomas P. Gibbons."

* * * * * * *

(The Court) By the way, if I may interrupt further, you gave me a brief but you have never given me the marked copies of the decrees which I asked for.

(Mr. Rome) I have them and they are marked, sir. I did not know Your Honor wanted them submitted at that time. I thought I ought to renew my primary offer of them.

(The Court) I have to have them before me before I can determine anything more about your proffer.

(Mr. Rome) They are here, and those portions which I seek to offer in evidence are marked in red. They are only the applicable portions, raising the same issues which we contend are raised in the present case.

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DR. EDWARD HAWKINS

Cross-examination:

Q. So far as you are concerned, a theatre located anywhere outside of the downtown or in the downtown area may be equally suitable as a first run motion picture theatre?

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(The Witness) If I must answer that from a marketing and economic point of view, I would say no.

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[fol. 314] WILLIAM ZIMMERMAN

Direct examination:

Q. Now, to the best of your recollection, tell the Court and jury in substance what transpired at that time. First, let me ask you, if I may, when the conference began, what was the nature of the run, if any, which was being requested or sought by Mr. Meyerberg?

A. Well, it is very difficult now, four years later, to try to be exact as to a conversation. I can only say at that conversation there was a request for either exclusive first run, and in the alternative a request for day and date first run. However, during the conversation the motion picture JOAN OF ARC became the subject of a request by Mr. Meyerberg, and in that instance my definite impression was that he wanted JOAN OF ARC either as a World Premiere or as a very early opening engagement to play exclusively first run in his Crest Theatre.

Q. Now, will you continue your recollection?

A. We had, I would say, a rather thorough discussion of his theatre, he described his theatre in great detail, the plans, the character of his theatre, the modern conveniences that were being installed, the type of community, the Hill Top community they were serving.

I think that as a part of this whole project there was this community project of stores. It was going to be a shop-

ping center. And he was most articulate in presenting his view, I thought, and I thought very competently.

I, on the other hand, remained unpersuaded because it seemed to me that he had in essence, however nice a theatre it was, however modern, he had a neighborhood theatre, serving a limited neighborhood area, and that, one, certainly in a show case city of the type of Baltimore, we are not going to use as a show case for our pictures, a neighborhood house. I indicated that to him. With respect to his request for a day and date run, I had discussed the matter at some length over the phone with Mr. Brecheen and inquired as to whether or not the first run downtown theatres [fol. 315] drew substantially from all areas of Baltimore, and Mr. Brecheen said they definitely did, so that for me to seriously consider, or for RKO to seriously consider the Crest Theatre a day and date run theatre with downtown, we had to look away from all the legitimate considerations with respect to the first run downtown theatres, eliminate clearance, even though the theatres were substantially competitive, and generally, it seemed to me, discriminate with respect to the Crest Theatre, with no compensation for doing so.

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A. As I said before, Mr. Watkins, I cannot tell you my recollection in specific words, because I cannot remember. I can tell you the substance of what I said. Now, the substance of what I said to him was that we thought in marketing our pictures in the large cities, the key cities, we found that it was preferable to license our first run in the downtown area for a number of reasons: First of all a theatre in the downtown area is centrally located, it is located where the masses of the people are found for their entertainment. It is easily accessible from all areas of the city. It is in the mind of the public, in the minds of the exhibitors, that an important picture has its first run in a large city in the downtown show case. If the picture is shown first run in a large city in a neighborhood house, it is tagged as an inferior picture. So that on subsequent runs, instead of getting large film rental, we get small film rental. We must think in terms, when we are marketing a picture in a large

city, like Baltimore, we must think not only of the first run exhibitions, we must think of all the subsequent run exhibitions. For example, in the City of Baltimore I think we have about 60 theatres.

Q. You say "we".

A. I think the City of Baltimore has 60 theatres. When I say, "We", I mean we solicit 60 theatres. In addition, I think there are about 40 theatres in the surrounding areas of Baltimore.

Now, if we have a successful picture in its first run, that has an important showing, then we can be successful in ob- [fol. 316] taining adequate terms from the exhibitors operating the 60 theatres in Baltimore, and the 40 theatres in the surrounding territory. So, we have not only a question of the immediate revenue obtainable from the first run, we have, which is frequently much more important, we have the first run as an exploitation device, to set up the importance, the desirability of seeing the picture in the mind of the public and, therefore, the desirability of licensing it in the minds of the various exhibitors operating in Baltimore.

Now, that is the substance of what I told Mr. Myerberg.

. . . . . .

Q. (Mr. Watkins) I show you Plaintiff's Exhibit 20, Mr. Zimmerman, and call your attention to the fact that this contains a confirmation or purports to contain a confirmation of an oral bid, stating Theater Enterprises, Incorporated, agrees to pay 55 per cent of the first $8,000 gross box office receipts and 65 per cent of all over $8,000. "We will also place any reasonable guarantee, the figure to be mutually agreed upon." Was that offer accepted?

A. It was not.

Q. Will you tell the Court and jury why the offer was not accepted?

A. Frankly, we thought that we could make more money by licensing the picture first-run downtown. As a matter of fact, I think the film rental we obtained from the exhibitor, from the, I think it played the Town Theatre, was $21,000. In addition to that, we frequently get offers, when an exhibitor wishes to make a point, he will say, "I will pay you X Dollars, or will give you any kind of reasonable

guarantee"; and assuming you do get the guarantee, and the picture does not do well in his theatre, it is traditional in our business to make what we call adjustments. It is a custom, when we are licensing motion pictures, if an exhibitor has an unsuccessful engagement, he can come to our office, and to the offices of the other distributors, and we are willing to give him a reduction in the film rental, because it turned out to be unprofitable. So, the fact that an exhibi-
[fol. 317] tor offers a guarantee, or offers a very attractive term, is not completely persuasive.

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A. We know, that if we do put a picture in a neighborhood area, it is deemed as an inferior picture, and the exhibitors give us their lowest terms.

Q. I have difficulty, Mr. Zimmerman, without attempting to argue in following you, in reaching your conclusion——

A. Now, wait just a second. I told you we couldn't—I don't know what I said to you—our preference, when we have a downtown outlet, we would prefer to sell that first-run. There are situations where we cannot get our preference. I don't have to go through all that, as to why. Then we market it as best we can.

Now, marketing as best we can, we try to get as much money as we can. If the only place we can put the picture would be in a neighborhood house, we put it in a neighborhood house. The effect of putting the picture in a neighborhood is, as I have told you.

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JOSEPH B. BRECHEEN

Direct examination.

Q. Your recommendation was for a first neighborhood run?

A. That is right.

Q. What was the reason for that?

A. Well, I looked at the theatre and its location, and I thought then, and I think now, that it is a very fine neighborhood theatre; but it is one of a number of fine neighborhood

theatres in the City of Baltimore, and deserving of no special privileges not accorded other profitable neighborhood houses.

Q. Is there any place within your Washington branch area in which a downtown theatre and a neighborhood theatre play day and date on RKO pictures?

A. Yes, I have one.

Q. Where is that?

A. Richmond, Virginia.

Q. What are the circumstances?

A. Well, the circumstances are entirely different from the situation with respect to Baltimore. First of all, that [fol. 318] run was built up through a series of circumstances, and it has existed over a long period of time. Years ago, the company was unable to find an outlet for its pictures in the mid-downtown area; so we did the best we could with our product, and we sold it first run in what was then and is now the Byrd, which is, I guess, two to two-and-a-half miles from the downtown area, but in a very heavily congested center of its own, with a good shopping center around it.

Later, when ownership of the Byrd was acquired by its present management, they had a downtown house, a very small one as compared with the Byrd, and over a period of years we created a day and date run in the two houses, and gives them a chance at revenues from those people who come from the opposite side of the city, as respects the location of the Byrd Theatre, but will not go all of the way through town and across town to see a picture.

It is our belief that people flow normally from all sections of the city into the heart of the city, but they will not flow all of the way across the city, through heavy traffic, to get something they can get nearer home.

So, the downtown theatre is inferior to the Byrd, but it does give us added revenue on a picture and a better chance at the income than if we played one house alone.

Q. You could not get downtown when you started?

A. We could not get downtown.

Q. Are there any instances in your Washington branch area, Mr. Brecheen, in which neighborhood houses have played day and date on first run?

A. Yes, I have two.

Q. What are those?

A. In Norfolk, Virginia, I sell two neighborhood theatres day and date first run, and in Roanoke, Virginia, I sell two very fine neighborhood houses first run. But in Roanoke they are the only neighborhood houses in the city.

Q. Was there available to you in Roanoke a downtown outlet for your pictures?

A. No, sir; there never has been.

Q. Is there at the present time?

A. No, sir.

[fol. 319] Are the two neighborhood houses commonly owned?

A. Under common ownership.

Q. I believe you said that was true in Richmond?

A. Yes, that is true in Richmond, that is true in Roanoke, and it is true in Norfolk.

Q. What is the situation otherwise in Norfolk?

A. In Norfolk we could never get a downtown first run; we were locked out; so we created a first run day and date in two neighborhood theatres, which probably offsets what we could not get downtown.

Q. In all three cases you were not able to get downtown outlets?

A. That is right. So we created the best market we could for our pictures.

Q. Would you prefer to have a downtown outlet to the method in which they are being played?

A. Yes, sir.

Q. Do you regard the cities as such, Richmond, Norfolk, and Roanoke, comparable to Baltimore?

A. No, sir.

Q. Are the subsequent runs of those cities of the importance that the subsequent runs are in Baltimore?

A. Oh, no. In Roanoke there are no subsequent run theatres, other than the theatre that plays first run products. They are not subsequent run houses. They are neighborhood houses that play first runs. There are no subsequent run theatres in Roanoke at all.

Q. It is where you play the first time?

A. That is right. In Norfolk there are very few subrun theatres. The subrun revenue in Norfolk is very negligible

as compared with a city like Baltimore. In Richmond there are only 5 or 6 subrun theatres, which are owned by the same people that buy our products first run.

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CHARLES V. GRIMES

Direct examination.

Q. Now, on the draw area of the Ambassador Theatre as contrasted with the draw area of the Crest Theatre out here on Reisterstown Road, what is your opinion as to the [fol. 320] density of the population and draw area in the two areas?

A. In the Washington area, with which I am very familiar, the density of population there is very heavy due to the number of apartment buildings. It is in an apartment section. There are very large apartments throughout the entire area. Connecticut Avenue and 16th Street. In the Crest Theatre section of Baltimore—I am not as familiar with the City of Baltimore as I am with the City of Washington, however, I have been through that section quite thoroughly—to me I would say that the Ambassador area is two to one in density.

* * * * * * *

DEFENDANT'S EXHIBIT No. 19

COMPUTATION OF NET LOSS OF CREST THEATRE, BALTIMORE *

| | | |
|---|---|---|
| Gross at Stanley Theatre, Baltimore, during claimed damage period, February 25, 1949 to March 23, 1950 (56 weeks) | $406,308.24 | |
| Ratio of gross of Ambassador Theatre, Washington, to gross of Warner Theatre, Washington, during period December 25, 1949 to December 30, 1951 (6 years) | 47.0% | |
| Gross applicable to Crest Theatre, Baltimore | | $190,964.87 |
| Less expenses:- | | |
| Film rental—35% of $190,964.87 | $ 66,837.70 | |
| Operating expenses—56 weeks at $2,500 | 140,000.00 | 206,837.70 |
| Net loss during claimed damage period | | $ 15,872.83 |

* Based on comparative grosses at Warner and Ambassador Theatres, Washington. (See statement attached.)

[fol. 321] Cross-examination.

Q. How many theatres are there, in all, that are operated by the Warner Bros. Circuit Management Corporation?

A. You mean nationally?

Q. Yes.

A. Well, as far as I know, there are in the neighborhood of approximately around 400 theatres.

Q. Do you know how many of those 400 are first-run theatres?

A. I would not know.

Q. Many of those theatres are located in the downtown sections of large cities, are they not?

A. There are theatres located in the downtown sections, but certainly the majority of them in your larger cities, I would say, would be neighborhood theatres.

* * * * * * *

ROBERT SMELTZER

Direct examination.

A. Well, the location, the transportation facilities. They have a small shopping district, but I do not think it would attract anyone but the neighborhood people. I do not think anyone would travel from South Baltimore or Southeast Baltimore, or possibly East Baltimore, over to the Crest Theatre to see a first run picture. I think his patronage would be drawn purely from that location where he is, and possibly over as far as the Ambassador or Reisterstown, or about the area that Mr. Myerberg stated his drawing area is —Park Circle—drawing first run pictures. That would be my idea of his drawing area. I do not think he could draw from the entire City of Baltimore for first run pictures. I do not think it is possible. So, I would not consider it as a first run outlet for Warner pictures.

Q. Did he ever ask you for a day and date first run with downtown?

A. No. He never asked for day and date first run. He was primarily interested in an exclusive first run. The day [fol. 322] and date issue never arose, to my knowledge never arose.

* * * * * * *

ALEXANDER LICHTMAN,

Direct examination:

Q. (Mr. Raftery) * * * Can you tell His Honor and the jury what happened in Cincinnati, what your experience was, and what the result is, today?

A. We were selling our pictures first run to a firm—I don't recall the corporate name, but it was operated by two men, Mr. White and Mr. Li on, and they operated three theatres downtown. One of them was closed at the time I

speak of—the Shubert was closed—and they were operating the Capital and the Keith. The Capital was the best theatre of the three. Certain subsequent-run exhibitors, and one operator of a drive-in theatre, demanded that we reduce the clearance of the first-run; the clearance then established was the fifth Sunday after the completion of the run in the Capital or Keith Theatres. They demanded that their clearance be reduced to 21 days, so our representative went to Mr. White and asked him to agree to this, which he refused; and he further stated that if we insisted on reducing his clearance, that he would not buy our pictures. And, after many negotiations, he still persisted in that position. The exhibitors making the demand for this clearance had threatened at that time, and subsequently did file a lawsuit against all the film companies, for three million and some-odd thousand dollars, treble damages, because of the unfair clearance they claimed. So, our representatives, after they were told by Mr. White that he would not buy our pictures with the reduced clearance, went to these exhibitors and negotiated with them to play our pictures simultaneously in those four theatres, plus this one drive-in, first-run, in the city of Cincinnati, because, after Mr. White refused to buy our pictures, we had no other outlet; and we said we would try it, and we sold them 14 pictures. And, when we sold them those 14 pictures, they took us out of the lawsuit; but they proceeded with the lawsuit against the other companies.

[fol. 323] Now, then, during the time that we were playing these pictures with these four theatres, the subsequent-run theatres, and the drive-in, we had all sorts of difficulties. Some of the theatres only wanted to play the pictures three days, while others would play it for a full week, which was the provision of the contract. In other words, it was difficult to get them to agree; and, furthermore, we found that we did not earn as much money as they promised us they would, as we earned with first-run on comparable pictures. And, when the contracts for the 14 pictures expired, we went back to sell our pictures with the reduced clearance.

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GERALD P. PRICE

Direct examination:

Q. As a matter of fact, during your stay here as manager of United Artists, you sold the great bulk of your pictures to the Mayfair Theatre, Baltimore?

A. That is correct. As a matter of fact, we sold them to practically every downtown theatre.

Q. Did you have any national policy or policies in your area as to either selling downtown, or uptown, or suburban, or in any way, in this area?

A. We sold where we got the most mo. y.

Q. As a matter of fact, down in Roanoke you were not able to sell any pictures downtown, were you?

A. That is correct.

Q. Do you know the reason?

A. Yes.

Q. What was it?

A. There was a breach of contract, and the owner of the American Theatre was taken into court, and a decision handed down against him; and, for that reason, he was mad at United Artists from that point on, and he would not buy their product, regardless of what stature it was.

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[fol. 324] C. GLENN NORRIS

Direct examination:

Q. Is that, in your opinion, of any importance in connection with establishing a picture for subsequent-run?

(Mr. Rome) Is what of any importance?

(Mr. Watkins) Exploitation of the picture in the downtown first-run theatre.

(The Witness) As a matter of fact, it is of vital importance. In an area like Baltimore, the first-run "showcase", as we like to refer to it, is important in more ways than just the amount of dollars we might earn through the exhibition of the pictu.e in that particular run, because during the showing of the picture on the first-run, the picture is sold to an entire area of in excess of a million people, a small

percentage of whom actually see the picture on the first-run; but we know from experience that the most valuable medium of advertising is the word-of-mouth advertising, the praise of a picture on the part of a person who has seen the picture, to one who has not; and that word-of-mouth advertising is —again, I am using a trade expression—is of vital importance to the success of a picture, not only in the subsequent-run theatres in the immediate city, but in all of the outlying communities that are served by a city like Baltimore as a central shopping center.

* * * * * * *

Q. You can have a day and date with one subject, can you not?

A. With one, and I think one of the most important things we are all overlooking here, no matter what distributors might have in mind with regard to a picture, whether it might be a film rental or availability or whatever it might be, it is no good unless he can get an exhibitor to buy it on that basis.

Q. You could not get downtown to buy on the basis of playing simultaneously with neighborhood houses; is that correct?

A. That is absolutely correct.

[fol. 325] Q. Have you played any Fox pictures at the Ontario since the date of this letter?

A. Yes; we played two pictures at the Ontario.

Q. Will you very briefly state the reasons for playing them, what they were, and what were the results?

A. The reason for playing them was it developed that the Ontario Theatre was the only available one we could get for the picture. We could not sell it to the Palace, and we could not sell it to the other downtown theatres, including the Playhouse, Plaza, Trans-Lux, and so on. The Ontario Theatre was available for a first run. They offered us a contract film rental for the picture, and we licensed it to them, and they played the picture.

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Cross-examination:

Now, what you have stated as being law—I am not a lawyer—I cannot sell a day and date run without taking into consideration two different exhibitors, and I cannot sell a day and date run without selling at least two exhibitors. Otherwise, it cannot be day and date. I did not want to sell the Crest Theatre exclusive first-run, because, for obvious reasons, it is not a suitable first-run showcase for pictures. I could not sell it a day and date run, because I couldn't get another suitable theatre to go with it.

* * * * * * *

SAM GALANTY

Direct examination:

A. My opinion then and my opinion now was and is that the Crest Theatre is a neighborhood house.

In deference to the theatre, I will say it has fine appointments, a well constructed theatre, but I believe that the location in which the builders elected to place the theatre is unquestionably in a neighborhood that did not show, in my [fol. 326] opinion hope of having too much of so-called patronage, too heavy patronage that would justify such a theatre.

* * * * * * *

Q. Now, there are within your territory three instances outside of the City of Washington in which you do not play your pictures exclusively in a downtown theatre. I wish you would briefly explain the situations in Richmond, Norfolk and Roanoke with respect to the playing of Columbia pictures first run.

A. Well, in the instance of Richmond, Virginia, we owning no theatres, that is, Columbia Pictures, we were compelled to find the only market that was available to us. In Richmond, most assuredly, we would have preferred to play our pictures at one of the downtown theatres, but not finding that market, we naturally looked to the only outlet that was available to us. Our account there, Mr. Martin Thalheimer, is a splendid exhibitor, but unfortunately I do not

believe his theatres are capable of yielding to us the returns we might have enjoyed had we been fortunate enough to find a downtown outlet for our pictures.

Q. Now, how about Norfolk?

A. The same thing applies in Norfolk. We tried for many years, and we continue to try now, to place our pictures in a downtown theatre, but we have not been successful in doing so.

Q. And Roanoke?

A. Roanoke, the same situation applies.

* * * * * * *

Q. Columbia has licensed some pictures for exhibition in the Ontario Theatre in Washington on first run, has it not?

A. That is so, we have.

Q. And in those cases in which you have licensed them first run at the Ontario, have you or have you not had available to you a downtown first run theatre for the exhibition of your pictures?

A. No, we have not.

Q. If you had had available a downtown first-run theatre, would you have preferred to have played your pictures in [fol. 327] such downtown first run theatre rather than at the Ontario?

A. Yes, I should say so.

Q. Do you have a record of your experience of the play of pictures at the Ontario Theatre?

A. I do.

Q. You had experience with five pictures, I believe, Mr. Galanty.

A. At this moment that is the history.

Q. I wonder if you would give us a summary of your experience of the playing of those pictures at the Ontario?

A. The first picture we played at the Ontario was Song To Remember, a picture that was very successful when first issued possibly five or six years ago, but it was delivered to the Ontario as a so-called "reissue."

Q. What were the terms?

A. In the event that the gross of this reissue was less than $6,000 we were to receive as film rental 25%.

Q. What, in fact, was the gross?

A. The gross was $4,852 on a 7-day engagement.

Q. And, therefore, the 25 percent rate applied?

A. $1,213.07.

Q. What was the second picture?

A. The second picture was one entitled Sunny Side Of The Street.

Q. Licensed on what basis?

A. Thirty percent of the gross.

Q. What was the gross?

A. The gross was $1,983.56.

Q. The picture played what dates?

A. It played December 19 to the 24th, 1951.

Q. What film rental was earned on that basis?

A. $595.07.

Q. Was any adjustment made?

A. It was reduced to straight 25 per cent. A 5 per cent adjustment was made in the terms.

Q. Why?

A. Well, I should say, because of the extremely poor gross that the exhibitor had experienced.

[fol. 328] Q. What was your next picture?

A. The next picture was Ten Tall Men.

Q. What were the licensing terms there?

A. The license terms were $3,500 guaranty the first week against 35 per cent of the gross, with the stipulation that in the event the picture held a second week, we were to receive as terms $1,500 against 35 per cent of the gross.

Q. Thirty-five or thirty?

A. Thirty per cent, I beg your pardon.

Q. What was the play experience on that?

A. The play experience was that it played in what is considered very choice playing time. It opened December 25, 1951, and played a week with a gross of $8,284.70; was held over for the second week to a gross of $6,131.66.

Q. Did it earn the guaranty in the first week? It had to gross $10,000, didn't it?

A. It grossed $8,284. No; it did not earn its guaranty the first week.

Q. Was any adjustment made as to the second week?

A. The second week, we agreed or proposed to adjust it. It has not been approved, but it is now in the home office for consideration, to reduce the terms of the second week to $1,500 flat.

Q. What is the fourth picture?

A. The fourth picture was BOOTS MALONE.

Q. What were the terms there?

A. $2,500 guaranty against 35 per cent of the exhibitor's gross. The picture played starting January 23 for 7 days to a gross of $4,349.83.

Q. Against a guaranty of $2,500 on a 35 per cent basis?

A. Quite right.

Q. And the guaranty was not earned, was it?

A. No, sir.

Q. Was any adjustment made on that picture?

A. We had—I have recommended to the home office that they give consideration to an adjustment.

[fol. 329] Q. The fifth picture?

A. The fifth picture was DEATH OF A SALESMAN.

Q. What were the terms on that?

A. The terms were $20,000 cash guaranty.

Q. For how long a performance?

A. For five-weeks engagement.

Q. Was there a varying percentage on the weeks?

A. Fifty per cent for the first week; 50 per cent for the second week; 40 per cent for the third, and 35 per cent for the fourth and fifth weeks.

Q. Was this picture, DEATH OF A SALESMAN, shown to the exhibitor before he licensed it on those terms?

A. Yes.

Q. How long did the picture play?

A. The picture played three weeks.

Q. Who terminated the performance?

A. The engagement was terminated—the exhibitor insisted upon terminating it, based upon the grosses, which were failing so badly that we were inclined to agree with his position, that his position was all that could possibly be expected.

Q. What were the grosses?

A. The first week, $8,302.53.

Q. The second week?

A. $4,245; and the third week, $2,691.

Q. Subject to verification, that is a total of $15,238.54 gross against a $20,000 guaranty?

A. Quite right.

. . . . . .

FREDDIE MEYERS.

Direct examination:

Q. What was the reason for servicing pictures on a 21-day or first-neighborhood-run availability?

A. The reason, frankly, in my opinion, he was not entitled to the 21 days. For some reason or another, only known to [fol. 330] himself, that this man or his organization decided to put a theatre in the middle, between theatres, in an area which, in my opinion, no theatre was entitled to be at that particular time. Namely, I will be specific on one, and cite the fact that on one side is the Ambasador Theatre, and on the other side the Uptown Theatre, and mentioning the Pimlico Theatre, which was in the same area, but nevertheless we made a decision to service him 21 days after downtown, giving him the same right as anybody else had in that area.

Q. In your opinion, with the building of the Crest Theatre, was that neighborhood overseated?

A. Definitely so. I so told that to the gentleman.

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(Mr. Rome) No, sir; you did not correctly understand me. What I wanted to say, and what I believe I did say, was that during the first 12 months of its operation, the Crest Theatre had a total gross admission of $122,000, and that according to the information furnished us by the defendants, the total gross of the Hippodrome Theatre during the 1948-49 season was $132,699.

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EDWARD K. O'SHEA.

Direct examination:

Q. Well, now, you have first runs in towns as small as what?

A. 500 people. 350 people, I think, is about the lowest I know of. The word "first-run" seems to be kind of a magic expression. You see, a city like Baltimore will take certain clearance which is recognized, over suburban runs

or towns immediately adjacent to the large city, but there could be towns 25 miles from here who could play that picture, immediately, first run in that little, tiny community.

We have—I am talking too much—and we have 280 to 400 prints of a picture. A print might play the Music Hall Theatre in New York, complete that engagement and go upstate to Pawling, a town of 250 and play an engagement, [fol. 331] and then it might come back and be repaired and inspected and then go over to Newark and play first run immediately after the little town in between. There are 6,000 clear first runs with no restrictions on them throughout the country. Really the only restrictions are in large cities, very large cities and surrounding areas, and that could also apply—I would like to put in the record, if there are two towns close to each other, the business goes back and forth, you then might sell one town some product and other companies would sell the other town another company's product, whichever they bought, so they would not be in conflict.

Q. And one town on its product might have clearance over the other town?

A. That is right.

Q. And vice versa?

A. That is right.

Q. But when you said the word "restriction" you meant clearance only?

A. That is right.

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JOHN F. MURPHY.

Direct examination:

The theatre is located in an area that is not a shopping area by the widest stretch of the imagination. What is there? A couple of meat markets, a diner, a used-car lot. Where is the opportunity given to the patrons who go downtown and shop around and see what picture he wants to see at the time he wants to go? The downtown areas of any cities are the first run areas, are the main shopping centers where people go and say: "I am going to go to the movie." They are not sure what they want to see, so what is here?

What is there? They look around and they pick one out. Where is that opportunity given to them out at the Crest Theatre? In the second place, how are they going to get there? It is tucked away in a remote corner of the City of Baltimore, and I would think that your patrons would resent having to go out there. Why should they be forced to [fol. 332] travel way out to the Crest Theatre to see a first run picture when they could go downtown conveniently? They can go downtown to shop and the restaurants and have a choice which is denied them at the Crest Theatre.

I honestly do not think the Crest Theatre, with first run pictures, would do as well as they would with second run.

(The Court) How about the question of exhibitors who wished to play day and date with the Crest Theatre?

(Mr. Boyd) That was my next question, sir.

Q. (Mr. Boyd:) Mr. Murphy, as the operator of the Century Theatre, would you license pictures for exhibition in the Century if those same pictures were licensed by the distributor playing day and date with the Crest Theatre?

A. I would not, never.

Q. I assume your reasons are the same you have just given?

A. I would go out of business.

* * * * * * *

Q. (Mr. Boyd) What reasons would you have for not playing day and date, Mr. Murphy?

A. If the Crest Theatre, in its location, non-shopping area in the country, has the right to buy first run pictures, then there are a dozen other theatres in the City of Baltimore just as good in every way, even better, physically and better located. The Crest is nothing unusual as a theatre. It is just a theatre. There are thousands of theatres over the United States, all over the United States as good or better, second run theatres, than the Crest, I think some of mine.

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Q. Mr. Murphy, can you tell the Court and Jury the approximate highest attendance you have had at the Century Theatre in recent years, in a week's time, let us say?

A. The highest I remember is BATTLE GROUND. In one week, the first week, we played to over 37,000 admissions.

[fol. 333] Q. And that stayed on for a subsequent play?

A. Yes, I think on BATTLE GROUND our total admissions on the downtown run were over 63,000 admissions in Baltimore.

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(Mr. Raftery) On Exhibit 29, down here, is the name of each of the distributors distributing pictures, and named a defendant in this case. Across the top are the names of the theatres.

The first one is the Hippodrome, operated by Mr. Rappaport, who is not a defendant in this case.

The second one is Keith's Theatre, operated by Mr. Schanberger, who is not a defendant.

Then we have the Town Theatre, operated by Mr. Rappaport, who is not a defendant.

Then we have the New Theatre, operated by Mr. Mechanic, who is not a defendant.

Then we have the Stanley Theatre, operated by Warner Bros. Circuit Management, which is a defendant.

Then we have the Century, operated by the Defendant Loew's; and the Valencia, a theatre Mr. Murphy just talked to us about, a move-over house.

Then we have the Little Theatre, operated by Mr. Rappaport, who is not a defendant.

Then we have the Parkway, which is operated by Loew's.

Then you have the Times and Roslyn, which are two houses up away from the downtown section, operated by an independent, Zeller.

And, at last, we have the Mayfair, which is operated by Mr. Hicks, who is not a defendant.

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Summarizing, the Hippodrome played these pictures that are listed down this column here, which indicates they played pictures released by Universal, Columbia, Warner, [fol. 334] Paramount, RKO, United Artists, Fox, and Loew's, the total number of pictures listed during the three years.

In the second column is Keith's, playing 101 pictures released by United Artists, Paramount, Universal, Fox, and Loew's.

In the third column shows the Town Theatre, which is a Rappaport Theatre, and they played 83 pictures during this period, released by Universal, Columbia, RKO, United Artists, and Loew's.

In the New Theatre, operated by Mr. Mechanic, he only played pictures released by Fox, or a total of 74 pictures for that entire period.

Now, the Stanley played a picture released by Universal, 83 by Warner's, 18 by Paramount, 2 by United Artists, and one by Loew's, or a total in the Stanley of 105 pictures for the whole period.

The Century played 21 released by Universal, 16 by United Artists, and 80 released by Loew's, or a total of 117 pictures.

The Valencia played 14 Universals, 12 United Artists, one Fox, and 7 Loew's, or a total for the whole period of 24 first run pictures.

In the Little Theatre, they played one Columbia, one from Paramount, one from United Artists, two from Fox, a total of five pictures; and that is a Rappaport Theatre.

The Parkway played one first-run picture during the entire period, and that was a Loew picture.

The Times and Roslyn played 5 pictures, and they were all United Artists.

The Mayfair played 6 pictures from Universal, 6 Columbia, 2 Warner, 17 Paramount, 20 United Artists, 6 Fox, and 3 Loew's, or a total for the period of 60 pictures.

And, now, adding the total pictures played in the area, 416 were played in the so-called independent houses, and [fol. 335] 247 were played in the Stanley, Century, Valencia and Parkway, which are the houses owned by the defendant-exhibitors in this case. In other words, 63 per cent of the first-run pictures shown downtown Baltimore were shown in independent houses, as against 37 per cent shown in the Stanley, Century, Valencia and Parkway.

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JEROME ADAMS.

Direct examination:

Q. Now, Mr. Adams, from his visit at that time, what did you understand he was seeking?

A. On Mr. Myerberg's original visit, I was of the opinion that he was seeking a first subsequent run. I will tell you why. Mr. Myerberg told me of his previous experience in the picture business, and he was aware, being a Baltimorean, that we had Loew's Theatre, and we utilized our products first run in the city; and, consequently, it was inconceivable to me at that time that he meant first run City of Baltimore.

Q. When did you gain the other impression?

A. When we received a letter asking for the World Premier of a motion picture in the Crest Theatre.

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[fol. 336]

## Defendants' Exhibit No. 32

### Loew's Pictures Played at Crest Theatre Under Guarantees

| Title | Playdates | Day of Week | Contract Terms | Gross Receipts Reported | License Fee Paid |
|---|---|---|---|---|---|
| Duchess of Idaho | 9/9–15 | Week | 2000, 50% ov. 4000 | 2513. | 2000. |
| 3 Little Words | 9/30–10/5 | SSMTWT | 1600, 50% ov. 5750 | 1967. | 1600. |
| Summer Stock | 10/21–25 | SSMTW | 1500, 50% ov. 4000 | 1794. | 1500. |
| Life of Her Own | 11/5–7 | SMT | 500, 50% ov. 1800 | 836. | 500. |
| Toast of New Orleans | 11/25–27 | SSM | 500, 50% ov. 1600 | 1138. | 500. |
| Right Cross | 12/3–6 | SMTW | 500, 50% ov. 1600 | 879. | 500. |
| To Please a Lady | 12/10–13 | SMTW | 500, 50% ov. 1600 | 630. | 500. |
| King Solomon's Mines | 1/21–27/51 | Week | 1200, 50% ov. 3200 | 2582. | 1200. |
| | | 60 Units | | 12,331 | 8300. |

| | |
|---|---|
| Total Guarantees | 8,300 |
| Total overhead (6 x weekly overhead $1,900) | 11,400 |
| Total cost of operation | 19,700 |
| Gross receipts | 12,331 |
| Loss | 7,369 |

Percentage of Film Rental
12,339 )8300.00( 67-+ %

[fol. 337] WILLIAM F. RODGERS.

Direct examination:

Q. When you first came into the motion picture business and the licensing of pictures, were there any theatres owned by any of the distributors; and how were pictures generally licensed in those days first run, in a town like Baltimore, let us say?

A. They were always licensed first in the theatre who was in position to pay; and those theatres were always downtown theatres. In those days, even prior to the feature pictures, we did the same thing with short subjects; we sold them at so much per day, as a rule according to the age. There was never any theatre that could pay the price for first run pictures except downtown houses.

Q. So, the showing of single-reels, or two-reels, or features, from 1910 on, when you first came into the business, generally was in the downtown first run theatres?

A. That is right. I don't think we originated that. I think that was the situation in all types of show business. I mean our vaudeville houses. We had so many of them that we always played our stellar acts first in what we called our flagship or State theatre. In the case of Keith's they always played the Palace before they went around to the other theatres in the vicinity.

I think the same thing is true of the legitimate shows, especially in cities which have legitimate houses, such as New York, where you would never think of opening a legitimate show in the Windsor Theatre, in Flatbush; you would certainly play it downtown first run.

Q. And that was true as the shows went on the road, and you played Baltimore?

A. Ever since I have been in the business.

Q. So this run and clearance thing is not something that originated in the motion picture business, but it is a part of the show business, and has been as long as you know?

A. Yes.

* * * * * * *

[fol. 338] Q. In your opinion is that theatre suited for showing your pictures, Metro pictures, first run exclusive in the City of Baltimore?

A. No, sir.

Q. Will you tell His Honor and the jury why?

A. Well, in the first place, it does not have what we would consider an adequate drawing power, nor would I believe that we would be treating the population in Baltimore fairly if we set our pictures in a theatre for exclusive first run in the neighborhood that would be equally impractical for people in another section to Baltimore to attend, and there are people who like to see pictures when they are very new and are willing to pay for it. But if they do not have the facilities to get there, they are not going to attend, and last, but not least, they could not possibly pay the amount of film rental that would be necessary for us to get for our first run pictures in a city of this population.

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(Mr. Rome) They would claim, and are not precluded from arguing to the jury, that they have not done this as the result of any conspiracy; and, if they are a party, this would be conclusive evidence.

* * * * * * *

(The jury thereupon returned to the courtroom and resumed seats in the jury box.)

(The Court) Members of the Jury, we will now continue this case, and in a few moments the arguments will begin; but counsel for plaintiff has asked to be permitted to introduce, as part of the evidence, decrees in an equity antitrust proceeding brought by the United States against these defendants, and the Court has ruled that under the Clayton Act, the plaintiff has the right to present to you those decrees, or the parts of them that it desires to introduce, because under that Act, in a situation of this kind, the Clayton Act provides that those decrees may be introduced as prima facie evidence.

[fol. 339] I will not at this time give you any further explanation of why these decrees are being introduced, or allowed to be introduced, except to explain to you that they arise as the result of lengthy litigation brought under the Restraint of Trade Statutes by the Government against these various defendants, and that the decrees do require

these defendants to refrain from agreeing with each other, or with any exhibitors or distributors, to maintain a system of clearances, the term "clearances" as used meaning a period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres; and also they were restrained from granting any clearance between theatres not in substantial competition, and also they were restrained from licensing any feature for exhibition upon any run to any theatre in any other manner than that each license shall be offered, and taken theatre-by-theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres, or others.

Now, as I have just explained, these decrees, or parts of them, which the plaintiff wishes to introduce, and is permitted to introduce, are to be taken as prima facie evidence in this case of what has been done and prohibited to have been done by these defendants; but we have here, as the issue before you, which will be fully explained to you in the course of instructions, that you must still, of course, pass upon and find whether there has been any concerted action, any conspiracy, to prevent this plaintiff from having what he is entitled to have by way of proper clearance.

I am just giving you a very broad statement now, in order that you may understand the reason for allowing these decrees to be put in as prima facie evidence in the case. The Court will give you, no doubt, in connection with or as part of its instruction on the law of this case, a further explanation of the weight and effect to be given to these decrees as part of the evidence in the case.

[fol. 340] Now, with that introduction, you may read them.

* * * * * * *

Now, with that in mind, I give you now the way I think this ought to be presented to the jury.

In order to establish a right to recover, the plaintiff in the present case must show, first, a conspiracy in restraint of interstate commerce and, second, injury to its business caused by such restraint. Of course, I will explain to the jury it is not every restraint, it is only unreasonable restraint.

I am not now going into a lot of questions that are involved, I am just dealing now with the Paramount decree, its position in the case, and the burden of proof.

"The law further provides that if any acts prohibited by the antitrust laws which are alleged to have damaged the plaintiff, have previously been established by decree obtained by the United States Government in either a criminal or civil action, that is, any equity proceeding under these antitrust laws, the plaintiff, in aid of its case, may rely upon such judgment or decree previously obtained by the Government, including the existence of the prohibited acts, and the law provides that such previously obtained judgment or decree is prima facie evidence against the same defendants in a suit of the present nature—that is, of the nature of this present suit before us—brought by the plaintiff against them, that is, prima facie evidence as to all matters that were decided by the previous decree. I instruct you that in the previous equity suits between the government and these same defendants it was decided and covered by the decree in that case that these defendants had conspired together in restraint of trade, in violation of the antitrust laws in restricting these first-runs and in establishing certain clearances in numerous places throughout the United States.

"Thus, these proven facts, I instruct you, become prima facie evidence in the present case, which the plaintiff may [fol. 341] use in support of its claim, that what the defendants have done in the present case in Baltimore is within the prohibition of this earlier decree. However, it is only prima facie evidence. There was not before the court in the prior case the present factual situation respecting the Baltimore theatres that we have in the present case."

"I say that, because I understand that it — true. The whole country was before it, and there may have been some evidence, a good deal of evidence about Baltimore, Philadelphia and San Francisco. If there was any about Baltimore, it certainly did not cover this point.

"Therefore, it is still necessary in the present case before the plaintiff can recover, for it to prove to your satisfaction, by the weight of the credible evidence that these defendants or any of them have conspired in an unreasonable

manner to keep first runs from the plaintiff, or also they conspired to restrict plaintiff to clearances which are unreasonable.

"If you find that the plaintiff has sustained its burden of proving conspiracy as just defined, then I instruct you that by virtue of the decree in the previous equity suit which forms part of the evidence in this case, the burden of proving the reasonableness of the failure to give plaintiff first run exclusively or day and date, and also the failure to give it other reasonable clearances, rests not upon the plaintiff but upon the defendant."

Now, after a more thorough, as far as I can judge, a complete study of the controlling cases on this point in the Supreme Court, that is what I understand to be the law. Of course, I might say we all know that, as a practical matter, this technical division of burden between the two parties fades away, because in an ordinary case, take a personal injury case, we have to instruct the jury that A has been injured, that B ran into him, and, of course, the burden is upon A to prove that by the weight of the credible evidence. Of course, A can take advantage of the evidence [fol. 342] that defendant has put in, as well as of the evidence he puts in, so there is a practical side to the situation which, perhaps, does not amount to very much after all, when you talk about dividing the burden.

Do counsel want to say anything?

* * * * * * * *

[fol. 343] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6512

THEATRE ENTERPRISES, INC., Appellant,

versus

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., United Artists Corporation, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Warner Bros. Circuit Management Corporation, Columbia Pictures Corporation, Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore

September 24, 1952, record on appeal other than the transcript of evidence is filed and the cause docketed.

September 26, 1952, the appearance of R. Dorsey Watkins and J. Cookman Boyd, Jr., is entered for the appellees.

MOTION TO ENLARGE TIME—Filed September 29, 1952

(Style of Court and Title Omitted)

The petition of Theatre Enterprises, Inc., respectfully shows:

1) That it filed its Notice of Appeal in this case in the United States District Court for the District of Maryland on June 25, 1952.

2) That on application to the said District Court, and with the approval of the defendants, the time for filing the transcript of record on appeal, and docketing the appeal, was extended by the District Court for a period not exceeding 50 (fifty) days from August 5, 1952, or to September [fol. 344] 24, 1952.

3) That the plaintiff-appellant and the defendants-appellees herein desire to make numerous corrections in the

stenographic transcript of testimony and that it will be impossible to make such corrections by September 24, 1952.

Wherefore it is prayed that this Court by its order extend the time within which Theatre Enterprises, Inc. may file the transcript of record on appeal and docket its appeal herein, from September 24, 1952 to and including October 3, 1952.

And, as in duty bound, etc.

Sol Berenholtz, Attorney for Theatre Enterprises, Inc.

No objection: J. Cookman Boyd, Jr., W. R. Dorsey Watkins, Attorneys for Defendants.

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Order Enlarging Time to File Record and Docket Cause—Filed September 29, 1952

(Style of Court and Title Omitted).

Upon the Application of the Appellant in the above entitled cause, no objection by the appellees, and for good cause shown,

It Is Ordered that the time within which to file the record on appeal and docket the cause in this Court, be, and it is hereby extended from September 24, 1952, to and including October 3, 1952; but the appeal shall be heard at the November Term of Court notwithstanding this extension of time for filing the record.

September 27, 1952.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 345] October 1, 1952, the appearance of Edwin P. Reme and Sol C. Berenholtz is entered for the appellant.

October 9, 1952, stipulation as to the time for the filing of the respective briefs is filed.

October 15, 1952, stipulation as to the time for the filing of the respective briefs is filed.

October 24, 1952, petition of appellant for permission to file brief in excess of 50 printed pages is filed.

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ORDER PERMITTING APPELLANT TO FILE BRIEF IN EXCESS OF 50 PAGES—Filed October 27, 1952

(Style of Court and Title Omitted)

Upon the Application of the Appellant, by its counsel, and for good cause shown,

Special Permission is hereby granted Appellant in the above entitled case to file brief in excess of 50 printed pages, but not exceeding 62 printed pages.

October 25, 1952.

John J. Parker, Chief Judge, Fourth Circuit.

October 28, 1952, brief and appendix of appellant are filed.

November 4, 1952, petition of appellees for permission to file brief in excess of 50 printed pages is filed.

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ORDER PERMITTING APPELLEES TO FILE BRIEF IN EXCESS OF 50 PAGES—Filed November 6, 1952

(Style of Court and Title Omitted)

Upon the Application of the appellees, by their counsel, and for good cause shown,

Special Permission is hereby granted appellees in the above entitled case to file brief in excess of 50 pages, but not exceeding 65 printed pages.

November 5th, 1952.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 346] November 8, 1952, brief and appendix of appellees are filed.

November 10, 1952, 3 volumes of the transcript of evidence are filed.

Same day, the original exhibits are certified up.

ARGUMENT OF CAUSE

November 21, 1952 (November term, 1952), cause came on to be heard before Parker, Chief Judge, and Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

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[fol. 347] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6512

THEATRE ENTERPRISES, INC., Appellant,

versus

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., et al., Appellees

Appeal from the United States District Court for the District of Maryland, at Baltimore. Civil

OPINION—Filed January 5, 1953

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges

Edwin P. Rome (Sol C. Berenholtz, and Gray, Anderson, Schaffer & Rome on brief) for Appellant, and J. Cookman Boyd, Jr., and R. Dorsey Watkins (Edward C. Raftery and E. Compton Timberlake on brief) for Appellees.

[fol. 348] SOPER, Circuit Judge:

This action was brought under the anti-trust laws * by Theatre Enterprises, Inc., a Maryland corporation, against the eight largest motion picture producing and distributing companies in the United States. The plaintiff sought injunctive relief as well as monetary damages for loss suffered as a result of the defendants' refusal to supply first-run motion pictures to the plaintiff's theater in the City of Baltimore pursuant to an alleged conspiracy during

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* 15 U. S. C. A. §§ 1, 2, 13, 15 and 16.

the period from February, 1942 to March, 1950. The suit was originally instituted in the District Court for the Eastern District of Pennsylvania but on motion of the defendants, under § 1404(a) of the Judicial Code, the case was transferred to the District of Maryland. The case came on for trial before a jury in the latter District and resulted in a verdict for all of the defendants; and the plaintiff appealed contending that the trial judge erred in denying plaintiff's motion for a directed verdict in its favor and in giving certain instructions to the jury.

At the conclusion of all of the evidence the plaintiff prayed the court to instruct the jury that they must return a verdict for the plaintiff in such an amount as they estimated the plaintiff's loss to have been. In other words, the court was asked to instruct the jury that the plaintiff had proved its case against the defendants and that the only question for their decision was the amount of the damages which the plaintiff had suffered. In order to pass on the refusal of this instruction the evidence submitted to the court must be summarized. The task is the easier because the facts presented by Harry D. Myerberg, the president of the plaintiff corporation and its only witness, and by the wit-[fol. 349] nesses for the defendants are largely undisputed, and the decision turns on the question whether the only reasonable inference from the facts is that the defendants, in violation of the law, conspired to deny the plaintiff the rights to which it was entitled in the operation of its business.

The testimony on behalf of the plaintiff was to the following effect: For many years, the showing in Baltimore of first-run motion pictures produced by the defendant companies had been confined to eight theaters located in the downtown section of Baltimore as follows: The Century and the Valencia, with seating capacity of 3,000 and 1000-1800 respectively, are both owned by Loew's. They have exhibited all of Loew's product, half of Universal's and some of United Artists'. The Stanley, seating 3,200, is owned by Warner's Circuit Management Corporation and exhibits all of Warner's films and one-half of Paramount's. In the 1920s Warner exhibited first-run exclusively at the Metropolitan, two and a half miles from downtown. Keith's, an independent, has played half of Universal's output, half

of Paramount's, and "whatever else is available." Seating capacity is 2200-2400. The New, seating 1300, is another independent and exhibits Fox films exclusively. The Hippodrome, seating 1800-2000, was also independently owned and exhibited RKO and Columbia films. The Town was opened in 1949 by the owner of the Hippodrome and split RKO and Columbia films with the Hippodrome. The Mayfair, independent, seating 1800, is situated next to the Stanley, but unable to obtain a continuous flow of films from defendant companies, getting "slough" and films of the smaller companies.

The Crest Theatre was built at a cost of $460,000 by Theatre Enterprises, Inc., a corporation whose entire stock is owned by Myerberg and his brothers. It was completed in February, 1949. It is equipped with the most modern [fol. 350] improvements and with 1600 seats, and is physically suitable to play first-run pictures, and if located downtown, probably would have been acceptable for the preferred showings. It is situated in a shopping center at Reisterstown Road and Rogers Avenue, six miles from the nearest downtown theater, in the midst of a population center estimated at about 105,000 people.

In January, 1948, before construction of the Crest had begun, Myerberg applied for exclusive first-run privileges at the offices of the defendant distributors in Washington, D. C. He was told by all of them that no consideration could be given to his request until the theatre was near completion. When the theatre was under roof in October, 1948, Myerberg renewed his request and was told that the matter had to be decided by the New York home offices of defendants, and that he should set forth his requests by letter, which would then be referred to New York for decision. He wrote substantially identical letters requesting first-run to each defendant, except perhaps Columbia, which was approached subsequently.

Warner and Loew's advised Myerberg that each of them operated a first-run house in Baltimore, and that he should not anticipate receiving their product. The branch managers of all of the companies expressed surprise that Myerberg sought first-run outside the downtown area, contrary to the general practice of the industry. Myerberg engaged in further correspondence with defendants from October,

1948 until the theatre opened on February 26, 1949, and was "stalled" by one company and two others did not reply. He was able to see top officials of only three of defendants, and all of his efforts resulted in rejection of his request for first-run.

During the negotiations plaintiff made specific offers to various defendants for particular first-runs, and in all but [fol. 351] one case the offer included a substantial guarantee of film rental and a percentage of the gross receipts, and plaintiff offered to post certified checks. None of the offers was accepted and in some instances plaintiff received no reply.

Plaintiff persisted in its efforts to induce defendants to grant it first-run after the Crest opened, and when this proved fruitless, plaintiff engaged present counsel who entered into six more months' futile correspondence and then brought this suit.

Plaintiff at first urged that it was not in substantial competition with the downtown theaters, and therefore was willing to take first-run on a day and date basis, that is, simultaneous showing with downtown and other non-competing suburban houses. Defendants contended that the Crest was in substantial competition with the downtown theaters, and plaintiff therefore expressed willingness to bid competitively for exclusive first-runs. Plaintiff denied claiming any superior rights over other comparable neighborhood theaters sufficiently far from downtown Baltimore and from each other as not to be in substantial competition with either downtown or each other, and was willing to play with them first-run day and date. Plaintiff pointed to the Northwood, Boulevard, Senator and Edmondson Village as theaters entering into such a scheme.

Defendants uniformly denied plaintiff first-run and uniformly granted it first-subsequent-run. They each gave the same basic reasons for their action, principally that each had a policy which limited showing of first-run films throughout the country to theaters in the downtown areas of large cities, and theaters outside those sections were therefore precluded from the preferred run.

Defendants' executives testified that the movie business has developed in such a manner as the result of heavier [fol. 352] downtown traffic and more numerous downtown

attractions to draw greater crowds, particularly for matinees. The defendants were primarily interested in obtaining the largest revenue possible from the exhibition of their pictures, and they said that downtown showings have greater exploitation and advertising value and that the downtown theaters may be properly called "show-case" theaters. In addition downtown theaters have been satisfactory customers of long standing.

Defendants further claimed that if they gave first-run to the Crest, they would lose their downtown customers as well as other subsequent-run customers. They declared that the Crest could not be successful with first-run and that they would not experiment with it. They further stated that the Crest could not be preferred to other similar neighborhood houses and if they should all be granted multiple first-runs the downtown theaters would be eliminated.

The unsuccessful efforts of the plaintiff to secure first-run pictures for its theater and the testimony of the defendants' witnesses indicate clearly in the plaintiff's opinion the existence of a nationwide policy, to which each defendant company adheres, that first-run picture should be shown only in theaters in downtown sections of cities. Thereby the pictures are exploited and later they are made available to all sections of the city and [illegible] classes of people by the reduction of admission prices at later showings.

In six instances set out in the testimony exceptions to this policy have been allowed. Thus in Washington, D. C., and in Wichita, Kansas, an exhibitor which had been giving a first-run privilege to its own theater remote from the center of the city thereafter granted a similar privilege to an independent theater to avoid the charge of discrimination; and in Kansas City, Denver, Boston and Los Angeles exceptions have been made by exhibitors to their own theaters distant [fol. 353] from the center of the city. These exceptions have not been attended by the disastrous result envisaged by those who established the general policy.

Loew's, Warner, Paramount, RKO and Fox, sometimes referred to as the "big five", owned hundreds of theaters in the United States. Many exhibited first-run, almost all of them downtown. All of the defendants exhibited their films in theaters owned by the five theater-owning defendants,

and there was cross-licensing among them. Defendants produce most of the desirable films in the United States.

In addition to the more general "business reasons," Warner opposed the Crest's request because it would destroy Warner's Stanley and all other downtown houses, and would mean the elimination of downtown theaters, of which Warner owned many among its 400 odd houses throughout the country. Loew's likewise opposed the Crest because it would compete with the Century and the resulting spread of neighborhood first-run would curtail revenue from the exhibition of its pictures in downtown first-run houses operated by Fox, Warner, RKO and Paramount in other parts of the country.

Each defendant was aware of the downtown policy of the others and of the theater ownership of the "big five" mostly downtown, and of the system of cross-licensing. Paramount's representative knew that the other companies were going to sell the Crest Theater on a 21 day availability before that house opened. Fox's manager found that no downtown theater in Baltimore was willing to play first-run day and date with the Crest Theatre and decided to do what everyone else was doing. There has been frequent interchange of top sales and distribution personnel among the various defendants.

The effect of the defendants' policy has prevented the [fol. 354] plaintiff from competing in the first-run portion of the movie industry.

In accordance with § 5 of the Clayton Act, 15 U. S. C. A. § 16, the plaintiff, in addition to the testimony above set out, offered in evidence the pertinent portions of certain decrees issued by the court against the same defendants in *United States* v. *Paramount Pictures*, 334 U. S. 131,* in order to show that the defendants, prior to the opening of the Crest Theatre, had conspired with one another in restraint of trade in the moving picture industry in violation of the statutes on which the instant suit is based.

The defendants offered 19 witnesses whose testimony may be summarized as follows: It was explained that "run and

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* See also D. C. N. Y., 66 F. Supp. 323, 70 F. Supp. 53, 85 F. Supp. 881.

clearance" are a well established and essential part of the distribution and exhibition of motion pictures. Indeed Myerberg himself stated during his testimony that "runs and clearances, basically, are all right." Each of the defendant distributors licenses each of its pictures for exclusive first-run in a theater in the downtown shopping area in Baltimore and normally the first-run exhibitor is given a clearance of 21 days over the next succeeding run called the "first-neighborhood-run." No such first-run was shown ever to have occurred in Baltimore. During the three years preceding the institution of the suit, 63 per cent of the first-run exhibitions in Baltimore were held in independent theaters. Myerberg agreed that there was no showing that any of the defendants conspired with the independent downtown exhibitors or with any of the neighborhood exhibitors.

The Crest Theatre is located in the northwest quadrant of Baltimore within a mile of two other neighborhood theaters one of which is comparable to the Crest in all material [fol. 355] respects except size; and there are numerous other theaters in the city which are equal or superior to the Crest in appointments and size, many of which are better located than the Crest in respect to public transportation services. Expert testimony placed shopping centers in three classifications, namely, primary centers which have 60 to 150 different stores with one large and several smaller department stores with a drawing power of 50 miles, such as the downtown retail business area in Baltimore; secondly, centers with 20 to 50 stores and at least one department store, of which there are half a dozen in Baltimore, and thirdly, neighborhood shopping centers with not more than 15 stores and no department stores. The Crest Theatre is located in a center of the last mentioned class.

Myerberg conferred with seven of the eight defendants in Washington, D. C., in October, 1948, and about October 12, 1948, sent to all the distributing companies, except Columbia, a letter requesting an outstanding film to open the theatre, preferably a "world premiere."

Myerberg had further conferences with the distributors during October, November and December, 1948. At first he requested exclusive first-run, assuming substantial competition with the downtown houses, and later he requested

simultaneous run on the ground of no substantial competition.

United Artists told him that all its immediate releases were already sold, and did not reply to his letters. Warner said that it had its own theater and therefore would not license first-run to plaintiff. RKO said "no" after Myerberg spoke with a top official in New York. Loew's, like Warner, said that it exhibited in its own theater. Universal rejected the request after its district manager came to Baltimore to examine the Crest, and concluded that the theatre was badly located, even for a neighborhood, and that the [fol. 356] area was already adequately served and overseated. Fox rejected plaintiff's offer because the location was suitable only for neighborhood operation, and later rejected a request for day and date first-run. Paramount wrote rejecting first-run on the ground that its business interests were best served by continued exhibition of first-run downtown, rather than in suburban areas.

The Crest opened February 26, 1949, and was licensed to play first-neighborhood-run, approximately 21 days after the end of downtown first-run, the same availability given other independent first-neighborhood-run houses.

Plaintiff's attorneys on November 1 or 2, 1949, wrote defendants asking them to experiment with the Crest, first-run, and in an exchange with Fox, asked Fox to experiment first-run day and date. Columbia and United Artists did not reply to these letters. RKO and Paramount did reply, and there is no evidence of replies by Loew's, Warner and Universal.

Prior to bringing this suit, plaintiff made offers for eight pictures to four of defendants. The reasons for their rejection are typified by the following examples. Myerberg asked for an extended first-run of "Samson and Delilah" (Paramount) and offered a guarantee of $35,000 against 50 per cent of the gross. On direct examination Myerberg said that he anticipated a run of from eight to ten weeks and a gross of over $80,000. On cross-examination it developed that this would require playing to 30,000 to 90,000 of the 105,000 people in the draw area, and Myerberg reduced his estimate to a five week run, with $50,000 gross, and failed to produce pencilled notes which he claimed to

have made concerning the matter. Myerberg also asked for an exclusive first-run of "Jolson Sings Again" (Columbia), with a guarantee of $10,500 against 40 per cent of the gross, [fol. 357] and offered to post a certified check. The film had already been shown in Baltimore first-run two months before.

Testimony of experienced persons in the industry and the testimony of experts was offered in contradiction of Myerberg's testimony in order to show that the downtown theaters in Baltimore draw a substantial number of persons from the outlying districts, such as that in which the Crest is situated. This was illustrated graphically during the transit strike in 1951 when the attendance of the showing of "Quo Vadis" was materially affected although this picture was hailed throughout the country as one of outstanding merit, and except in Baltimore, far outgrossed in its first week the earlier successful picture, "Gone with the Wind." Specific evidence tended to show that the downtown theaters draw 16.34 per cent of their attendance from the area which the Crest claims to serve and that from this area and two other outlying neighborhood areas the downtown theaters draw 37 per cent of their business.

The plaintiff company contends that the evidence above summarized permits of no other conclusion than that the defendants knowingly and deliberately conspired to restrain trade in violation of the statutes and that this conspiracy is shown by the course of conduct which the defendants knowingly, deliberately and uniformly pursued. The burden to prove the conspiracy is upon the plaintiff and there is no direct evidence that the defendants entered into an unlawful agreement; but it is said that such an agreement must necessarily be inferred from the unanimity with which the defendants have adopted the national policy of limiting first-run pictures to downtown theaters under a system of runs and clearances, and that in accord with this policy they have denied first-run pictures but granted the first-subsequent-run of their pictures to the plaintiff.

The plaintiff rests its case to a great extent upon certain [fol. 358] passages in the opinions in cases in the Third Circuit to which most of the defendants in the instant case were parties. In *Wm. Goldman Theatres* v. *Loew's Inc.* 3 Cir.,

150 F. 2d 738, the court found that the defendants, who controlled the exhibition of motion pictures in downtown theaters in Philadelphia, had conspired to deny a similar privilege to another completely qualified downtown theater which the plaintiff had opened. In *Ball* v. *Paramount Pictures*, 3 Cir., 169 F. 2d 317, the court found that the defendant had conspired to take away from a theater first-run pictures upon the termination of the tenant's lease, and had agreed to license the tenant to display these pictures in a new location; and in *Milgram* v. *Loew's, Inc.*, 3 Cir., 192 F. 2d 579, the court found that the defendants had conspired to deny first-run pictures to a drive-in theater somewhat removed from the center of the nearby city.

Each of these cases was tried without a jury and the circumstances of uniform action consciously taken by a number of persons were thought by the judge to justify an inference that they had engaged in an unlawful conspiracy, and certain expressions in the opinions of the Court of Appeals have led the appellant here to conclude that such an inference from uniform action is not merely permissible but compulsory, once the facts are found. Thus in the *Goldman* case it was said:

> "* * * Plaintiff's evidence shows that there is concert of action in what has been done and that this concert could not possibly be sheer coincidence. We think there must have been some form of informal understanding. The axiom is ancient that the deed speaks for itself and that man intends the probable consequences of his act. Here, the conclusion is justified that defendants acted in concert in excluding plaintiff. This conclusion is strengthened by the circumstance that de- [fol. 359] fendants 'with like unanimity, failed to tender the testimony, at their command, of any officer or agent of a distributor who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action. * * * '". (p. 743)

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> "* * * Uniform participation by competitors in a particular system of doing business where each is aware of the other's activities, the effect of which is

> restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the statutes before us." (p. 745)

The last quoted statement is repeated in *Milgram* v. *Loew's, Inc.*, *supra*, at p. 584.

Notwithstanding these statements, we are not persuaded that it was the intention of the court to hold that it is not necessary to find that the defendants actually conspired if proof of conscious uniform action is adduced. Indeed in the *Milgram* case the court made the following statement:

> "* * * This uniformity in policy forms the basis of an inference of joint action. This does not mean, however, that in every case mere consciously parallel business practices are sufficient evidence, in themselves, from which a court may infer concerted action. Here we add that each distributor refuses to license features on first run to a drive-in even if a higher rental is offered. Each distributor has thus acted in apparent contradiction to its own self interest. This strengthens considerably the inference of conspiracy, for the conduct of the distributors is, in the absence of a valid explanation, inconsistent with decisions independently arrived at" (p. 583).

[fol. 360] Subsequently in speaking of the *Goldman* case the court said:

> "* * * The key question in that case was whether the uniform action of all distributors in not licensing pictures on first run to Goldman was the result of a conspiracy" (p. 585).

See also the decisions in *Westway Theater* v. *Twentieth Century-Fox Film Corp.*, *D. C. Md.*, 30 F. Supp. 830, 4 Cir., 113 F. 2d 932; *Windsor Theater Co.* v. *Walbrook Amusement Co.*, *D. C. Md.*, 94 F. Supp. 388, 4 Cir., 189 F. 2d 797.

In the pending case, as we have seen, the defendants offered a substantial body of evidence tending to show a certain independence of action in dealing with Crest and to explain the reasons which led the industry generally to confine the exclusion showing of first-run pictures to down-

town theaters; and it is urged on behalf of the defendants that the decision as to the Crest Theatre by each defendant was based on its experienced judgment as an individual operator, since it was obvious that the grant of first-run privileges to Crest would have led to like grants to neighborhood theaters similarly situated, to the great detriment if not the destruction of the downtown houses generally. Similarly they contend that the adoption by each of them of the same solution of a problem common to the industry indicated the exercise of individual judgment rather than the formation of an unlawful conspiracy.

We think that there was evidence to support both of the inferences drawn by the opposing parties to the case and thus an issue was presented which was necessarily submitted to the jury for decision. In doing so the judge in effect instructed the jury as to the nature of an unlawful conspiracy and told them that the burden of proof was [fol. 361] upon the plaintiff to prove the conspiracy; but that the proof might consist of direct evidence of the fact or circumstantial evidence which gives rise to a logical inference of the existence of the fact, and that in considering the evidence in the case the jury should take into consideration the similarity of business practices of the defendants in general, and with respect to the Crest Theatre in particular, in determining whether there had been a conspiracy; but that if the similarity resulted from nothing more than a common business solution of identical problems in a competitive industry the similarity of conduct would not require a conclusion that the conspiracy actually existed. We find no error in this action of the trial judge.

The plaintiff raises numerous objections to the charge of the court. The District Judge in the opening paragraphs of the charge told the jury that the suit was brought under the anti-trust acts to recover damages suffered by the plaintiff during the period from the opening of its theatre up to March 20, 1950, "the date of the filing of this suit which was originally brought in Philadelphia but was transferred to this jurisdiction on defendants' motion for convenience of the parties, such being permitted since the suit might have been brought originally in this court." The plaintiff objects to the quoted passage on the ground that there was

some doubt as to whether the suit could have been originally brought in Maryland against all defendants and hence the right of removal was not settled until December 8, 1910 when the opinion in *Pennsylvania Tobacco v. Rodney*, 1 Cir., 186 F. 84 [illegible] was handed down.

There is nothing in the case, however, to indicate that the charge as given was incorrect in this particular either in fact or in law. The only possible statement by the plaintiff in this connection was the disclosure of the fact that it preferred to try the case in Philadelphia whereas [fol. 362] the defendants preferred to try the case in Baltimore. This was brought out by counsel for defendants in their closing argument and counsel for the plaintiff replied that the case was brought in Philadelphia because of the double share mentioned. The plaintiff, however, manifested its preference to try the case in Baltimore by resisting the removal even after the right of removal was clearly established, so that the jury were in no way misled as to the material fact.

The plaintiff objects to the instruction that its claim must be judged separately as to each defendant although it was asserting the existence of a national conspiracy which happened to have its impact in Baltimore. There is nothing in the point, there or in the same part as well as in other portions of the charge, the judge made it quite clear that the gist of the plaintiff's case was the existence of a combination or conspiracy of the defendants and it was necessary that the jury consider the actions of each defendant separately in order to determine whether it was a member of the combination.

The instruction to the jury on the question of burden of proof is also assailed. The language objected to is contained in the following statement of the court:

"* * * The burden of proof, as I have explained to you, rests upon the plaintiff. If there was no common purpose and no uniformity of conduct between any one defendant and any of the other defendants, you may consider those facts in determining whether that defendant entered into any combination or conspiracy with any of the other defendants. It is not enough that there has been created in your minds some doubt or

suspicion as to the conduct of the defendants; the plaintiff must produce proof of such a nature as carries a conviction to your minds, such as would [fol. 363] influence you in the conduct of your own business or daily affairs. The character of the proof must be such as you would be willing to act upon and base a judgment upon in the disposal of important matters."

It is contended that this language placed the burden of proof beyond a reasonable doubt upon the plaintiff; but obviously this is not so; and moreover, the judge, prior to making the statement, had contrasted the burden of proof in civil cases with that in criminal cases which, as he pointed out, the jury had learned from their experience in previous criminal trials. The jury were expressly told that the burden of proof in a civil case of the kind before the court is met if it is supported by what the jury finds to be the weight of the credible evidence.

It is also contended that the judge should have told the jury in the words of the Third Circuit in the *Goldman* case, 150 F. 2d 738, 745, that uniform participation by competitors in a particular system of doing business, where each is aware of the others' activities, is sufficient to establish an unlawful conspiracy, if the effect is restraint of interstate commerce. This statement standing alone would have been misleading and insufficient, for although conscious similarity or uniformity of action may give rise to a reasonable inference of conspiracy, it does not compel a finding of conspiracy. We think that this was made clear to the jury by the charge of the court. The holding in *Interstate Circuit v. United States*, 306 U. S. 208, [illegible] to the contrary. In that case the trial judge had drawn a reasonable inference of conspiracy from the concerted action of the defendants, and the defendants had failed to tender any evidence as to whether an agreement had in fact been reached, and the Supreme Court said that since the proof supported the inference of concerted action the burden [fol. 364] rested on the defendants of going forward with the evidence to explain or contradict it. In the pending case the defendants did go forward with explanatory proof.

During the trial, the plaintiff in order to establish its charge of conspiracy against the defendants, offered in evidence the decrees issued against the same defendants by the court in *United States v. Paramount Pictures*, 334 U. S. 131, D. C. N. Y., 66 F. Supp. 323, 70 F. Supp. 53, 85 F. Supp. 881. In that case it was found that the same defendants, prior to the existence of the Crest Theatre, had conspired to restrain trade in violation of the anti-trust acts by agreeing illegally to fix prices and to impose unreasonable clearances and in other ways, and decrees of injunction were accordingly issued against them.

The evidence was admitted in the instant case under the provisions of § 5 of the Clayton Act, 15 U. S. C. A. § 16, which provides that a final judgment rendered in a criminal prosecution or in a suit in equity brought by the United States under the anti-trust laws to the effect that a defendant has violated these laws, shall be prima facie evidence against the defendant in any suit brought against him by any other party under the said laws as to all matters respecting which the former judgment would be an estoppel as between the parties thereto.

The statute was applied in *Emich v. General Motors*, 340 U. S. 558, where the plaintiff sued to recover damages against certain defendants who had conspired to restrain trade in violation of the anti-trust acts, and it was held that the plaintiff was entitled to put in evidence the decree in a prior injunction suit brought by the government in which it was shown that the same defendants had entered into such a conspiracy and had effectuated it by illegally coercing the plaintiff and other persons. The decree was held to be prima facie evidence both of the conspiracy and [fol. 365] of the effectuating acts. It was also held that the judge was free to exercise his discretion in explaining to the jury the issues decided in the prior case bearing upon the case on trial before him.

The Paramount decrees had no relation to the Crest Theatre since it was built after they were rendered, but they were offered to show that the defendants had entered into a prior conspiracy which was given effect when the plaintiff applied for first-run privileges. The judge resolved his doubts as

to admissibility in favor of the plaintiff, and gave the following instructions to the jury:

"* * * I instruct you that in that case, which was a suit between the Government and the same defendants, which was decided and covered by the decrees in that case, these same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become prima facie evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only prima facie evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibitions from the plaintiff, or have conspired [fol. 366] to restrict plaintiff to clearances which are unreasonable.

If you find that the plaintiff has sustained this burden of proving a conspiracy as just defined, then, I instruct you that, by virtue of the terms of the decrees in the previous equity suit, which form part of the evidence in this case, the burden of proving the reasonableness of the failure to give the plaintiff first run exclusively or day and date, that is, questions of clearance, as well as the failure to give it any other clearance such as would be reasonable, rests not upon the plaintiff but upon the defendants."

We find nothing detrimental to the plaintiff in these instructions. The court correctly instructed the jury that the decrees were only prima facie evidence and not conclusive

evidence of the conspiracy on which the plaintiff's case is based. This is in accordance with the terms of the statute and with the holding in *Fifth & Walnut, Inc.* v. *Loew's, Inc.*, 2 Cir., 176 F. 2d 587, 590, where it was held that the decision in the *Paramount* case was not conclusive of the question of conspiracy among the defendants in a private damage action involving a single city. See also *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 2 Cir., 190 F. 2d 951, 957-8.

There were other objections to the Judge's charge, all of which have been considered, but we find no error, and nothing worthy of additional comment. The judgment is therefore

Affirmed.

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[fol. 367] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6512

THEATRE ENTERPRISES, INC., Appellant,

vs.

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO Radio Pictures, Inc., Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc., United Artists Corporation, Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, Warner Bros. Circuit Management Corporation, Columbia Pictures Corporation, Appellees

Appeal from the United States District Court for the District of Maryland

JUDGMENT—Filed January 5, 1953

This Cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

January 5, 1953.

John J. Parker, Chief Judge, Fourth Circuit; Morris A. Soper, U. S. Circuit Judge; Armisted M. Dobie, U. S. Circuit Judge.

January 27, 1953, petition of appellant for a stay of mandate is filed.

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[fol. 368] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ORDER STAYING MANDATE—Filed January 29, 1953

(Style of Court and Title Omitted)

Upon the Application of the Appellant, by its counsel, and for good cause shown,

It Is Ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the said Appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

January 28, 1953.

John J. Parker, Chief Judge, Fourth Circuit.

February 26, 1953, motion for further stay of mandate is filed.

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ORDER FURTHER STAYING MANDATE—Filed February 26, 1953

(Style of Court and Title Omitted)

Upon the Application of the Appellant, by its counsel and for good cause shown,

It Is Ordered that the mandate of this Court in the above entitled case be, and the same is hereby, further stayed

pending the application of the said Appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a Writ of Certiorari is filed in the said Supreme Court by March 9, 1953.

February 25, 1953.

John J. Parker, Chief Judge, Fourth Circuit.

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[fol. 369] In the Supreme Court of the United States, October Term, 1952

[Title omitted]

Stipulation—February 24, 1953

It Is Stipulated and Agreed, by and between counsel for the respective parties hereto, that for the purpose of the petition for writ of certiorari the printed record may consist of the following:

1. Appendix to brief of appellant in the United States Court of Appeals for the Fourth Circuit.

2. Appendix to brief of appellees in the United States Court of Appeals for the Fourth Circuit, and its Opinion.

3. The proceedings had before the United States Court of Appeals for the Fourth Circuit.

4. This stipulation.

It Is Further Stipulated and Agreed that the petitioner will cause the Clerk of the United States Court of Appeals for the Fourth Circuit to certify and file with the Clerk of the Supreme Court of the United States the complete record on appeal; and that, in the event the petition for writ of [fol. 370] certiorari is granted, the printed record shall consist of the printed record on the petition for writ of certiorari and such additional portions of the certified record as the parties may designate.

It Is Further Stipulated and Agreed that the parties hereto may refer in the petition for writ of certiorari and

briefs to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

Gray, Anderson, Schaffer & Rome, by Edwin P. Rome, Sol C. Berenholtz, Counsel for Petitioner; R. Dorsey Watkins, J. Cookman Boyd, Jr., Counsel for Respondents.

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[fol. 371] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 366] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 649

THEATRE ENTERPRISES, INC., Petitioner,

vs.

PARAMOUNT FILM DISTRIBUTING CORP., et al.

ORDER ALLOWING CERTIORARI—Filed May 25, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

# Supreme Court of the United States

OCTOBER TERM. No.

*Theatre Enterprises, Inc., Petitioner,*

v.

*Paramount Film Distributing Corp.,*
*Loew's Incorporated,*
*RKO Radio Pictures, Inc.,*
*Twentieth Century-Fox Film Corporation,*
*Universal Film Exchanges, Inc.,*
*United Artists Corporation,*
*Warner Bros. Pictures Distributing Corp.,*
*Warner Bros. Circuit Management Corp.,*
*Columbia Pictures Corporation, Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Theatre Enterprises, Inc., prays that a writ of certiorari issue to review final judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on January 5, 1953.

## OPINION BELOW.

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at F. 2d.

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## STATEMENT OF THE MATTER INVOLVED.

This is an action begun on March 20, 1950, by Theatre Enterprises, Inc., a Maryland corporation, under the anti-trust laws against the eight largest and most important motion picture companies in the United States. Petitioner sought injunctive relief and monetary damages for the loss suffered as a result of defendants' denying petitioner's theatre access to first-run product in Baltimore.*

Suit was originally instituted in the United States District Court for the Eastern District of Pennsylvania, but the case was transferred to the United States District Court for the District of Maryland where it was tried before Judge William C. Coleman and a jury. The jury brought in a verdict in favor of all defendants, which was affirmed on appeal.

This case revolves around the denial of first run motion pictures to petitioner's new 1600-seat Crest Theatre, built, at the cost of almost half a million dollars, six miles away from the nearest downtown first run theatre in Baltimore. The trial judge submitted all the issues to the jury having refused to charge as a matter of law that the conduct of the defendants, *based on the admitted and undisputed evidence*, established a fixed and arbitrary system of runs and clearances causing the exclusion from the first run exhibition field of any independent exhibitor whose

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*The complaint contained a second cause of action seeking damages for the loss suffered as the result of discriminatory practices to which petitioner's theatre was subjected even on the first subsequent run which it was granted. Although much evidence was submitted on this phase of the case during the trial, questions relating to it were not raised on appeal.

theatre is located outside of the downtown area of cities. This conduct, it was argued, violated the anti-trust laws and the decrees following this Court's opinion in *United States* v. *Paramount Pictures, et al.*, 334 U. S. 131 (1948).

The defendants admit that if the Crest Theatre were in downtown Baltimore or were owned by one of themselves, it would be granted access to first run films. They gave as their principal reason for their refusal so to license pictures to the Crest the fact that they have a uniform policy, not only in Baltimore but in all the cities throughout the United States, limiting the exhibition of first run pictures to downtown theatres. Significantly, two of the defendants, Loew's and Warner, rejected the petitioner's request for first run because if it were granted they feared the competition to their own downtown theatres in Baltimore and other cities.

The existence of this national policy was specifically admitted by the defendants as was the knowledge of each that the others followed the same policy. Defendants' counsel, in his opening statement to the jury speaking about petitioner's request for access to first run pictures, said (1a):

> "That is his idea of the new manner of distribution that he wants to put into Baltimore and thus change the entire manner and method that has been in existence in this state, and most of the states of the United States, for years and years."

Some of the defendants attempt to assign other "business reasons" as additional justification for refusing petitioner first run, but these do not militate against the illegality of the maintenance of this admittedly uniform policy.

The evidence in this case must be viewed against the background of the conduct of the motion picture industry by these defendants. As was held in the *Paramount* case:

1. These defendants conspired to evolve and maintain a uniform system of run and clearance.

2. These defendants have imposed arbitrary and unreasonable clearances.

3. The system of run and clearance evolved by or acquiesced in by these defendants frequently worked to the disadvantage of independent exhibitors in competition with affiliated exhibitors and to the disadvantage of new theatres trying to break into the field and compete with old customers of these defendants.

4. One of the purposes of the theatre-owning defendants, in fixing runs and clearances, was to exclude competition to their own theatres.

Against that background must be placed the following which appears from the undisputed evidence in the present case:

1. The defendants uniformly deny petitioner access to first-run pictures, but uniformly grant first subsequent run pictures.

2. The defendants uniformly adhere to a policy, applicable not only to Baltimore but throughout the United States, which limits the showing of first-run pictures to downtown theatres.

3. Each defendant knows that every other defendant has followed the same national policy for many years, before, during and after the *Paramount* litigation, and has applied the policy to all theatres located outside of the downtown sections of cities no matter how fine they may be and no matter what film rental they may offer.

4. The rare exceptions to the national policy recognized by the defendants have been made almost always for theatres owned by one of themselves or else to avoid the obvious discrimination which would

be manifest by denying the run to an independent in a city where one of the defendants' own suburban theatres is granted to run.

5. Five of the defendants own hundreds of theatres throughout the country, many of which are first-run theatres and practically all of which first-run theatres are located in the downtown sections of cities.

6. All defendants license their first-run pictures to theatres owned by these five and substantial revenues are derived from such cross-licensing.

7. All defendants know of the theatre ownership of the five, know of the cross-licensing and of the substantial revenues thus derived.

8. Petitioner's Crest Theatre is a new $460,000 sixteen hundred seat house located six miles from the nearest downtown theatre, is comparable to the theatres in Baltimore actually granted first-run and, if it had been located downtown, or if it had been owned by one of the defendants, would itself have been granted first-run.

9. Petitioner was willing to pay by certified check film rentals equal to or greater than those actually received by the defendants from their existing first-run accounts.

10. The defendants refused to grant the Crest first run because they feared the competition to their own downtown first-run houses from the Crest and from similar demands of suburban theatres all over the country.

11. The decisions of the defendants were made without regard to the particular circumstances of the Crest Theatre and without any top executive actually seeing the theatre.

12. The decisions of the defendants and their national policy necessarily establish a fixed and

arbitrary system of runs and clearances and cause the exclusion of any independent exhibitor from the first-run exhibition field if his theatre is located outside of the downtown area of cities.

These twelve points of the present case are accepted by the Court of Appeals in its opinion with the single exception of the reference to the fact that the defendants had a fixed and arbitrary system of runs and clearances. Nevertheless, the judgment for the defendants was affirmed.

* * * * * * *

The factual situation, as revealed in a little more detail by the record below, is as follows:

The theatre situation in Baltimore.

For many years, eight theatres located in the downtown section of Baltimore have had divided among them the first-run product of the defendant companies (2a-6a). Loew's has operated two of these houses and Warner Bros. one. The other five theatres have been owned by independent exhibitors. Over the years there has been no change in the division of product among the various theatres. For example, Warner's Stanley Theatre has always exhibited all of Warner and half of Paramount pictures, while Loew's houses have always exhibited all of Loew's, half of Universal and some United Artists pictures. This rigid allocation was explained by defense witnesses on the ground that each company had a satisfactory customer and saw no need to seek better terms from any other exhibitor (144a).

The construction of the Crest Theatre and its qualifications.

The Crest Theatre was built as part of a shopping center after a population survey revealed that about

105,000 people lived in the immediate vicinity. The qualifications of the Crest are not really disputed. It received an international award as one of the finest theatres built in the western hemisphere in 1949 (53a), and the correspondence and testimony of the defendants show their recognition of its merits (22a, 64a, 84a, 144a, 191a). Witnesses for Columbia, Universal, Paramount and Loew's all agreed that if the Crest were located downtown it would have access to first-run pictures (206a, 211a, 219a). Warner's District Manager even intimated that the Crest, located where it is, would have been able to license first-run day and date pictures had Warner owned it (166a).

**Petitioner's efforts to obtain first-run pictures.**

Even before ground was broken for the Crest, petitioner's president, Mr. Myerberg, in January, 1948, went to the branch offices of the defendants in Washington, informed them of his plans and sought first-run pictures. He was uniformly advised that no consideration could be given to his request until the theatre was near completion (10a, 189a). Thereafter, from October, 1948, on, repeated efforts were made and voluminous correspondence exchanged, to no avail. Petitioner was "stalled" by at least one company (48a), two did not reply at all (28a), and Mr. Myerberg was never able to see any company representatives, apart from the Washington branch managers and salesmen, except the Eastern Division managers of Fox and Universal and the assistant to the Vice President of RKO (29a, 43a, 50a). All his efforts met a uniform refusal.

Petitioner's specific offers for particular pictures for first-run exhibition, which included very substantial guarantees of film rental, and a readiness to post certified checks, were either rejected or ignored (29a, 45a, 55a, 58a, 59a).

**What the petitioner sought.**

Because the Crest was located 6 miles away from the nearest downtown first-run theatre, petitioner has always been convinced that it was too far away to be considered in substantial competition with those theatres. Consequently, petitioner has always been ready and willing to exhibit the defendants' pictures on first run day and date with any of the downtown houses, and has been willing to pay the same film rentals for a day and date or an exclusive first run. Since the defendants took the view that the Crest was in substantial competition with the downtown first-run theatres, petitioner has always been ready and willing to negotiate or bid competitively against those theatres for the right to exhibit pictures on an exclusive first run.

In essence, then, what petitioner sought was the opportunity to exhibit pictures on *first run*, and although it would have preferred to exhibit them simultaneously with a downtown house, it was prepared to accede to the defendants' contention of substantial competition if thereby the Crest were at least given the opportunity to compete.

**The uniform rejection by defendants and their reasons.**

Not a single home office executive with ultimate responsibility for making the decision saw the Crest Theatre before it was uniformly denied first-run and uniformly granted first subsequent-run pictures (50a). All companies acted on the basis of the national policy limiting the showing of first-run films throughout the country to downtown theatres. Although other purported "business" reasons were referred to, they were actually attempted explanations or justifications for the national policy. The most significant such reason is the assertion by the defendants that they had "satisfactory customers" in the downtown theatres, and saw no reason to depart from their old

policy of preferring those customers (144a, 148a). The defendants claimed that playing first-run pictures in a so-called suburban theatre like the Crest could not be successful although, with only rare exceptions mentioned below, they had never experimented with the idea nor would they experiment with it (150a, 230a).

**The national policy of the defendants.**

The national policy referred to in defense counsel's opening statement, noted above, was spelled out by witnesses from each company. Space limitations permit the quotation of a single example only, but representative of all such testimony is that of Mr. Zimmerman of RKO (145a-146a):

"Q. Now, let us take this specific example. Suppose the Crest Theatre was located in the downtown area of Baltimore. Would it have right to access?

A. Yes.

Q. It would have right to have access to RKO pictures on first run in the City of Baltimore?

A. It would be offered a competitive opportunity.

Q. So, if I understand you and follow you, it is only by reason of the fact that it is located outside of the downtown area that it has been denied that right of access to RKO pictures?

A. I think that is a fair statement of the reasons for our decision.

Q. And that would be true as to any theatre located outside of the downtown area, no matter how fine it might be?

A. That is correct. I mean it is true of any theatre in Baltimore. It is true of any theatre located outside of the downtown area.

Q. Is not that true also with regard to other cities in the country?

A. Yes, generally true with respect to other cities, depending on circumstances."

Executives from Warner's (164a), Fox (182a), Loew's (233a), Paramount (218a), Columbia (60a) and Universal (213a) testified to the same effect.*

**The exceptions to the national policy.**

In about half a dozen situations throughout the country the defendants have granted access to first-run pictures to theatres located outside of the downtown areas. In so doing they have demonstrated their power and control over the distribution and exhibition of motion pictures as well as the complete unsubstantiality of their "business reasons" for refusing the Crest.

An example is found in Washington, D. C. There Warner Bros. owns and operates a first-run theatre, the Warner, in the downtown section and another theatre, the Ambassador, located approximately 2½ miles from downtown. Despite all the purported reasons against such a practice, Warner's Ambassador has for years played Warner, Paramount and Columbia first-run pictures day and date with the Warner downtown house (69a).

In 1951, an independent exhibitor sought first-run pictures for the new Ontario Theatre at 17th and Columbia Road, a block away from Warner's Ambassador. Paramount's Washington Branch Manager wrote to his superiors that the demand, if pushed, "can result in a real whopper" and "could lead to one fine mess" (70a). He warned that "this is a rather ticklish situation as you can readily understand" (72a). Higher officers "stressed the importance of the matter" and felt "that a conference should be held relative to it" (74a). The Ontario Theatre actually obtained Paramount pictures on an exclusive first run (75a). Paramount's Assistant General Sales Manager admitted that this was granted because Warner's Ambassador Theatre had for years been granted access to Paramount product (216a, 218a).

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* United Artists called only a former Branch Manager who knew nothing of the situation.

In a few other instances the defendants also ignored all the so-called business reasons which they said prevented their granting first-run to the Crest and gave such a preferred run *to their own theatres* even though located away from downtown. Thus, it was done in Kansas City (90a) and Denver (205a) where Fox owned "neighborhood houses" and in Boston where Loew's owned such a theatre and in Los Angeles where a number of the defendants owned theatres (204a).

In Wichita, Kansas, Fox's Boulevard Theatre, more than four miles away from downtown, played first run and when two new independent theatres in the same area sought equal access they were ultimately granted it because, as one of Paramount's lawyers wrote (105a):

> "Both Mr. Smith and myself have reached the conclusion that because we have licensed this run in the past from time to time in the Fox Boulevard Theatre, we could be accused of discrimination in favor of Fox if we do not offer a comparable theatre the same opportunity."

It should be added that despite the assertion that the change in the national policy would be bad business, would harm the first and subsequent run revenues derived by the defendants and would cause the elimination of the downtown theatres, the defendants' witnesses themselves admitted that these exceptions to the policy have been successful (161a), and, contrary to their predictions, the subsequent run theatres had not gone out of existence nor have the first-run theatres really been hurt (185a).

**The defendants' theatre holdings and cross-licensing.**

The record below supports the well-known facts of the importance of the defendants' pictures (142a), the ownership by the Big Five of hundreds of theatres throughout the country (126a, 138a) and the cross-licensing

and payment of substantial sums for film rental among the defendants (178a, 203a, 230a). It is also shown that many of the theatres owned by the Big Five are first-run houses which, with almost no exception, are located downtown (139a, 176a).

These facts supply the real economic motivation for limiting the showing of first-run pictures to downtown theatres in accordance with the defendants' national policy.

Charles V. Grimes, of Warner Bros., admitted that his company opposed the granting of first run to the Crest and other theatres like it because "it would destroy" Warner Bros., Stanley and all other downtown houses (162a). Mr. Grimes explained that Warner's simply did not want the Crest competing with the Stanley (162a).

Robert Smeltzer of Warner Bros. (103a) and John F. Murphy of Loew's (223a) testified to the same effect. William F. Rodgers of Loew's drove the point home by admitting that if theatres out of the downtown area were to get access to first-run pictures, he feared that the revenues derived by Loew's from the exhibition of its pictures in the downtown first-run house operated by the other defendants would be considerably curtailed (230a).

**The defendants' knowledge.**

The defendants' key witnesses admitted that each knew that the other defendants adhered to the same policy. As Mr. Zimmerman of RKO pointed out, all one had to do in order to be aware of the fact was to look in the papers (150a). In addition, however, Paramount's Washington Branch Manager wrote his home office before the Crest opened, told his superiors exactly what the other companies were going to do, and recommended doing the same thing (66a). The Fox Branch Manager testified flatly, "* * * we did what everyone was doing" (192a).

The amazing interchange of top sales and distribution personnel among the various companies is the most striking evidence of all establishing the knowledge pos-

sessed by each defendant of the conduct of the owners in denying first-run to suburban theatres.

Thus, Alexander Lichtman has been successively General Manager for Paramount, Vice President and General Sales Manager and later President of United Artists, then Vice President of Loew's and, at the time of the trial, Vice President of Fox (167a). The president of Fox is Spyros Skouras, a life-long friend of Mr. Lichtman (168a). Mr. Skouras has a brother, George, who heads a separate circuit, operating "quite a number" of theatres (175a-176a). There is another brother, Charles Skouras, who heads the subsidiary of Fox itself which operates "approximately 500 theatres", many of which are first-run downtown houses (176a).

One of the executive heads of Fox is Joseph Schenck, the brother of Nicholas Schenck, who is the president of Loew's, Inc. (175a).

Andrew Smith, who preceded Mr. Lichtman in his sales position with Fox, had himself earlier held similar positions with RKO and Warner (140a).

Mr. Smith's successor as General Sales Manager at RKO was Robert Mochrie, and Mr. Mochrie before going with RKO was a sales executive with United Artists and Warners (140a).

Samuel Goldwyn, whose pictures are now distributed through RKO, used to be one of the chief executives of United Artists (141a).

Another sales executive of United Artists, during Mr. Lichtman's tenure there, was G. L. Sears, who was formerly with Warners in a similar capacity (177a).

Howard Minsky, one of the Fox officials who participated in the discussions about the Crest, is now with Paramount (176a). Fred Meyers, once Universal Eastern Division Sales Manager, is now with United Artists and used to be with RKO.

Loew's General Sales Manager is now Charles Reagan, who previously headed Paramount's sales force

(177a). Edward K. O'Shea, for the last six years the Assistant General Sales Manager of Paramount, was for 26 years with Loew's (177a).

William Scully, the General Sales Manager of Universal, once was a sales executive with Loew's (177a) and Mr. Blumberg, the President of Universal used to be Vice President of RKO (178a).

**The effect of denying the Crest first run.**

The defendants recognized that their denial of first run to the Crest had the effect "naturally" of confining first run to the downtown area (150a) and of fixing the terms, conditions and manner in which this new $460,000 theatre could compete in the motion picture industry (189a). The decision of the defendants fixed the run and the clearance for the Crest (206a) as well as for all theatres throughout the country located outside the downtown sections of cities.

Petitioner contended, therefore, that in effect a fence had been erected by the defendants around one portion of the motion picture industry and that thereby competition was unreasonably restricted.

**The Paramount case.**

In accordance with Section 5 of the Clayton Act, petitioner offered in evidence the pertinent portions of the decrees from the *Paramount* case. Although Judge Coleman originally sustained the defendants' objections to this offer, before the case went to the jury he admitted the decrees. He charged the jury most briefly concerning the Government's action and rejected all of the requests for instruction submitted by petitioner for the purpose of explaining the effect of the *Paramount* case to the jury, in accordance with the procedure set forth in *Emich v. General Motors Corporation*, 340 U. S. 558 (1951). The trial judge's charge and his denial of these

and other requested instructions form the basis of numerous exceptions taken by the petitioner.

* * * * * * *

The reason supporting petitioner's contention that the defendants' conduct, measured against the yardstick of the *Paramount* case, violated the antitrust laws *as a matter of law* was summed up succinctly in *Milgram* v. *Loew's, Inc.*, 94 F. Supp. 416, 421 (1950), affirmed in 192 F. 2d 579 (C. A. 3, 1951), cert. denied 96 L. ed 508 (1952):

> "Both the District Court and Supreme Court, in the Paramount case, unqualifiedly condemned any system of clearance which had 'acquired a fixed and uniform character' and which were 'made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade.'"

The *Milgram* case is extraordinarily apposite to the present case since there the same defendants violated the antitrust laws by their uniform conduct to effectuate their nationwide policy denying first-run pictures to *drive-in* theatres. In *Milgram* these defendants advanced the identical "business reasons" which they used against petitioner's conventional theatre in Baltimore, but these were held by the Court of Appeals for the Third Circuit to be "not strictly relevant" (192 F. 2d at 585) and were rejected in the face of the existence of the national policy.

The Court of Appeals in affirming the judgment in the present case held "that there was evidence to support both of the inferences drawn by the opposing parties to the case and thus an issue was presented which was necessarily submitted to the jury for decision". It attempted to distinguish *Milgram* on the ground that it was tried without a jury and that the trial judge inferred a conspiracy from the circumstances of uniform action before him. In the same way the Court sought to dis-

tinguish two other decisions from the Third Circuit, *William Goldman Theatres* v. *Loew's, Inc.*, 150 F. 2d 738 (1945), cert. denied 334 U. S. 811 (1948), and *Ball* v. *Paramount Pictures*, 169 F. 2d 317 (1948), cert. denied 339 U. S. 911 (1950).

Actually in both *Goldman* and *Ball* the trial judge sitting without a jury had found in favor of the defendants because in each instance he was unable to conclude that the purported business reasons of the defendants were not reasonably valid and because he had not been able to find a conspiracy. The importance of these cases arises from the fact that the Third Circuit reversed both judgments and held *as a matter of law* that the particular conduct of the defendants constituted a conspiracy. On the basis of this authority, petitioner in the present case contends that the Court of Appeals for the Fourth Circuit erred in affirming the trial judge's submission of the issue of conspiracy to the jury. Under the rulings in *Paramount*, *Goldman* and *Ball* the conduct of the defendants is necessarily to be equated with conspiracy and it was error to permit the jury below to speculate about the problem.

* * * * * * *

The decrees from the *Paramount* case having been admitted below, petitioner requested various instructions to explain the full scope and effect of the earlier case. In trying to meet the obligation placed upon him by the *Emich* case, the trial judge charged the jury in five sentences only (273a):

> "* * * I instruct you that in that case, which was a suit between the Government and these same defendants which was decided and covered by the decrees in that case, these same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run

and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become *prima facie* evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only *prima facie* evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibition from the plaintiff, or have conspired to restrict plaintiff to clearances which are unreasonable."

Petitioner contends that this portion of the charge is both inadequate and erroneous. Actually the trial judge for all practical purposes took the *Paramount* case out of the jury's consideration by asserting that it did not cover the Baltimore factual situation and *therefore*, it was still necessary for petitioner below to prove the conspiracy charged.

Baltimore was in fact referred to in the Government's Amended Complaint but, in any event, there was no requirement that the Government prove all the issues that might arise in any given locality: *Deluxe Theatre Corp.* v. *Balaban & Katz Corp.*, 95 F. Supp. 983, 986 (N. D. Ill., 1951).

The trial court's attitude and intention with regard to the *Paramount* case are illuminated by his remarking (211a), "That was a pretty big order, wasn't it?", when his attention was invited to the rule of the *Emick* case. Later, in colloquy with counsel, he said (1501), "All you

are entitled to is what I understand to be the bald principles that are announced in these decrees," But the comment which most clearly reveals the arbitrary and rigid limitations being placed upon petitioner's use of the *Paramount* case is found in Judge Coleman's remark to counsel (236a):

> "* * * it does not amount to anything, it has not force, no probative value unless they [the jury] find a concert of action."

The Court of Appeals found "nothing detrimental to the plaintiff in these instructions". It added that the trial judge had properly told the jury, in line with *Fifth & Walnut Inc.* v. *Loew's Inc.*, 176 F. 2d 587 (C. A. 2, 1949), that the decree from the *Paramount* case was not conclusive but only *prima facie* evidence of conspiracy. Petitioner here had not, however, contended that the *Paramount* decrees were conclusive but had only sought a full and clear charge on the subject which was required by the *Enich* case and which was necessary in order to have the facts in the present case fall into proper perspective. Compare *Ball*, 169 F. 2d at 321, and *Milgram*, 192 F. 2d at 581.

Judge Coleman's misapprehension of the scope and effect of the *Paramount* case manifested itself in other ways in his charge. Thus, the jury was instructed over objection that Loew's and Warner had an unqualified legal right to place their own pictures in their own theatres (271a). These defendants are, however, enjoined by the *Paramount* decrees from granting any clearance to theatres not in substantial competition and therefore Judge Coleman was requested to instruct the jury that if it found that the Crest was so far away from the Warner and Loew houses as not to be in substantial competition, then clearance between those theatres would be improper; in other words, if there were no substantial competition, the Crest would be entitled to play day and date with these defendants' own theatres.

The refusal of this request left the jury in ignorance of the entire problem of day and date first-run exhibition, a crucial issue in this case.

Furthermore, the petitioner was seeking injunctive relief for the future. No matter what might have been true in the past, it was admitted at the time of trial that Loew's, for example, was then no longer licensing its product exclusively to its own Century Theatre. Other houses were being given access and the Crest, therefore, was entitled to equal treatment. The situation had changed because of the divorcement and divestiture treatment of the *Paramount* decrees, but the trial judge below did nothing to inform the jury with regard to those matters.

On the contrary, in telling the jury that Loew's and Warner's had the absolute legal right to do with their pictures what they chose, the court likened the situation to a person selling his own home grown farm products in his own grocery store (267a). This economic analogy is, of course, contrary to the recognized fact that these defendants produce the desirable motion pictures on which the operators of first-run theatres in this country are dependent in order to stay in business: *White Bear Theatres Corp.* v. *State Theatre Corp.*, 129 F. 2d 900, 903 (C. A. 8, 1942); *William Goldman Theatres, Inc.* v. *Loew's, et al.*, 150 F. 2d 738, 741 (C. A. 3, 1945); *Gittone* v. *Warner Bros. Pictures, Inc.*, 30 F. Supp. 823 (E. D. Pa. 1939), reversed on other grounds 110 F. 2d 292 (C. A. 3, 1949); *United States* v. *Paramount Pictures*, 66 F. Supp. 323, 334 (S. D. N. Y. 1946).

This Court will recall that the decrees in the *Paramount* case provided that:

> "Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof."

This provision had an important bearing upon burden of proof in the present case but we respectfully suggest that the trial judge's exposition of the problem must have left the jury completely confused. He said (273a):

"If you find that the plaintiff has sustained this burden of proving a conspiracy as just defined, then, I instruct you that, by virtue of the terms of the decrees in the previous equity suit, which form part of the evidence in this case, the burden of proving the reasonableness of the failure to give the plaintiff first run exclusively or day and date, that is, questions of clearance, as well as the failure to give it any other clearance such as would be reasonable, rests not upon the plaintiff but upon the defendants.

"I will just summarize that again. I told you earlier that the burden of proof in this case, just like in all civil suits, generally speaking, rests upon the moving party; and if A sues B, the law says that A must prove his claim in order to recover. That is true in this case, as I have explained. But, by reason of the fact that what we may call the broad issues involved in this case were involved in the Paramount case, there is a statutory provision which allows those issues, insofar as they may have a bearing upon the issues in a particular case like this, to become *prima facie* evidence; and, if you find, as a result of your examination of those decrees, that, as respects clearances, these defendants, or any of them, have given unreasonable clearances, it is not necessary for you to find that the plaintiff has proved that, but the burden of showing that they are not unreasonable shifts over to the defendants.

"I might explain that a little more in A-B-C language in this way: a court order, which is called a decree for the purposes of this kind of a case, is obtained against certain parties,—let us say in a trademark case—that they can only use a certain

label or words in a certain way, and the party that was originally aggrieved thinks that label has not been followed out, but that a label in violation of the court's order has been used; so the parties can be brought into court; and then the burden is on that party who has used the new label to show that he is within the order of the court and is not in contempt of it. That, I think, explains somewhat the only really technical point of law that exists in this case."

This instruction begins by telling the jury that if petitioner proves a conspiracy, i. e., wins its case, then the defendant must assume the burden of proving the reasonableness of the clearance imposed. This can hardly be said to be in line with the provision of the decrees placing the burden of proof on the defendants in the beginning whenever a clearance provision is attacked. The court's instruction links reasonableness of clearance with conspiracy and literally shifts the burden of proof at a time when petitioner would be entitled to a directed verdict as a matter of law. This error, we submit, is compounded by the court's later language telling the jury that if they found from the *Paramount* decrees that the defendants had imposed unreasonable clearances then it was not necessary for the jury to conclude that petitioner had proved that fact. In that event, said the court, the defendants would have the burden of showing that the clearance was not unreasonable.

The fact is, of course, that if the jury found from the decrees that the clearance was unreasonable petitioner would have proved it since the decrees were introduced as part of its case. But, in addition, we respectfully suggest that this portion of the charge is a logical impossibility since if petitioner *proved* the clearance was *unreasonable* it would seem to follow that it would be impossible for the defendants to *prove* that the clearance was *not* unreasonable.

The Court of Appeals, however, found no error in any of these instructions.

## JURISDICTIONAL STATEMENT.

This Court has jurisdiction to review the final judgment in question under Section 1254(1) of the Judicial Code, 62 Stat. 928, 28 U. S. C. § 1254(1).

Petitioner seeks review of the judgment of the Court of Appeals for the Fourth Circuit of January 5, 1953.

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## STATUTES INVOLVED.

The statutes involved are the Sherman Act (Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. § 1,2) and the Clayton Act (Act of October 15, 1914, 38 Stat. 741. 15 U. S. C. § 15).

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## QUESTIONS PRESENTED.

1. Do not the following admitted or undisputed facts in the present case constitute as a matter of law a violation of the anti-trust laws:

*a.* The defendants uniformly deny petitioner access to first-run pictures, but uniformly grant first subsequent run pictures;

*b.* The defendants uniformly adhere to a policy applicable not only to Baltimore but throughout the United States, limiting the exhibition of first-run pictures to downtown theatres;

*c.* Each defendant knows that every other defendant has followed the same national policy for many years, before, during and after the *Paramount* litigation, and has applied the policy to all theatres located outside of the downtown sections of cities no matter how fine they may be and no matter what film rental they may offer;

*d.* The rare exceptions to this national policy recognized by the defendants have been made almost always for theatres owned by one of themselves or else to avoid the obvious discrimination which would be manifest by denying the run to an independent in a city where one of the defendants' own suburban theatres is granted the run;

*e.* Five of the defendants own hundreds of theatres throughout the country, many of which are first-run theatres and practically all of which first-run theatres are located in the downtown sections of cities;

*f.* All defendants license their first-run pictures to theatres owned by these five of their number and substantial revenues are derived from such cross-licensing;

*g.* All defendants know of the theatre ownership of the five, of the cross-licensing and of the substantial revenues thus derived;

*h.* Petitioner's Crest Theatre is a new $460,000 sixteen hundred seat house located six miles from the nearest downtown theatre, is comparable to the theatres in Baltimore actually granted first run and would itself have been granted first run if it had been located downtown or had been owned by one of the defendants;

*i.* Petitioner was willing to pay by certified check film rental equal to or greater than that actually received by defendants from their existing first-run accounts;

*j.* The defendants refused to grant petitioner's theatre first run because they feared the competition to their own downtown first-run houses from the Crest and from similar demands of suburban theatres all over the country;

*k.* The decisions of the defendants were made without regard to the particular circumstances of the Crest Theatre and without any top executive actually seeing the theatre;

*l.* The decisions of the defendants and their national policy necessarily establish a fixed and arbitrary system

of runs and clearances and cause the exclusion of any independent exhibitor from the first-run exhibition field if his theatre is located outside of the downtown area of cities?

2. Did the court below err in failing fully to explain the background, scope and significance of the *Paramount* case and its impact on the case at bar and in negativing the benefits of Section 5 of the Clayton Act by instructing the jury that petitioner still had to prove conspiracy since the present factual situation had not been before the court in the *Paramount* case?

---

## REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The result reached in the present case and the rulings which led up to it are in conflict with the decision of this Court in the *Paramount* case as supplemented by the opinions of the Statutory Court. That case documented the conduct of these same defendants in conspiring to dominate and control the distribution and exhibition of first-run pictures throughout the country, and it held certain conduct—particularly the establishment of and adherence to a fixed and arbitrary system of runs and clearances made applicable generally without regard to the particular facts and circumstances of any given situation—to be violative of the antitrust laws. The decrees that were entered in that case outlawed that form of business practice, laid down certain rules with regard to burden of proof in antitrust cases when the legality of clearance was attacked, established certain obligations which had to be met by the distributors in the licensing of their films, and sought to recreate and protect equality of opportunity and freedom of competition in the industry.

The present case, if it is permitted to stand, illus-

trates the way in which these same conspirators are able to circumvent the injunctive provisions in the *Paramount* case and to perpetuate, with the sanction of the Court of Appeals for the Fourth Circuit, the same outlawed business practices which gave the defendants the "cream of the business", the lucrative first-runs.

2. In line with the *Paramount* case are the decisions of the Court of Appeals for the Third Circuit in the *Goldman* and *Ball* cases. These three cases in a similar manner equated as a matter of law certain conduct with conspiracy. Under these holdings there is no reason for speculation about the conclusion to be drawn from admitted or undisputed conduct such as we find in the present case. Consequently, the decision of the trial judge, as affirmed by the Court of Appeals below, in submitting to the jury the issue of conspiracy, is in direct conflict with the decisions of the Third Circuit and of this Court. Such a conflict should, of course, be resolved.

3. There is a similar conflict arising from the failure of the court below to adhere to the principle of the *Emich* case which spells out the duty of a trial judge in a civil case who must explain the scope and effect of the judgment in favor of the Government. The requirements of the *Emich* case were here honored only in their breach and the salutary provisions of Section 5 of the Clayton Act were as effectively denied to petitioner as though the statute had never existed. As has been seen above, what the Court granted in one breath it took away with the next so that the congressional mandate was effectively nullified.

4. The net effect of all the foregoing is to place a most serious limitation upon the freedom of competition in the motion picture industry. It preserves in the hands of companies with a notorious proclivity for conduct violative of the antitrust laws an unassailable power to keep

the field of first-run exhibition as their own private domain. So long as these defendants remain satisfied with the present method of limiting first-run exhibition to theatres located in the downtown sections of cities, there would seem to be no way of changing the fixed pattern of the industry. The forward looking economic spirit which fostered this country's growth, by reason of its readiness to adapt itself to changing conditions and times, has by this decision been stifled with consequences that will be as far reaching in every other field of endeavor as in the motion picture industry. The conclusion reached below is, therefore, completely antithetical to the spirit and letter of the anti-trust laws and the landmark decisions which have attempted to keep open the life stream of our economy. As was said by Chief Judge Kirkpatrick in *Milgrom* (94 F. Supp. at 421):

> "Progress under the competitive system comes from the constant development of new forms and methods and their entry into free competition with the old. Unless, or until, they have been demonstrated to be detrimental to the public, they should so far as possible be allowed to find their proper place in the industry, rather than have a place assigned to them by a dominant group with monopolistic power. The erection of a fence around an industry to keep out newcomers is wholly repugnant to the policy which underlies our anti-trust legislation.
>
> "I am of the opinion that a restraint of commerce in the distribution of motion pictures which is imposed as a result of the adoption of a general policy, implemented by a system of clearances intended to operate uniformly throughout the entire field of exhibition and wholly to suppress a new form of competition is an unreasonable restraint and I hold that these defendants, in imposing such a restraint, are violating the anti-trust laws."

For all of the foregoing reasons, therefore, we urge that this Court issue its writ of certiorari in order to review the judgment below.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

October Term, 1953

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No. 19

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THEATRE ENTERPRISES, INC., *Petitioner*

v.

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO PICTURES, INC. TWENTIETH CENTURY-FOX FILM CORPORATION, UNIVERSAL FILM EXCHANGES, INC., UNITED ARTISTS CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORP., WARNER BROS. CIRCUIT MANAGEMENT CORP., COLUMBIA PICTURES CORPORATION, *Respondents*

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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## BRIEF FOR THE PETITIONER

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### OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit (R. 345-361) is reported at 201 F. 2d 306.

### JURISDICTION

The Judgment of the Court of Appeals was entered on January 5, 1953 (R. 361). The petition for a writ of certi-

orari was filed March 9, 1953, and was granted on May 25, 1953. (SR. 93).[1] The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether, under the admitted or undisputed facts in this case, the District Court erred in refusing to direct a verdict for petitioner as a matter of law.

2. Whether the District Court erred in failing adequately to explain the background, scope and significance of the Paramount Case and its impact on the instant case, and in negativing the benefits of Section 5 of the Clayton Act by instructing the Jury that petitioner still had to prove conspiracy because the present factual situation had not been before the Court in the Paramount Case.

## STATUTES INVOLVED

Petitioner brought suit under Sections 4 and 16 of the Clayton Act (38 Stat. 731; 15 U.S.C. Sec. 14, 26) for alleged violations of Sections 1 and 2 of the Sherman Act (38 Stat. 209; 15 U.S.C. Sec. 1 and 2). Section 5 of the Clayton Act (38 Stat. 731; 15 U.S.C. Sec. 16) enumerates the benefits afforded private plaintiffs from Government antitrust litigation. The pertinent provisions of these Statutes are set forth in the Appendix, *infra*, pp. 61-62.

## STATEMENT

On March 20, 1950, petitioner, a Maryland corporation, filed suit under the antitrust laws against the eight largest motion picture producers and distributors in the United States, seeking injunctive relief as well as monetary damages for loss incurred as a result of respondent's refusal to license first-run motion pictures to petitioner's theatre, located in the City of Baltimore, during the period from

[1] The designation "SR" in this brief refers to the supplemental record filed herein by respondents. All other record references, designated "R", refer to the record filed by petitioner.

February 1949 to March 1950.[2] Petitioner asserted that the eight respondents, respectively called Paramount, Loew's, RKO, Fox, Warner, Universal, United Artists, and Columbia, had conspired with each other to dominate and and control the distribution and exhibition of motion pictures in Baltimore and elsewhere It was alleged that the discrimination against petitioner was the product of a nationwide conspiracy found to exist among the same distributors in *United States* v. *Paramount Pictures, Inc., et al.*, 66 F. Supp. 323 (1946); 70 F. Supp. 53 (1947); 334 U. S. 131 (1948); 85 F. Supp. 881 (1949) (SR. 1-7)

The case was tried before a jury and resulted in a verdict for the respondents (R. 290a). Petitioner appealed to the Court of Appeals for the Fourth Circuit on the following grounds, inter alia: (1) that the Trial Court should have directed a verdict for petitioner as a matter of law on the issue of conspiracy since the undisputed and uncontroverted evidence, coming largely from respondents, was susceptible of no other conclusion than that respondents deliberately and uniformly participated in a course of conduct which restrained trade, particularly when such course of conduct was viewed against the findings and decision in the *Paramount* Case, *supra*; and (2) that the Trial Court failed to reconstruct adequately for the jury the purpose, scope and effect of the judgments in the *Paramount* case and rejected all requests for instructions submitted by petitioner in accordance with the procedure established by this Court in *Emich* v. *General Motors Corporation*, 340 U. S. 558 (1951), for the purpose of explaining the effect of the rulings in the *Paramount* case.

The Court of Appeals rejected both contentions and affirmed the judgment below (R. 345-361). On the question of conspiracy the Court held that there was evidence to

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[2] A second cause of action sought damages for losses suffered as a result of discriminatory practices to which petitioner's theatre had been subjected even on the first subsequent run which it was granted. Questions relating to this phase of the case have not been raised here.

support both of the inferences drawn by the opposing parties and hence an issue was presented which was properly submitted to the jury for decision (R. 356). On the question of instructions relating to the *Paramount* judgments the Court found nothing detrimental in those given (R. 360-361).

### 1. The Situation Relating to First-Run Exhibitions in Baltimore

First-run product of respondent companies for years has been divided among eight theatres located in the downtown section of Baltimore (R. 2a-6a). Loew's has operated two of these houses, the Century, seating 3000, and the Valencia, seating between 1600 and 1800. The Valencia is an upstairs theatre used principally as a move-over house, that is, pictures are moved directly from first-run in the Century to the Valencia without any clearance. These two houses exhibit all of Loew's product, half of Universal and some United Artists (R. 2a-4a). Warner Bros. Circuit Management Corporation operates the Stanley which seats 3200 and exhibits all of Warner's and half of Paramount's product (R. 3a-4a).

The other five theatres are owned by independent exhibitors. For many years there has been no change in the division of product as among them. The Keith, operated by Mr. Schanberger, seats 2200 to 2400 and plays half of Universal, half of Paramount, and whatever else it can pick up. The New Theatre, owned by Mr. Mechanic, seats 1300 and has exhibited exclusively Fox pictures for twenty years. The Hippodrome, owned by Mr. Rappaport, seats 1800 to 2000, and exhibits RKO and Columbia pictures. In 1949, Rappaport opened the Town Theatre and thereafter split RKO and Columbia pictures formerly played only at the Hippodrome between the Town and Hippodrome. The Mayfair, owned by Mr. Hicks, seats 800. Although it is located next door to the Stanley the Mayfair has never been able to secure a continuous flow of product from any re-

spondent company. It has operated largely with so-called "slough" or second grade pictures and films of smaller producing companies such as Republic (R. 2a-6a).

Through the years no respondent company licensed its first-run product to any theatre except the eight down-town theatres described above. (R. 6a).

### 2. Suitability of Crest for First-Run Exhibitions

Early in 1947, petitioner's president, Mr. Myerberg, and his brothers, purchased a fifteen acre tract of land at Reisterstown Road and Rogers Avenue in the City of Baltimore. They built more than fifty homes on that portion of the tract zoned for residential purposes, all of which were sold before completion. Since the commercial life of Baltimore, like that of most large cities, was no longer centered exclusively in the downtown area, the brothers decided that this particular intersection would support a first-class commercial development. They, therefore, undertook the construction of what is now known as the Hilltop Shopping Center. The Crest Theatre was built as a part of the shopping center. A population survey disclosed that approximately 105,000 people lived in the immediate vicinity and that the neighborhood was growing rapidly. (R. 7a-9a).[3]

The Crest Theatre, built and equipped at a cost of over $460,000, is located six miles from the nearest downtown theatre. The seating capacity is 1600 on the first floor with accommodations for 100 more in the loges. It has many innovations. For example, the projection booth is hidden thus eliminating both noise and direct small beam light from the projection machine. It was the first theatre to have a television lounge. This lounge seats 100 people who may view television projected on a screen 6 by 9 feet. Free parking space capable of accommodating 400 cars is available in front, at the side, and in the rear of the theatre. Additional parking space is available on streets surrounding the theatre. The seats are staggered so as to give each patron

[3] By 1951 it had increased to 125,000 (R. 119a).

an unobstructed view of the screen and the rows are spaced apart sufficiently to allow ample knee room. The decorations and appointments are most luxurious. The projection and air-conditioning equipment are the finest obtainable. One of the best examples of carved glass in the entire country is found in the front bay of the theatre over the marquee. The theatre was built so as to handle large crowds comfortably and to accommodate first-run feature pictures (R. 50a-53a).

The qualifications of the Crest are not disputed. It received the International Award of the "Exhibitor Magazine," a well-known trade paper in the motion-picture industry, as one of the finest theatres constructed in the western hemisphere in 1949. The award was presented to Mr. Myerberg by Governor McKeldin of Maryland at public ceremonies (R. 53a).

In addition to recognition by independent persons in the industry the merits of the Crest Theatre were recognized by respondents. Thus, H. J. Martin, Universal Branch Manager, wrote that he had seen the Crest and that it was all Mr. Myerberg had claimed from the standpoint of appointments and capacity (R. 26a). A. C. Benson, Paramount's branch manager, wrote the home office that the Uptown Theatre (a neighborhood Baltimore house) was one of the finest theatres in the country and that the Crest was "equally as beautiful and is larger than the Uptown" (R. 64a). J. B. Brecheen, RKO branch manager, wrote his home office that the Crest will compare very favorably with Mr. Rappaport's new Town Theatre, a downtown house (R. 22a).

High ranking officials of RKO, Paramount, Universal and Columbia agreed that if the Crest had been located downtown it would have had access to first-run pictures. For example, William Zimmerman, an assistant to the Vice President of RKO in charge of domestic distribution and who also assists the President of that company in the formulation of distribution policy, testified that if the Crest was

located in the downtown area of Baltimore it would have the right of access to first-run pictures, that it would be offered a competitive opportunity, and that it had been denied access to RKO pictures first-run only because it was located outside the downtown area. (R. 145a-146a). Fred Myers, Eastern Division Sales Manager of Universal, testified categorically that had the Crest been located downtown it would have been granted access to first-run Universal Pictures (R. 210a-211a). Similar testimony was given by Edward K. O'Shea, Assistant General Sales Manager of Paramount, and formerly Eastern and Southern Division Sales Manager for Loew's (R. 219a),[4] and by George Josephs, the Assistant to the General Sales Manager of Columbia (R. 206a). Robert Smeltzer, District Manager for Warner, hinted that the Crest even in its present location might have been able to license first-run day and date pictures if Warner had owned it. (R. 166a-167a).

### 3. Efforts of Petitioner to Secure First-Run Film

In January 1948, before ground had been broken for erection of the Crest, Mr. Myerberg visited each of respondents' branch offices in Washington, D.C., informed them of his plans, described the theatre, its size and appointments, and sought first-run pictures. Each branch manager advised him that it was company policy not to discuss or give consideration to such requests until the theatre was built; that after the theatre was completed they would consider film for it. (R. 10a).

In October 1948, when the Crest was under roof, Mr. Myerberg returned to Washington, D. C. and renewed his request for first-run product. He was advised that such matter must be decided by the home offices in New York;

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[4] Mr. O'Shea testified also that a city of 100,000 was certainly capable of supporting a first-run theatre (R. 216a). Mr. Myerberg had previously testified that the area served by the Crest had a population of 105,000 at the time of construction (R. 9a) which had increased to 125,000 by 1951 (R. 119a).

that he should write a letter setting out his request, which would be forwarded to New York for decision (R. 12a). Thereupon, Myerberg wrote identical letters to each respondent, describing the theatre and its special qualifications and requesting access to first-run pictures. The letter to Warner is illustrative (R. 13a-15a).

The branch managers of Warner and Loew told Myerberg that he couldn't expect to secure their first-run since they owned their own theatres in Baltimore and that it was their policy throughout the United States to play their own pictures first-run in their own theatres (R. 11a; 17a).[5] All branch managers expressed surprise that Myerberg should seek first-run pictures for a theatre located outside of the downtown area of the city since it was the general practice in the industry to limit first-run showings to theatres in downtown areas (R. 60a, 145a-146a, 165a, 182a-183a, 218a, 233a).

Myerberg engaged in voluminous correspondence with respondents from October 1948 until the Crest opened on February 26, 1949. (R. 17a-49a; 56a-80a). He was admittedly stalled by RKO (R. 48a), and United Artists and Columbia never replied (R. 28a). He was able to see top officials of only three companies, Fox, Universal and RKO. All his requests met with uniform refusal. (R. 29a, 43a-45a, 50a).

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[5] The evidence introduced in the *Paramount* case showed that the Century and Valencia were operated by Loew but owned only 50% by Loew with the other 50% owned by United Artists Theatre Circuit, Inc. Appendix to Government's Brief, p. 225, footnote 14, Exhibit 214, *United States* v. *Paramount Pictures, Inc., et al.* 334 U. S. 131. In speaking of such joint ownerships this Court said that the result was to eliminate competition *pro tanto* both in the exhibition and in the distribution of feature films because the parties naturally would direct the films to the theatres in whose earnings they were interested. It said: "The practices were bald efforts to substitute monopoly for competition and to strengthen the hold of the exhibitor defendants on the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine." (334 U.S. 131, 149).

Myerberg made specific offers to Universal, RKO, Columbia, and Paramount for particular pictures for first-run exhibition. These offers included substantial guarantees of film rental and a readiness to post certified checks. Such offers were either rejected or ignored (R. 45a, 55a, 58a, 77a, 78a, 80a, 81a, 82a).

During the trial Myerberg offered Fox $15,000 for an extended first-run of the picture "Diplomatic Courier" which was accepted by Mr. Lichtman, Director of Distribution for Fox who was then on the witness stand (R. 174a). However, when Myerberg's certified check for that amount was tendered the following day it was rejected (R. 205a-206a).

Petitioner opened February 26, 1949, by exhibiting, under protest, pictures on first subsequent run. Thereafter, he continued his efforts to secure first-run product by engaging counsel who, for another six months, corresponded directly with the home offices of all respondents in a further unsuccessful attempt to secure first-run film. (R. 59a, 79a-81a, 84a-92a). Suit was then filed.

Since the Crest is located six miles from the nearest downtown first-run theatre, petitioner was of the opinion that the Crest was too far out to be considered in substantial competition with the downtown theatres. Hence, at all times, petitioner has been ready and willing to exhibit respondents' pictures on first-run day and date with any of the downtown houses, and to pay the same film rentals for a day and date or an exclusive first run. But since respondents insisted that the Crest was or would be in substantial competition with the downtown theatres, petitioner has always been willing to negotiate or bid competitively against the downtown theatres for the right to exhibit pictures on an exclusive first-run (R. 90a-95a).

### 4. Reasons Offered by Respondents for Uniform Rejection of Petitioner's Requests for First-Run Product

Respondents uniformly denied petitioner an opportunity to compete for first-run product but uniformly granted petitioner first subsequent run (R. 50a). Not a single home office executive with ultimate responsibility for making the decision saw the Crest before it was uniformly denied first-run and uniformly granted first subsequent-run pictures (R. 50a).

The chief reason advanced by each respondent for denial of first-run product to petitioner was the existence of a nationwide policy which had been in existence for many years under which, with minor exceptions noted hereinafter, the licensing of films for first-run exhibition was confined to the downtown area of cities.

William Zimmerman, the Assistant to the Vice-President of RKO in charge of domestic distribution, and who also assists the President of RKO in the formulation of distribution policy and in the handling of exhibitor relations, testified that it was the policy of his company to deny access to RKO pictures to theatres located outside the downtown area in all cities, including Baltimore, and that this policy was applied regardless of how fine the neighborhood theatre might be. (R. 145a-146a, 150a).

Robert Smeltzer, District Manager for Warner, testified that wherever possible his company confined the licensing of first-run films to downtown areas; that such is the general policy of the company nationwide; that such policy is pursued wherever possible and every effort is made to follow such a policy; that insofar as the application of the Crest for first-run product was concerned he didn't have to take the matter up with the New York executives because of the existence of such policy (R. 164a-165a).

Alexander Lichtman, Director of Distribution for Fox, testified that he was one of those who took part in establishing nationally the practice of the industry of confining the licensing of first-run films to downtown areas. He stated that the theory of distribution of feature films from

its inception was to have a representative first-run theatre in each of the large cities of the country which could attract the greatest number of patrons; that such a theatre would be used as the exploitation point for the territory; that it would be shown on subsequent run in other theatres at smaller admission prices so that all classes would be able to view it; that there has never been any basic change in this policy (R. 182a-183a).[6]

William F. Rodgers, for 16 years the General Sales Manager of Loew's, testified that the policy of confining first-run product to theatres located in downtown areas had existed as long as he could remember; that it was a definite practice of Loew's, even though Loew's was obligated to license its product theatre-by-theatre; that the general objective of all the major distributors was to confine first-run exhibitions to downtown theatres. (R. 233a-234a).

Edward K. O'Shea, who had been the Eastern and Southern Sales Manager for Loew's for many years before becoming the Assistant General Sales Manager of Paramount, testified that Paramount maintains a national policy which limits the showing of pictures on first-run to houses located only in the downtown areas of cities (R. 218a). George M. Josephs, Assistant to the General Sales Manager of Columbia wrote that it had been the policy of his company not to recognize requests of neighborhood houses for first-run product (R. 60a). Representatives of Universal gave similar testimony. (R. 213a).[7]

In his opening statement Counsel for respondents expressed shock that petitioner, by requesting first-run product for a neighborhood theatre, would "thus change the

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[6] Lichtman was the highest ranking official appearing on behalf of any respondent at the trial. He entered the motion picture industry in 1910, and at various times has been Sales Manager of the old Famous Players Film Company, the General Manager of Paramount Pictures, the Vice-President and General Manager of United Artists and later its President, and the Vice-President of Loew's, Inc. (R. 167a-169a).

[7] United Artists called only a former Branch Manager who knew nothing of the situation. (SR. 684-685)

entire manner and method that has been in existence in this State, and most of the States in the United States for years and years" for licensing first-run film. (R. 1a).

Although other purported "business" reasons were advanced by respondents for denying petitioner an opportunity to compete for first-run product, they were in reality attempted justifications for maintenance of the national policy embraced by all. The most often repeated justification was that they had "satisfactory customers" of long-standing in the downtown areas and saw no reason to disturb such relations by attempting to sell their product to others (R. 144a, 148a). They also claimed that the Crest could not successfully play first-run film, although they admitted that with rare exceptions mentioned hereafter where they owned neighborhood theatres they had never experimented with such an idea and wouldn't experiment with it. (R. 147a, 150a, 230a).

The record contains additional facts which supply the real economic motivation for limiting the showing of first-run pictures to downtown theatres in accordance with respondents' national policy. Respondents produce and distribute most of the important and desirable feature motion pictures in the United States. (R. 142a). Five of the defendants, Loew's Warner, Paramount, RKO and Fox owned hundreds of theatres located in the largest cities throughout the United States during the damage period (R. 126a-127a, 138a).[8] Most of the theatres exhibit pictures on first-run and almost all of the first-run theatres are located downtown (R. 139a, 176a). These five respondents admitted the existence of cross-licensing among them and the payment to one another of substantial sums for film rental (R. 178a, 203a, 230a).

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[8] The final decree in the *Paramount* case required these majors to divest themselves of their theatre holdings. They were given a period of from 1 to 3 years to achieve such separation. The separation with respect to Loew, Fox and Warner was not to be finally effected until 3 years from the entry of the final degree which was dated February 2, 1950.

Charles V. Grimes, District Manager for Warner Bros. Circuit Management Corporation, admitted that his company opposed the granting of first-run to the Crest and other neighborhood theatres because "it would destroy" Warner Bros. Stanley and all other downtown houses and that they simply didn't want the Crest competing with the Stanley (R. 162a). Similarly, Robert Smeltzer, District Manager for Warner, admitted that he opposed first-run for the Crest and other neighborhood houses because "it would mean the elimination of the downtown theatre" (R. 163a). William F. Rodgers, General Sales Manager for Loew's, feared that if neighborhood theatres were given access to first-run film Loew's revenue from exhibitions of its pictures in the downtown first-run houses operated by Fox, Warner, RKO and Paramount would be considerably curtailed (R. 230a).

It is clear from the record that each of the respondents was aware that each of the other respondents was adhering to the identical national policy of denying first-run products to the Crest, as well as to all other theatres located outside of the downtown section of cities no matter how fine they might be and regardless of the amount of film rental offered. As Mr. Zimmerman of RKO pointed out, all one had to do to be aware of such facts was to look in the papers (R. 150a). Moreover, the knowledge of all respondents concerning the theatre ownership of the Big Five as well as the location of more all of their first-run theatres in downtown areas of cities, is undisputed. Each respondent also knew of the cross licensing of films and of the substantial revenues derived from each by such practice.

The record in this case contains an abundance of additional testimony which is persuasive of the knowledge of each respondent that the others were denying first-run film to neighborhood theatres, particularly the denial to the Crest. For example, the Washington Branch Manager of Paramount wrote his home office before the Crest opened, telling them what each of the other respondents was going to do and recommending that Paramount do the same thing.

(R. 66a). The Branch Manager of Fox testified that his company "did what everyone was doing." (R. 192a).

The frequent interchange of top sales and distribution personnel is additional evidence showing the knowledge by each respondent of the decisions of the others in denying first-run to suburban theatres. Thus, Alexander Lichtman has been successively General Sales Manager for Paramount, Vice-President and General Sales Manager and later President of United Artists, Vice-President of Loew's and Vice-President of Fox (R. 167a). The President of Fox, Spyros Skouras, is a lifelong friend of Lichtman (R. 168a). Charles Skouras, a brother of Spyros Skouras, heads the Fox subsidiary which operates approximately 500 theatres, many of which are first-run downtown houses (R. 176a). Joseph Schenk, a top executive of Fox, is a brother of Nicholas Schenk, President of Loew's, Inc. (R. 175a). Andrew Smith, who preceded Mr. Lichtman as Sales Manager of Fox, had earlier held similar positions with RKO and Warner (R. 140a). Mr. Smith's successor as General Sales Manager of RKO, Mr. Robert Mochrie, was a sales executive with United Artists and Warner before transferring to RKO (R. 140a). Samuel Goldwyn, whose pictures are distributed by RKO was formerly a chief executive of United Artists (R. 141a). Howard Minsky, a Fox official who participated in discussions concerning the Crest, is now with Paramount (R. 176a). Charles Reagan, General Sales Manager for Loew's, formerly occupied a similar position with Paramount (R. 177a). Edward K. O'Shea, Assistant General Sales Manager of Paramount, was formerly with Loew's (R. 177a). Mr. Blumberg, President of Universal, was formerly Vice-President of RKO (R. 178a).

Respondents recognized that their denial of first-run to the Crest had the effect of confining first-run to the downtown area (R. 150a) and of fixing the terms and conditions and manner in which this new $460,000 theatre could compete in the exhibition field (R. 189a, 208a).

### 5. Exceptions to the National Policy of Confining First-Run Product to Downtown Areas

In a few instances respondents have departed from their national policy of confining the licensing of first-run film to downtown theatres. These exceptions occur where respondents own neighborhood houses and permit them to play day and date with downtown theatres owned by themselves, or where an independent located near one of respondents' first-run suburban houses threatens suit on grounds of discrimination if it is denied the opportunity to compete for first-run product.

Illustrative is the situation in Washington, D. C. There, Warner owns and operates a first-run theatre, the Warner, in the downtown area and also owns another theatre, the Ambassador, located approximately 2½ miles from the downtown area. The Warner seats 2154 and the Ambassador 1344. For years the Ambassador has played Warner, Paramount and Columbia first-run product day and date with the Warner downtown house. (R. 69a; SR. 626-627).

In 1951 an independent exhibitor built the Ontario Theatre, seating 1301, at a cost of half a million dollars. It was located two blocks from the Ambassador (R. 69a). The Ontario sought first-run day and date on Paramount pictures showing downtown that were not played at the Ambassador. This request was transmitted by the Washington Branch Manager to a member of the legal department in Paramount's New York office. In replying Mr. Gibbons, the lawyer, said no immediate decision need be made since the theatre was still under construction; that the problem would have to be met at some future date, at which time the request would have to be granted or denied, but that an exclusive first-run in Washington was out of the question (R. 68a). In his reply the Branch Manager agreed that no action need be taken at that time since the theatre had not yet reached the completion stage (R. 70a).

The dilemma confronting respondents as a result of the request of the Ontario for first-run film was illustrated in

their correspondence. Paramount's Washington Branch Manager wrote his superiors that the demand, if pushed, "can result in a real whopper" and "could lead to one fine mess" (R. 70a). He warned that "this is a rather ticklish situation as you can readily understand" (R. 72a). Mr. Gibbons "stressed the importance of the matter" and felt "that a conference should be held relative to it." (R. 74a).

The matter was finally resolved by giving the Ontario an exclusive first-run on Paramount pictures (R. 69a, 216a). Paramount's Assistant General Sales Manager admitted that the Ontario was granted exclusive first-run because Warner's Ambassador had for years been granted access to Paramount's product first-run; that a denial of first-run to the Ontario might have laid the company open to an accusation of discrimination, and that such a charge might have resulted in a lawsuit (R. 218a).

A similar situation developed in Wichita, Kansas, where Fox owned the Fox Boulevard Theatre, a neighborhood house located more than four miles from the downtown area and which was exhibiting RKO and Paramount pictures on first-run. Two new independents, the Crest and the Tower, located in the same area as the Boulevard, sought and received first-run product.

In reluctantly granting the Crest in Wichita, Kansas access to first-run, William Zimmerman, of RKO, Assistant to the Vice-President in charge of domestic distribution and Assistant to the President in the formulation of distribution policy and the handling of exhibitor relations, wrote Counsel for the Crest saying that in a city the size of Wichita, RKO's pictures were best marketed and their exhibition possibilities most fully realized if their first-run showing was confined to downtown; that the present playing position of RKO pictures in the Crest (subsequent run) was appropriate for their neighborhood, but that "in an effort to avoid litigation between us, we have decided to afford your client's Crest Theatre and the competitive Tower Theatre an opportunity to obtain our pictures on an exclu-

sive first-run in the City of Wichita." (R. 102a). Paramount made a similar concession to the Tower Theatre. In writing to the Kansas City branch office of Paramount, a member of that company's legal department wrote: "Both Mr. Smith and myself have reached the conclusion that because we have licensed this run in the past from time to time in the Fox Boulevard Theatre, we could be accused of discriminating in favor of Fox, if we do not offer a comparable theatre the same opportunity (R. 105a).

In a few other situations respondents ignored the so-called business reasons advanced for denying first-run to the Crest Theatre in Baltimore in the instant case and granted first-run to neighborhood theatres owned by them. This occurred in Kansas City (R. 90a) and Denver where Fox owned neighborhood houses (R. 204a), in Boston where Loew's owned such a house and in Los Angeles where a number of respondents owned theatres located outside the downtown area (R. 204a). The reason for such departures was rather lamely explained by A. W. Smith, Jr., Vice-President in Charge of Distribution for Fox when explaining the Kansas City situation. He wrote that the neighborhoods concerned were "operated by our own subsidiaries, and we felt that we had greater room for experiment when we were showing our own pictures in our own theatres" (R. 90a).

It is apparent that the threat of litigation on a charge of discrimination is occasionally sufficient to cause respondents to relax their commonly pursued national policy of uniformly refusing to license first-run pictures outside the downtown areas of cities. It is equally clear that respondents are willing to make exceptions to the national policy where they themselves own the neighborhood theatres concerned.

Despite protestations that departures from the national policy would be bad business, would harm the first and subsequent run revenues, and would result in the elimination of downtown theatres, respondents' witnesses admitted that

the few exceptions made to the national policy had proved successful (R. 161a, 204a, 227a) and, contrary to their predictions, the subsequent-run theatres as well as the downtown houses had continued in business (R. 185a).

### 6. The Trial Court's Instructions Relating to the Purpose, Scope and Effect of the Judgments in the Paramount Case.

Pursuant to Section 5 of the Clayton Act (15 U.S.C. Sec. 16) petitioner offered in evidence pertinent provisions of the decrees entered in the *Paramount* case.[9] The offer was made in accordance with the procedure established by this Court in *Emich* v. *General Motors Corporation*, 340 U. S. 558 (1951).

This offer was made three times. The decrees[10] were first proffered immediately after the close of the opening statement (SR. 116-117). After argument the trial court refused to admit them but said such ruling was made without prejudice to petitioner to renew its motion either during the course of the trial or at the close of the testimony. (SR. 220-222). The offer was renewed at the close of the petitioner's case in chief and again refused (SR. 482-483). At the close of all the testimony, and immediately preceding the summations to the jury, the offer was again renewed,

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[9] *United States* v. *Paramount Pictures, Inc., et al*, 66 F. Supp. 323 (1946); 70 F. Supp. 53 (1947); 334 U. S. 131 (1948); 85 F. Supp. 881 (1949).

[10] Four decrees eventually emerged from the *Paramount* litigation. The first was a consent judgment against RKO, entered on November 8, 1948. The second was a consent judgment entered against Paramount on March 3, 1949. These consent judgments were entered after the remand from the Supreme Court to the Statutory Court. No additional testimony was taken after remand insofar as RKO is concerned. Some additional testimony was taken after remand but before entry of consent judgment against Paramount. Two decrees were entered at the conclusion of all the litigation, on February 8, 1950, one against the three remaining major defendants, Loew, Fox and Warner; the other against the three minor defendants, Columbia, Universal and United Artists. As to all important features applicable to the instant case the four decrees were substantially identical. [See record in *Loew's Inc.* v. *United States*, 339 U.S. 974 (1950)]

and, after lengthy argument, petitioner was permitted to read to the jury four paragraphs common to all four decrees which provided that the defendants were enjoined: (1) from agreeing to maintain a system of clearances;[11] (2) from granting any clearance between theatres not in substantial competition;[12] (3) from granting other than reasonable clearance against theatres in substantial competition, with the burden of proof to sustain the legality of any such clearance under attack to be borne by the distributor making the clearance arrangements;[13] and (4) from licensing any feature on any run in any theatre except on the basis that each license shall be offered and taken theatre by theatre, solely on the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.[14] (SR. 1002-1004)

At the insistence of respondents an additional paragraph was read to the jury which permitted the five defendants owning theatres to continue, during the period set for the separation of their business of distribution and production from their exhibition business, to exhibit their own pic-

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[11] Par. II, 2. From agreeing with each other or with any exhibitors or distributors to maintain a system of clearances; the term "clearances" as used herein meaning the period of time stipulated in license contracts which must elapse between runs of the same feature within a particular area or in specified theatres. (SR. 1003)

[12] Par. II, 3. From granting any clearance between theatres not in substantial competition. (SR. 1003)

[13] Par. II, 4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof. (SR. 1003)

[14] Par. II, 8. From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others. (SR. 1004) (This provision appears in the decrees as to all defendants except RKO.)

tures in their own theatres, on their own terms.[15] (SR. 1004-1005)

In order that the jury might be properly apprised of the scope, purpose, and effect of the *Paramount* judgments, as required by the procedure established by this Court in the *Emich* case, particularly with respect to the impact of such judgments on the instant case, petitioner submitted sixteen proposed instructions all of which were refused. (R. 295a; 299a-303a).

These instructions may be summarized as follows: that the respondents in this case were all found guilty in the Government suit of conspiring to fix uniform runs and clearances and of imposing unreasonable clearances;[16] that any system of clearances which has acquired a fixed and uniform character and which is applied to situations without regard to special circumstances necessary to sustain them as reasonable restraints of trade violate the antitrust laws;[17] that the five theatre-owning defendants, Warner, Paramount, Fox, Loew's and RKO have been adjudged guilty of fixing runs and clearances for the purpose of limiting competition offered by independents to theatres owned by them;[18] that as a result of their country-wide theatre holdings the Court found as a fact that the best customers of each of the big five defendants were usually one or more

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[15] Typical of this proviso is Par. V of the decree against Loew, Fox and Warner which reads: "Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for completion of the plan of reorganization provided for in Section IV, to license, or in any way to provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or indirectly." (SR. 1004-1005). The period for divestiture allowed RKO was one year from the date of entry of the decree, and for Paramount one year. The effective date for each actually was January 1950.

[16] Petitioner's proposed instruction No. 75 (R. 301a).

[17] Petitioner's proposed instruction No. 31 (R. 295a).

[18] Petitioner's proposed instruction No. 76 (R. 301a-302a).

of the other defendants;[19] that the Government case adjudicated that clearances and runs fixed illegally by defendants have frequently disadvantaged independent exhibitors trying to compete with theatres owned by defendants, or by large circuits or other favored exhibitors;[20] that the Government case adjudicated that the clearances and runs fixed illegally by defendants frequently worked to the disadvantage of exhibitors attempting to break into the field with new theatres and compete with exhibitors who were old customers of defendants;[21] that the Government case had adjudicated that all defendants had failed in their legal duty to license pictures solely on the merits of the theatre involved, but had discriminated against some exhibitors in favor of others in the runs and clearances granted their theatres;[22] that the decrees in the *Paramount* case constitute *prima facie* evidence that the defendants conspired to fix runs and clearances in violation of law;[23] that the past proclivity of these defendants for violating the antitrust laws is such that the Court has hitherto recognized a strong temptation on the part of the same defendants to continue their same illegal distribution practices.[24]

More particularly the Court was asked to give the following instructions, also based upon the *Paramount* case, namely, that the power of these defendants to fix runs and clearances existed and was exercised to exclude independents who were or wished to be competitors in the first-run field;[25] that the Court in the *Paramount* case found that these defendants actually excluded independents from the first-run field approximating in the aggregate 70 per cent of the first-run theatres in the 92 largest cities of the coun-

[19] Petitioner's proposed instruction No. 74 (R. 301a).
[20] Petitioner's proposed instruction No. 77 (R. 302a).
[21] Petitioner's proposed instruction No. 78 (R. 302a).
[22] Petitioner's proposed instruction No. 79 (R. 302a).
[23] Petitioner's proposed instruction No. 80 (R. 302a).
[24] Petitioner's proposed instruction No. 73 (R. 301a).
[25] Petitioner's proposed instruction No. 71 (R. 301a).

try of which Baltimore is one;[26] that defendants were guilty of abusing their discretion in deciding what theatres should be granted first-run and what clearance should be granted a particular theatre;[27] that defendants have a duty to license their product, picture by picture and theatre by theatre, without discrimination in favor of affiliated theatres, circuit theatres or others;[28] that defendants have the burden of establishing the reasonableness of the clearance imposed upon the Crest;[29] and that the system of preferring old customers has been used by these defendants in the past as an excuse for a fixed system of runs and clearances and was to that extent unlawful.[30]

These instructions were necessary to reconstruct the *Paramount* case "in the manner and to the extent necessary to acquaint the jury fully with the issues determined therein," and to "explain the scope and effect of the former judgment on the case at trial," as provided by this Court in the *Emich* case (340 U. S. 558, 572).

The trial court refused all of these instructions. Instead he explained the purpose, scope and effect of the voluminous proceedings in the *Paramount* case in exactly five sentences which covered only twenty-seven lines of the transcript. He charged as follows (R. 273a):

> "I instruct you that in the previous equity suits between the Government and these same defendants, which have been referred to as the Paramount case,—you will recall I allowed the decree in that Paramount case to be introduced in evidence by the plaintiff,—I instruct you that in that case, which was a suit between the Government and the same defendants, which was decided and covered by the decrees in that case, these same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in re-

[26] Petitioner's proposed instruction No. 70 (R. 300a-301a).
[27] Petitioner's proposed instruction No. 72 (R. 301a).
[28] Petitioner's proposed instruction No. 83 (R. 303a).
[29] Petitioner's proposed instruction No. 93 (R. 303a).
[30] Petitioner's proposed instruction No. 61 (R. 299a).

straint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become *prima facie* evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only *prima facie* evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner to keep first run exhibitions from the plaintiff, or have conspired to restrict plaintiff to clearances which are unreasonable."

In accordance with the decree provision in the *Paramount* case requiring a distributor to sustain the burden of proof whenever any clearance provision is attacked as illegal (SR. 1003), petitioner sought an instruction to the effect that the respondents had the burden of establishing the reasonableness of the clearance imposed upon the Crest.[31] Instead, the trial Court reversed the burden of proof in such circumstances and charged as follows: (R. 273a)

"If you find that the plaintiff has sustained this burden of proving a conspiracy as just defined, then, I instruct you that, by virtue of the terms of the decrees in the previous equity suit, which form part of the evidence in this case, the burden of proving the reasonableness of the failure to give the plaintiff first run exclusively or day and date, that is questions of clearance, as well as the failure to give it any other clearance such as would be reasonable, rests not upon the plaintiff but upon the defendants."

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[31] Petitioner's Requested Instruction 93 (R. 303a).

Again, on the question of clearance, petitioner, in accordance with the provision in the *Paramount* decrees prohibiting the granting of any clearance between theatres not in substantial competition (SR. 1002-1003), sought an instruction to the effect that if the jury found that the Crest was not in competition with theatres owned by Warner and Loew then clearance between the Crest and the Warner and Loew houses would be improper (R. 302a-303a). Instead, over objection, the trial Court instructed the jury that Loew and Warner had an unqualified right to show their own pictures in their own houses. (R. 271a).

The Court of Appeals found "nothing detrimental to the plaintiff in these instructions."[32]

## SUMMARY OF ARGUMENT

Since there was no factual conflict for the jury to resolve, the Court below erroneously affirmed the action of the trial Court in refusing to grant a directed verdict for petitioner on the question of conspiracy at the close of all of the evidence.

Respondents admitted that for many years, both before and after the decision of this Court in *United States* v. *Paramount Pictures, Inc., et al.*, 334 U. S. 131, it had been the national policy of each to confine the exhibition of feature films to theatres located in the downtown areas of cities, including Baltimore; that each was aware that every other respondent followed the same policy; that each knew that the common policy of all could not be maintained in the absence of common action by all of them; that in rare situations exceptions to the national policy had been made, but only in circumstances where a neighborhood theatre was owned by one of them or to avoid the obvious discrimination which would result from denial of such a run to independents in such circumstances.

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[32] *Theatre Enterprises* v. *Paramount Film Distributing Corp., et al.*, 201 F. 2d 306, 315.

The uncontradicted evidence also showed that five of the respondents owned hundreds of theatres throughout the United States, many of which were first-run houses and virtually all of which first-run houses were located in the downtown areas of cities; that all the respondents license their feature pictures on first-run to the downtown theatres owned by these five respondents, and that substantial revenues are derived by all the respondents as a result of such cross-licensing.

The undisputed evidence disclosed further that petitioner's Crest Theatre seated 1600, was built at a cost of $460,000, and was comparable in seating capacity, size, equipment and appointments to the downtown theatres in Baltimore which were granted first-run product; that the Crest was located six miles from the nearest downtown theatre; that petitioner was willing to pay and had offered to pay by certified check film rentals equal to or greater than those actually received by respondents from their existing first-run accounts in Baltimore.

Respondents admitted that had the Crest been located downtown it would have been afforded an opportunity to compete for first-run product. They also admitted that their decision to deny first-run to the Crest resulted from the application of their national policy to confine first-run exhibitions to downtown theatres and had no necessary relationship to the particular circumstances involving the Crest Theatre.

Respondents denied concert of action in maintaining their exclusionary policy, insisting that each of them exercised its independent business judgment which resulted in identical solutions to a common business problem. Each of them insisted that it confined first-run exhibitions to theatres located in downtown areas because such theatres drew larger crowds and have produced the largest revenues; because downtown theatre investments would be destroyed if neighborhood theatres were licensed first-run; because the downtown theatres had been satisfactory customers of long

standing, and because the Crest would not be successful as a first-run house and hence they refused to experiment with it on a first-run basis.

Since evidence showing merely that respondents had a common business purpose for excluding petitioner from the first-run market is irrelevant to a showing that they did not conspire to do so, there was no relevant evidence from which the jury could have drawn an inference that respondents did not conspire. Hence, the case of conspiracy proved by petitioner was the only relevant evidence with respect to the question of conspiracy, and the trial court should have directed a verdict for petitioner on that point and should have submitted to the jury only the question of the amount of damages suffered by petitioner. This is particularly true in view of this Court's finding in the *Paramount* case that these same respondents had conspired to impose a uniform system of runs and clearances without regard to the special circumstances necessary to sustain them as reasonable restraints of trade. A uniform system of runs and clearances was the device used here to deny petitioner access to first-run product.

Under this Court's decisions the type of conduct established by petitioner's case in chief has been equated with conspiracy. This Court has held also that evidence showing a conspiracy to impose unreasonable restraints upon commercial competition cannot be rebutted by evidence showing business necessity, economic motives, or good intentions.

Viewed in the light most favorable to respondents the uncontested and uncontradicted evidence clearly established the existence of a conspiracy in Baltimore and elsewhere to foreclose petitioner and other neighborhood theatres similarly situated from an opportunity to compete in the first-run market. Respondents have erected a fence around the suburban theatre and relegated it to subsequent run status. By such action respondents are continuing their efforts to monopolize the cream of the business, the lucra-

tive first-runs which this Court in the *Paramount* case decrees should be opened to competition.

The Court below erred in affirming the action of the District Court which had refused an adequate explanation to the jury as to the background, scope and significance of the *Paramount* case and its impact upon the instant case. The Court below erred further in affirming the action of the District Court which had instructed the jury that it was still necessary for petitioner to prove conspiracy despite the legal effect of the *Paramount* judgments because the present factual situation had not been before the Court in the *Paramount* case. These errors denied to petitioner the benefits to which he was entitled under Section 5 of the Clayton Act as interpreted by this Court in *Emick* v. *General Motors Corporation*, 340 U. S. 558.

The District Court refused to permit petitioner to introduce the decrees in the *Paramount* case until a moment before it charged the jury on the entire case. Thus, the jury was afforded no opportunity to evaluate the evidence relating to the local situation in Baltimore against the background of the Government's lengthy litigation with these same respondents on the identical question of clearances and runs.

Despite full instructions requested by petitioner, which were denied, the District Court, contrary to the clear guide laid down by this Court in the *Emick* case, failed to examine the record in the *Paramount* case for the purpose of determining the issues decided by these judgments, failed to reconstruct that case in the manner and to the extent necessary to acquaint the jury fully with the issues therein determined, and failed to explain the scope and effect of those judgments on the instant case. The practical effect of such failure to charge was to nullify the evidentiary effect of the *Paramount* decrees and to deprive petitioner of the benefits of Section 5 of the Clayton Act. Petitioner was required to prove the issue of conspiracy *de novo* despite the fact that such issue had previously been resolved against respondents.

## ARGUMENT

### I

### Since the Admitted and Undisputed Facts Constituted a Violation of the Sherman Act as a Matter of Law Petitioner Was Entitled to a Directed Verdict at the Close of All of the Evidence

At the close of all the evidence petitioner requested the Trial Court to instruct the jury that they must return a verdict for the petitioner in such amount as they estimated petitioner's loss to have been. In effect, the Court was asked to instruct a verdict for petitioner and to submit to the jury's decision only the question of the amount of damages suffered by petitioner. This request was refused (SR. 973). In affirming the judgment the Court of Appeals held "that there was evidence to support both of the inferences drawn by the opposing parties to the case and thus an issue was presented which was necessarily submitted to the jury for decision." *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp., et al.*, 201 F. 2(d) 306, 313.

Usually the question of whether defendants have violated the Antitrust laws depends upon disputed factual issues which can only be resolved by submitting the case to a jury or to a court sitting as both judge and jury. In this case, however, it is submitted that the undisputed and uncontradicted evidence, supplied largely by respondents, admits of no reasonable conclusion other than that respondents knowingly, deliberately and uniformly participated in a common course of conduct which unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures in Baltimore and elsewhere.

This is especially true when respondents' conduct here is measured against the background and findings in the *Paramount* case. While the decrees in that case were offered as prima facie evidence of all matters with respect to which such decrees would constitute an estoppel as between respondents and the Government, the *Paramount* case has

added significance here since it held that these same respondents had conspired with each other to fix a uniform system of runs and clearances on a nationwide basis without regard to local factual situations, and that such conduct constituted an unreasonable restraint of trade in violation of the Sherman Act. *United States* v. *Paramount Pictures, Inc., et al.*, 334 U. S. 131, 146-147.

In uniformly denying petitioner first-run and in uniformly granting it first subsequent run, respondents admittedly were applying to a local situation in Baltimore a national policy adhered to by each of them the effect of which was to impose a fixed and uniform system of runs and clearances without regard to the local circumstances herein involved.

Respondents do not deny that such conduct would constitute a violation of the Sherman Act if done as a result of conspiracy. Indeed they could not in view of this Court's oft-repeated pronouncement that exclusion of a competitor from a substantial part of the market constitutes a *per se* violation of the anti-trust laws. *International Salt Co.* v. *United States*, 332 U. S. 392, 396; *United States* v. *Griffith Amusement Co., et al.*, 334 U. S. 100, 107; *Times-Picayune Pub. Co.* v. *United States*, 97 L. ed. 819, 829. Rather, they insist that petitioner's admitted inability to obtain first-run product for its Crest theatre, either on an exclusive or a day and date basis, was the natural result of the exercise by each respondent of its independent business judgment resulting in the similar solution of a common business problem.

Before treating with the undisputed and uncontradicted evidence relating to petitioner's proof of conspiracy and respondents' failure to offer any relevant defense to such proof we think it helpful to review briefly the findings and conclusions in the *Paramount* case since the local situation here grew out of and is an integral part of that litigation

in which these same respondents were parties defendant.[33]

In the *Paramount* litigation the District Court found that the eight distributor defendants (the respondents here) had conspired to establish a uniform system of runs and clearances[34] for theatres to which they licensed their films; that the exhibitor defendants had assisted in creating and had acquiesced in such system, and that such conduct violated the Sherman Act;[35] that both independent exhibitors and distributors, in attempting to bargain with defendants had been met by a "fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with defendants' theatres or with theatres to which the latter have licensed their pictures;" that under the circumstances disclosed in the record "there has been no fair chance for either the present or any future licensees to change a situation sanctioned by such effective control and general acquiescence as have obtained." The Court concluded that competition could be effected in the present system of clearances and runs only by requiring a defendant when licensing its pictures to others "to make each picture available at a

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[33] The time sequence is significant. The damage period in the instant case was from February 1949 to March 1950. (R. 260a). The first decision of the Statutory Court was made on July 26, 1946 (66 F. Supp. 323), and the supporting findings were entered on December 31, 1946 (70 F. Supp. 53). New findings were entered by the Statutory Court (after remand from this Court) on February 2, 1950 (85 F. Supp. 881) and on the same day final judgments were entered as against six of respondents. The judgment against the three majors was affirmed by this Court per curiam on June 5, 1950 (339 U. S. 974).

[34] The relationship between clearance and run was explained by the District Court as follows: "Clearances are given to protect a particular run against a subsequent run, and the practice of clearance is so closely allied with run as to make comment on one applicable to the other." (66 F. Supp. 323, 345).

[35] 66 F. Supp. 323, 343.

minimum fixed or percentage rental and (if clearance is desired) to grant a reasonable clearance and run."[36]

The District Court concluded as a matter of law that the distributor defendants had unreasonably restrained trade and had attempted to monopolize trade in the distribution and exhibition of motion pictures in violation of the Sherman Act by: (1) "Conspiring with each other to maintain a nationwide system of runs and clearances which is substantially uniform as to each local competitive area;" (2) "agreeing individually with their respective licensees to grant discriminatory license privileges to theatres affiliated with other defendants and with large circuits;" (3) "agreeing individually with such licensees to grant unreasonable clearance against theatres operated by their competitors."[37] It found further as a matter of law that the exhibitor-defendants had unreasonably restrained trade and had attempted to monopolize trade and commerce in the distribution and exhibition of motion pictures by: (1) "conspiring with each other and with the distributor-defendants to fix substantially uniform minimum motion picture theatre admission prices, runs, and clearances;" (2)

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[36] Ibid, p. 346.

The Court said the following factors should be considered in determining the reasonableness of clearance (Ibid, p. 343).

(1) The admission prices set by the exhibitors involved
(2) The character and location of the theatre involved, such as size, type of entertainment, appointments, transportation facilities
(3) Policy of operating theatre involved, such as showing double features, give-aways, gift nights, premiums, lotteries, cut-rate tickets, etc.
(4) Rental terms and license fees paid by theatre involved and revenues derived from such theatre by defendants
(5) Extent to which theatres involved compete with one another for patronage
(6) Fact that the theatre involved is affiliated with a defendant distributor or with an independent circuit of theatres
(7) There should be no clearance between theatres not in substantial competition.

[37] 70 F. Supp. 53, 72.

"conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission price, run, clearance and other license terms."[38]

The District Court then enjoined each distributor-defendant from: (1) "agreeing with each other or with any exhibitors or distributors to maintain a system of clearances;" (2) "granting any clearance between theatres not in substantial competition;" (3) "granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted" and (4) provided that whenever any clearance was attacked as illegal the burden shall be upon the distributor to sustain its legality. It decreed further that: (1) each picture should be licensed "solely upon the merits and without discrimination in favor of affiliates, old customers or others," and (2) that "each license shall be offered and taken theatre by theatre and picture by picture."[39]

The principal remedy provided by the District Court was a judicially supervised system of competitive bidding which the Court thought would give independent exhibitors an opportunity to compete, as to each feature picture released, for the preferred runs which independents had been prevented from obtaining as a result of the conspiracy since the same offer would be made to all prospective exhibitors in a community.[40]

On appeal this Court affirmed the findings of law violation, vacated those provisions of the decree which were inconsistent with divorcement, and remanded the case for further consideration of that relief.[41]

In approving the findings and conclusions of the District Court in regard to clearances and runs this Court

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[38] Ibid, p. 72.

[39] Ibid, pp. 73, 74.

[40] 66 F. Supp. 323, 358; 70 F. Supp. 53, 74.

[41] 334 U. S. 131.

held that there was sufficient evidence to show that "many clearances had no relation to the competitive factors which alone could justify them;" that the clearances in use had "acquired a fixed and uniform character and were made applicable to situations without regard to special circumstances which are necessary to sustain them as reasonable restraints of trade;" that the evidence was ample to sustain the finding of the District Court "that the defendants either participated in evolving this uniform system of clearances or acquiesced in it and so furthered its existence," and that such evidence was "adequate to support the finding of conspiracy to restrain trade by imposing unreasonable clearances."[42]

On remand the District Court held that there should be divorcement and divestiture relief against the five major defendants because such relief was necessary to end the conspiracy.[43] New findings were entered which reaffirmed the earlier findings as to the nature and scope of the conspiracy and findings were added to the effect that affiliation of the distributors with first-run theatres provided an incentive for their illegal conduct.[44] The two final judgments entered on February 8, 1950, left the 1946 declaration of the prima facie invalidity of defendants' clearance systems unchanged and added a provision to the effect that no feature could be licensed "for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others."[45]

In summary, the *Paramount* case adjudicated the following in reference to clearance and run: (1) that the distributor-defendants (respondents here) conspired to evolve and maintain a uniform system of clearance and run; (2) that defendants imposed arbitrary and unreasonable clear-

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[42] Ibid, pp. 146-147.

[43] 85 F. Supp. 881, 893-894, 895-896.

[44] Ibid, pp. 888-889.

[45] Sec. II, Par. 8 (S.R. 1004).

ances; (3) that such clearances had acquired a fixed and uniform character and were imposed without regard to the local circumstances to which they were applied; (4) that the system of runs and clearances evolved by or acquiesced in by all the defendants discriminated against independent exhibitors which were in competition with exhibitors affiliated with defendants; (5) that this system of runs and clearances discriminated against new theatres attempting to enter into the exhibition field and in favor of established customers of defendants; and (6) that one of the purposes of maintaining such a system of runs and clearances was to exclude competition with theatres owned and operated by defendants.

Against this background of unlawful conduct with respect to run and clearance, which both the District Court and this Court found was the result of a common course of conduct amounting to conspiracy among the same respondents, the following undisputed and uncontradicted evidence was adduced at the trial of the instant case.

Respondents admitted that it is the national policy of each to confine the exhibition of first-run feature films to the downtown areas of cities; that each has followed such a policy for many years, both before and after the *Paramount* litigation, and that such policy is applicable not only to Baltimore but throughout the United States.[46] They conceded that in rare situations exceptions to the national policy have been made but only in circumstances where a neighborhood theatre is owned by one of them or to avoid the obvious discrimination which would result from denial of such a run to independents in such circumstances.[47]

Respondents further admitted that each is aware that the other respondents are following the identical exclusionary policy.[48]

The uncontradicted evidence shows that five of the re-

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[46] R. 1a; 11a; 17a; 60a; 145a-146a; 164a-165a; 182a-183a; 213a; 218a; 233a-234a.

[47] R. 69a; 216a; 218a; 102a; 103a; 105a; 90a; 204a-205a.

[48] R. 150a; 66a; 192a.

spondents [49] own hundreds of theatres throughout the United States, many of which are first-run theatres and virtually all of which first-run theatres are located in the downtown section of cities; [50] that all of the respondents license their first-run pictures to theatres owned by the five distributor-exhibitor respondents and that substantial revenues are derived from such cross-licensing; and that all of the respondents know of the theatre ownership of these five respondents, as well as the cross-licensing and the substantial revenues thus derived. [51]

The uncontradicted evidence disclosed further that petitioner's Crest Theatre, seating sixteen hundred, built at a cost of $460,000, and located six miles from the nearest downtown theatre, is comparable in size, seating capacity, equipment and appointments to the downtown theatres in Baltimore which latter houses are granted first-run product. [52]

Respondents admitted that had the Crest been located downtown, or had it been owned by one of the respondents in its present location, it would have been afforded an opportunity to compete for first-run product. [53]

The evidence was also undisputed that petitioner was willing to pay, and had offered to pay by certified check film rentals equal to or greater than those actually received by respondents from their existing first-run accounts. [54]

Respondents admitted that their decision to deny petitioner an opportunity to compete for first-run film resulted from the application of their national policy to confine first-run showings to theatres located in downtown areas and had no necessary relationship to the particular cir-

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[49] Warner, Fox, Loew's, RKO, and Paramount.

[50] R. 126a-127a; 138a; 139a; 142a; 176a.

[51] R. 178a; 203a; 230a.

[52] R. 50a-53a; 22a; 26a; 64a.

[53] R. 145a-146a; 210a-211a; 219a; 166a-167a; 206a.

[54] R. 45a; 55a; 58a; 77a; 78a; 80a; 82a; 174a; 205a-206a.

cumstances of the Crest Theatre.[55] In fact this was affirmatively demonstrated by the fact that not a single top executive of any respondent ever saw the Crest prior to the uniform denial to it of first-run product.[56]

We submit that such evidence establishes the fact that respondents conspired illegally to deny petitioner an opportunity to compete for first-run product, and that petitioner was excluded from the first-run market for reasons wholly unrelated to the peculiar circumstances applicable to its local situation. Each respondent followed the same exclusionary policy in the knowledge that every other respondent was likewise following such policy. Each respondent knew that the common policy of all of confining the licensing of first-run film to downtown areas could not be maintained in the absence of common action by all of them. Each respondent followed a course of conduct over a period of years with the deliberate purpose and intent of excluding petitioner and others similarly situated from a substantial part of the market. This Court has held repeatedly that such a factual setting is sufficient to constitute a conspiracy to violate the Sherman Act. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 226-227, *United States* v. *Masonite Corp.*, 316 U. S. 265, 275; *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 723; *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809-810; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 142.

The cases cited, when considered together, hold that evidence sufficient to establish a combination or conspiracy in violation of the Sherman Act exists when it is proved that members of an industry have participated in a particular course of conduct under circumstances which indicate that each must have known that the others would do or had done the same things, and the necessary result of their common, though separate, acts is to impose a restraint of trade

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[55] R. 1a; 11a; 60a; 145a-146a; 164a-165a; 182a-183a; 213a; 218a; 233a-234a.

[56] R. 50a.

of the character prohibited by the Sherman Act. These cases hold that the existence of conspiracy is even clearer where, as here, the course of conduct could not continue in the absence of participation by all of those involved, and the course of conduct, as it did here, produced results uniformly favorable to the participants and unfavorable to their competitors.

Proof of the type of circumstances existing here goes further than merely to establish an inference of conspiracy which respondents may rebut in the ordinary way. Where circumstances such as those herein admitted have existed this Court has held that conspiracy was established, even though the findings of the District Court that defendants had not entered into an agreement coterminous with the conspiracy alleged be accepted, and even in the face of explicit denials by each defendant either of the existence of an agreement or of any intention to combine with the others involved.[37]

In the instant case the undisputed evidence shows that respondents, who are in full control of the supply of pictures in the market in which petitioner desires to compete, have pursued a uniform course of conduct the necessary effect of which is to impose unreasonable restrictions upon commerce, each with an awareness that the others were also pursuing the same policy. Each knew that the exclusionary result could not be achieved except by the common action of all. It is submitted that such evidence clearly established a case of conspiracy as a matter of law under the cases last cited.

It is even clearer that petitioner established a case of conspiracy as a matter of law when the facts in the instant case are considered against the background and findings in the *Paramount* case. As previously pointed out this Court there held that these same respondents had conspired to impose unreasonable runs and clearances on a nationwide basis; that many clearances "had no relation to the competitive factors which alone could justify them;"

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[37] *United States* v. *Masonite Corp.*, 316 U. S. 265, 275-276.

that the clearances which were in vogue had "acquired a fixed and uniform character and were made applicable to situations without regard to special circumstances which are necessary to sustain them as reasonable restraints of trade." *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 146. Since the undisputed evidence in this case shows that these same respondents were pursuing the same course of conduct which this Court in the *Paramount* case found was the result of conspiracy and which had been condemned as illegal, and since there was no factual conflict for the jury to resolve, the District Court should have directed a verdict for petitioner on the question of conspiracy. Under such circumstances the conduct here should have been equated with the conspiracy found in the *Paramount* case. There was no reason for permitting the jury to speculate as to whether or not there was conspiracy.

As against the undisputed and uncontradicted evidence of the existence of conspiracy the respondents advanced five so-called business reasons for uniformly denying petitioner an opportunity to compete for first-run film. These reasons were: (1) the existence of the national policy, followed by each, of confining first-run exhibitions to theatres located in downtown areas;[58] (2) the downtown showings draw larger crowds and hence bring in the largest revenues;[59] (3) the Crest could not be preferred to other similarly situated neighborhood houses, and if all neighborhood houses were granted access to first-run product the downtown theatres throughout the country, which were largely owned by respondents, would be eliminated;[60] (4) the downtown theatres have been satisfactory customers of long standing,[61] and (5) the Crest would not be successful and hence respondents would not experiment with it.[62]

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[58] R. 1a; 11a; 60a; 145a-146a; 164a-165a; 182a-183a; 213a; 218a; 233a-234a.

[59] R. 86a; 115a; 147a; 165a; 227a.

[60] R. 162a-163a; 230a.

[61] R. 144a; 148a.

[62] R. 147a; 150a; 230a.

These five so-called business reasons constituted the "evidence" relied upon by respondents to rebut petitioner's case in chief on the question of conspiracy. But evidence which shows merely that respondents had a common business purpose for excluding petitioner from the first-run market has no relevance to a showing that they did not conspire to do so. The logical inference would be to the contrary. Since admittedly there was exclusion of a competitor from the market the fact that there were business reasons which made such exclusion desirable to respondents affords no legal justification for such conduct. *United States* v. *Masonite Corp.*, 316 U. S. 265, 276 (1942).

These so-called business reasons were merely *excuses* which were offered to justify the maintenance of the jointly-pursued non-competitive national policy of confining first-run showings to downtown areas, rather than evidence to prove that there was no joint or common purpose to exclude petitioner from the first-run market. Three of the excuses, namely, the larger revenue from downtown operations, the necessity for protecting respondents' investment in their downtown theatres, and the satisfactory relationship with existing customers, do not constitute evidence rebutting the existence of conspiracy but are merely reasons for the adoption and maintenance of the conspiracy they are pleased to call a national policy.

The only excuse given which might possibly have pointed to independent competitive behavior was respondent's statement that the Crest would not be successful if operated as a first-run house. But since all of them refused to experiment with first-run film at the Crest, the question of whether it could in fact have been operated successfully on a first-run basis is purely conjectural. In addition, this particular reason for exclusion has no probative force since respondents would not have granted first-run to the Crest anyway because of the existence of their jointly-pursued national policy of confining first-run exhibitions to theatres located in downtown areas. The evidence did show that in the few situations in which respondents had licensed

neighborhood theatres on first-run such operations had been successful.[63] One respondent hinted that had it owned the Crest such theatre would probably have been granted first-run privileges.[64]

To advance the national policy as an excuse for denying petitioner access to first-run product is but to admit the fact of conspiracy since each pursued the same policy with knowledge that all the others were following the same policy, each knew that the exclusionary result could be achieved only by the common action of all, and each knew that common pursuit of such policy would impose an unreasonable restraint upon petitioner's theatre operation. Under the cases discussed (pages 36-37, *supra*) such conduct constitutes conspiracy.

Respondents' contention that downtown theatres draw larger crowds and bring in more revenue has no peculiar application to Baltimore. Indeed it was patently inapplicable to the particular situation here since petitioner had offered guarantees which were adequate to protect respondents.[65] If the drawing power of the downtown theatres proved so superior to that of the Crest that the latter could not continue to offer the required guarantees, then competition would effectively dispose of petitioner's bids for first-run pictures.

Doubtless respondents believed that their nationwide system of runs and clearances which were substantially uniform as to each local competitive area, and which had been unqualifiedly condemned by this Court in the *Paramount* case, were financially advantageous to them, but that fact supplied a motive for joint action rather than proof of its absence. It is interesting to note that William F. Rodgers, who for sixteen years had been the general sales manager for Loew's, testified that in Boston where a suburban house owned by Loew's was playing first-run day

[63] R. 161a; 185a; 204a-205a; 227a.

[64] R. 166a-167a.

[65] R. 45a; 55a; 58a; 59a; 77a; 80a; 82a; 174a; 205a-206a.

and date with a downtown house also owned by Loew's, it was "not uncommon for the theatre in the Back Bay section to outgross the theatre downtown." (R. 227a).[66]

Respondents' concern with the possible effect upon their nationwide theatre investment in downtown theatres if neighborhood houses were granted an opportunity to compete for first-run product is understandable. Such concern provides a strong motive for the nationwide exclusion of neighborhood theatres from first-run product but it offers no basis for an inference of local independent competitive activity in this case. Nor has it any bearing whatsoever upon petitioner's qualifications for first-run film in Baltimore, nor to the local competitive situation. Such common concern, however, does explain the unanimity with which respondents refused petitioner first-run product and the unanimity with which they granted petitioner first subsequent run. However, it is wholly irrelevant to a showing that each acted independently of the others.[67]

The excuse that the Crest was denied first-run product because the downtown theatres have been customers of long standing is no defense to proof of a nationwide conspiracy to adopt and maintain non-competitive runs and clearances. At best it merely confirms an established industry aversion to the stresses of competition. In denying the request of the minor defendants that they be permitted to retain their old customers regardless of discrimination, the District Court in the *Paramount* case said that "the system of preferring old customers undoubtedly aided discrimination in

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[66] Boston was one of the few cities in which respondents permitted a neighborhood house owned by one of them to play first-run film.

[67] While only Loew's and Warner owned downtown theatres in Baltimore, the three other majors, Fox, Paramount, and RKO, as well as Loew's and Warner, owned and operated first-run theatres and dominated the first-run market in the 92 largest cities of the nation, including Baltimore. Each of the five majors could expect, and in fact did receive, reciprocal favored treatment in those major cities in which such distributors owned theatres. (See 85 F. Supp. 881, 888, 893-895.)

the past and served as a ready excuse for a fixed system of runs and clearances and was to that extent unlawful."[48]

This is not a case in which the alleged conspirators offered evidence that they acted independently from some motive unrelated to restraint of trade. On the contrary, respondents not only knew that their common course of conduct would unreasonably restrain competition, but by their explicit admission, they deliberately intended to restrain the trade of independent neighborhood theatres. Their defense was merely that it was convenient and economically profitable to do so.

Nor did the excuses offered by respondents for denying first-run to the Crest have anything to do with the size, seating capacity, equipment, appointments, or policy of operation of that theatre. The excuses advanced were admittedly applicable across-the-board to all neighborhood theatres without regard "to the special circumstances which are necessary to sustain them as reasonable restraints of trade." *United States* v. *Paramount Pictures, Inc., et al*, 334 U. S. 131, 146.

It is firmly established that evidence showing a conspiracy to impose unreasonable restraints upon commercial competition cannot be refuted by evidence showing business necessity, good intentions, or economic motives. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 599 (1951); *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 468 (1941); *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150, 220, 221 (1940); *Paramount Famous Lasky Corporation* v. *United States*, 282 U. S. 30, 43, 44 (1930); *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600, 613 (1914); *Standard Sanitary Manufacturing Company* v. *United States*, 226 U. S. 20, 49 (1912); *American*

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[48] 85 F. Supp. 881, 898. Petitioner's requested instruction No. 61 which was refused reads (R. 299a): The system of preferring old customers has been used by these defendants in the past as a ready excuse for a fixed system of runs and clearances and was to that extent unlawful.

*Medical Association* v. *United States*, 120 F. 2(d) 233, 249 (C. A. D. C. 1942) affd. 317 U. S. 519; *United States* v. *General Motors Corporation, et al.*, 121 F 2(d) 376, 406, 407 (C. A. 7, 1941), cert. den. 314 U. S. 618. The question for determination here was not *why* respondents excluded petitioner from the first-run market but whether the *admitted exclusion* was the *result* of *conspiracy*. The business reasons offered by respondents in defense of their action were beyond the scope of such inquiry.

The real reason for respondents concerted refusal to offer petitioner an opportunity to compete for first-run product lies in their desire to retain monopoly control of first-run exhibitions.[*] As this Court said in the *Paramount* case "the main contest is over the cream of the exhibition business—that of the first-run theatres;" that the central problem was "which exhibitors get the highly profitable first-run business;" that "the controversy over monopoly relates to monopoly in the first-run phase of the exhibition business." *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166-167. As a means of breaking respondents' strangle-hold on the first-run exhibition business this Court approved the action of the District Court in enjoining the fixed system of runs and clearances which had been imposed without regard to local situations and decreed the divorcement of exhibition from distribution in order to end the conspiracy.[**]

Despite these judgments against them respondents have resisted every effort to break their monopoly of the first-run exhibition field. When a new method of competition developed in the form of the drive-in theatre these same

[*] These same respondents have concertedly denied first-run product to independent theatres located in downtown areas where such independent theatres were comparable in size and appointments to downtown theatres owned by respondents. (*See Williams Goldman Theatres* v. *Loew's, Inc.*, 150 F. 2(d) 738 (C. A. 3, 1945), cert. den. 334 U. S. 811 (1948); *Ball* v. *Paramount Pictures*, 169 F. 2(d) 317 (C. A. 3, 1948), cert. den. 339 U. S. 911 (1950).

[**] 334 U. S. 131, 146-147, 174-176.

respondents uniformly relegated such theatres to subsequent-run status without regard to local circumstances. In the *Milgram* case the distributors refused a drive-in theatre an opportunity to compete for first-run film despite the fact that the operator of such theatre had offered higher film rentals than was paid by the exhibitor-defendants.[71] These same respondents offered the identical "business reasons" as those offered here for denying first-run pictures to drive-ins but the Court of Appeals there held that such reasons "were not strictly relevant."[72] It held further that such reasons were not peculiarly applicable to plaintiff's drive-in theatre but, on the contrary, were applicable to all drive-in theatres,[73] and that denial of first-run film to the plaintiff was the result of a nationwide policy of all the distributors to relegate drive-ins to second-run status.[74]

Where, as here, another method of competition developed, namely, the de luxe suburban house, respondents again acted with unanimity in relegating it to second-run status. While this case arose from the demand of a single theatre owner and involves a local situation, the reasons for refusing such theatre first-run product are directed to the position occupied by neighborhood theatres in the motion picture field. The plain fact is that the Crest was denied an opportunity to compete for first-run product simply because it was a suburban theatre. This conclusion is buttressed by the admission of respondents that had the Crest been located in the downtown area it would have been afforded access to first-run film. In effect, respondents have erected a fence around the neighborhood theatre and relegated it to subsequent run status.

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[71] *Milgram* v. *Loew's, Inc., et al*, 94 F. Supp. 416, 418 (1950), affd. 192 F. 2(d) 579 (C. A. 3, 1951), cert. den. 343 U. S. 929 (1951).

[72] 192 F. 2(d) 579, 585.

[73] *Ibid.*, p. 583.

[74] *Ibid.*, p. 586.

Such a policy runs counter to the modern trend of locating both business houses and theatres in the suburban areas of large cities so as to avoid growing congestion in downtown areas. Suburban areas are themselves frequently cities within Metropolitan boundaries with their own business, shopping, and entertainment centers. They have developed because of the spreading growth of cities, the distance of suburban areas to downtown, and the complicated and expensive parking problems which are present in any large city. To deny neighborhood theatres an opportunity to compete for first-run product is but to stem the tide of progress and deny convenient entertainment outlets to patrons. This is especially true where, as here, the suburban theatre is of adequate size, properly managed, suitably equipped, located in a thriving community from which it can draw on a large population, and capable of charging the same admission prices as well as paying the same or potentially greater film rentals to the distributors as are paid by downtown houses.

Under our competitive system progress is achieved from "the constant development of new forms and methods and their entry into free competition with the old," and unless proved to be detrimental to the public they should "be allowed to find their proper place in the industry, rather than have a place assigned to them by a dominant group with monopolistic power." *Milgram* v. *Loew's, Inc., et al.*, 94 F. Supp. 416, 421 (1950), aff'd. 192 F 2(d) 579 (C. A. 3, 1951), cert. den. 343 U. S. 929 (1951).

It is apparent from the factual situations developed in the *Milgram* case as well as in the instant case that respondents are continuing their efforts to monopolize "the cream of the business," the lucrative first-run field, in the teeth of this Court's action in the *Paramount* case.

It is the position of the petitioner that the undisputed and uncontradicted evidence in this case, when viewed in the light most favorable to respondents, clearly established the existence of a conspiracy to foreclose petitioner and

other neighborhood theatres similarly situated from an opportunity to compete in the first-run film market; that the conspiracy was a continuance of the same conspiracy already condemned by this Court in the *Paramount* case, and that no relevant defense was offered to refute the clear case of conspiracy established largely through respondents' own admissions, and hence that the trial court erred in refusing to instruct a verdict for petitioner on the question of conspiracy.

## II

### The District Court Deprived Petitioner of the Benefits of Section 5 of the Clayton Act by Failing to Explain Adequately the Background, Scope and Significance of the Paramount Case and Its Impact Upon the Instant Case and by Instructing the Jury that Petitioner Still Had to Prove Conspiracy Because the Present Factual Situation Had Not Been Before the Court in the Paramount Case

Section 5 of the Clayton Act provides that judgments in Government Antitrust suits shall constitute prima facie proof of all matters which the defendants are estopped from relitigating with the Government. The admissibility of such judgments under Section 5 was conclusively established by this Court in *Emich* v. *General Motors Corporation*, 340 U. S. 558 (1951). It was there held that not only the final judgment but any other part of the primary record in the Government case necessary to determine the scope of the estoppel described in Section 5, should be received in evidence.[75] It was held further that the trial court should then instruct the jury with respect to the significance which should be given the judgment in the Government suit in weighing the charges of illegal conduct.[76] This Court held also that, although the private litigant is required to establish the injury to his business by independent evidence, he is entitled to rely upon the estoppel created by the judgment in the Government suit to establish the prima

[75] At pp. 571-572.

[76] At p. 572.

facie illegality of the conduct by which he has been injured as well as the injurious purpose of such conduct."[77]

This Court has determined that the theory of Section 5 is that Congress, recognizing that the prosecution of an antitrust suit involves numerous complex burdens which might discourage private suitors from availing themselves of the remedy afforded by Section 4 of the Clayton Act, intended to integrate public and private enforcement of the antitrust laws by permitting judgments in Government suits to be used in private suits as prima facie proof of the charge of illegal conduct, leaving to the private suitor the burden of a prima facie showing that such illegal conduct actually injured him."[78]

It is submitted that the trial Court's charge with respect to the purpose, scope and effect of the *Paramount* litigation was so superficial and so limited as to deprive petitioner of any of the benefits conferred upon it by Section 5 of the Clayton Act. Although he had before him all four final decrees entered in that litigation, and had had his attention called to the reported opinions, findings of fact, and conclusions of law from which such decrees were derived, and also had had the benefit of two full arguments relating to the admissibility of the decrees (SR. 174-222; 914-952), the trial Court refused all of petitioner's requested instructions.

The Court told the jury that he had allowed the decrees in the *Paramount* suit to be introduced in evidence; that that suit was one brought by the Government against these same defendants at a time prior to the opening of the Crest and had held that these defendants had violated the antitrust laws by "restricting to themselves first-run and in establishing certain clearances in numerous places throughout the United States;" that such facts become prima facie evidence which plaintiff may use to support its claim that what the defendants have done since in Baltimore is within

[77] At pp. 570-571.

[78] At pp. 567-568.

the prohibition of the earlier decrees; that the present factual situation in Baltimore was not before the Court in the prior case and hence it was still necessary to plaintiff's recovery that it prove that the defendants conspired unreasonably to deprive plaintiff of first-run films, or to restrict plaintiff to unreasonable clearances. (R. 273a).

The Court of Appeals found "nothing detrimental to the plaintiff in these instructions." It held that the district court had correctly instructed the jury that the decrees were prima facie but not conclusive evidence of the conspiracy on which plaintiff's case was based, and that such an instruction was in accordance with the terms of Section 5 of the Clayton Act. *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp., et al*, 201 F. 2(d) 306, 315-316.[79]

Contrary to the clear guide laid down by this Court in the *Emich* case[80] the trial Court: (1) failed to examine the record in the *Paramount* case for the purpose of determining the issues decided by those judgments, (2) failed to reconstruct that case in the manner and to the extent necessary to acquaint the jury fully with the issues therein determined, and (3) failed to explain the scope and effect of the *Paramount* judgments on the instant case.

Although petitioner offered the relevant documents in the *Paramount* case at the beginning of the trial (SR. 220-

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[79] Petitioner had not contended that the *Paramount* decrees were conclusive but sought only a full and clear charge which was necessary to permit the facts in the instant case to fall into proper perspective.

[80] This Court there said (340 U. S. 558, 572):

"In summary the trial judge should (1) examine the record of the antecedent case to determine the issues decided by the judgment; (2) in his instructions to the jury reconstruct that case in the manner and to the extent he deems necessary to acquaint the jury fully with the issues determined therein; and (3) explain the scope and effect of the former judgment on the case at trial. The Court may, in the interest of clarity, so inform the jury at the time the judgment in the prior action is offered in evidence; or he may so instruct at a later time if, in his discretion, the ends of justice will be served."

222), and reoffered them at the close of its case in Chief (SR. 482), as well as at the close of all of the evidence, the Trial Court refused their admission until a moment before he charged the jury on the entire case, at which time it was obviously too late for their proper consideration by the jury. (SR. 1002-1004).

Had the trial Court given even cursory attention to the *Paramount* judgments and to the comprehensive findings of fact and conclusions of law upon which they were based, it would have seen that the distributor defendants there, who are respondents here, were estopped by such judgments from relitigating with the Government the following matters of law and fact which were relevant to the instant case:[81]

(1) That these respondents in 1945, had illegally conspired with each other and with their first-run licensees to establish a nationwide system of runs and clearances which were substantially uniform in each local competitive area, and which had the effect of protecting affiliated first-run exhibitors from competition by independent exhibitors, such as petitioner;[82]

(2) That these respondents in 1945, had illegally conspired to discriminate against independent exhibitors, such as petitioner, by granting special license privileges to theatres affiliated with them and with large theatre circuits;[83]

(3) That these respondents in 1945, had illegally conspired to discriminate against independent exhibitors, such as petitioner, by granting unreasonable clearances against theatres operated by such independents;[84]

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[81] 70 F. Supp. 53, 71-74; 85 F. Supp. 881, 883-884, 885, 897-898.
[82] Conclusion of Law No. 7, 70 F. Supp. 53, 71-72.
[83] Conclusion of Law No. 8(d), 70 F. Supp. 53, 72.
[84] Conclusion of Law No. 8(e), 70 F. Supp. 53, 72.

(4) That the illegal conspiracy and discrimination described above could be ended only by divorcing each respondent from the theatre circuits affiliated with it;[85]

(5) That each respondent was enjoined from agreeing with any other respondent or with any exhibitor or distributor to maintain a system of clearances; from granting any clearances between theatres not in substantial competition; from granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license in excess of that which was reasonably necessary to protect the licensee in the run granted, and that whenever any clearance provision was attacked as illegal, the burden was placed on the distributor to sustain its legality;[86]

(6) That hence-forth respondents were required to negotiate run and clearance, theatre by theatre, solely upon the merits of the respective offers received for a particular run from competing theatres and without discrimination in favor of affiliated theatres, circuit theatres or others.[87]

(7) That the relief necessary to end the continuing conspiracy and discrimination was not granted until February 8, 1950.[88]

The above constituted the minimum requirements for instructions relating to the scope and effect of the *Paramount* judgments as those judgments bear on the instant case. They constituted the matters of law and fact relevant to

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[85] 85 F. Supp. 881, 895-896; Sec. IV of Final Decrees of February 8, 1950.

[86] Sec. II, Pars. 2, 3 and 4 of decrees entered February 8, 1950 (SR. 1003)

[87] Sec. II, Par. 8, of decrees entered February 8, 1950 (SR. 1004)

[88] SR. 1004.

this case respecting which respondents were estopped by the judgments from relitigating with the Government. These judgments, which the trial Court refused to explain, were prima facie evidence that the admitted refusals of respondents to permit petitioner an opportunity to negotiate competitively for first-run film in Baltimore were, as charged, the product of a nationwide conspiracy to protect respondents' existing first-run licensees from independent competition. Failure to give the jury the benefit of such instructions constituted prejudicial error of the clearest kind. The sketchy instructions which were given did not afford the jury any opportunity to evaluate the evidence relating to the local situation in Baltimore against the background of the Government's lengthy litigation with these same respondents.

While it is true that such evidence is subject to refutation by respondents, and that any conflicts resulting therefrom were for the jury to resolve as to factual matters, and for the Court as to issues of law, the Court's failure to explain such matters in his charge left the jury in ignorance as to their relevance and importance. As a result petitioner was deprived of the benefits which Section 5 was intended to confer upon him.

While this Court in the *Emich* case properly left to the discretion of the trial court the exact manner in which the explanation of the prior judgment should be made,[89] it did 'set up clear guides [90] which were ignored by the trial Court here. The practical effect of the exceedingly narrow construction given was to nullify the evidentiary effect of Section 5 as far as petitioner's case was concerned. We submit that the instruction given by the trial Court frustrates the purpose of Congress in enacting Section 5 as a means of minimizing the burdens which would otherwise have to be borne by private suitors. The instruction given

[89] 340 U. S. 558, 571.
[90] 340 U. S. 558, 572.

also failed to follow this Court's construction of the use to be made of Section 5 as announced in the *Emich* case.

By instructing the jury that, despite the prior Government litigation it was still necessary, if petitioner was to recover, to prove that respondents conspired unreasonably to deprive petitioner of first-run product because the Baltimore factual situation was not before the Court in the *Paramount* case, the trial Court, in substance if not in form, required petitioner to retry the issue of conspiracy previously resolved against respondents.[91]

Baltimore was in fact referred to in the Government's amended complaint. In addition, exhibits were received in evidence in that case showing the first-run distribution of respondent's films in the 92 cities of the country with populations over 100,000 *including* Baltimore.[92] In any event the Government was not required to prove all the factual situations that might arise in any given locality in order to prove a nationwide conspiracy. *United States* v. *General Motors Corporation, et al*, 121 F 2(d) 376, 405 (C. A. 7, 1941) cert. den. 314 U. S. 618; *De Luxe Theatre Corp.* v. *Balaban & Katz Corp., et al*, 95 F. Supp. 983, 986; *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 299, 305, 307 (1953). To establish a prima facie case under the ruling in the *Emich* case[93] it was only necessary for

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[91] The Court of Appeals held that the *Paramount* decrees had no relation to the Crest Theatre since it was constructed after the decrees were entered, but said they were offered to show that defendants had entered into a prior conspiracy which was given effect when plaintiff applied for first-run privileges. *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp., et al*, 201 F. 2(d) 306, 315.

[92] Exhibits Nos. 428 and 428a, *United States* v. *Paramount Pictures, Inc., et al.*, 66 Fed. Supp. 323, 70 F. Supp. 53, 334 U. S. 131.

[93] There the private suitor introduced the criminal judgments in the prior Government suit to show prima facie evidence of the existence of a nationwide conspiracy on the part of the General Motors group to monopolize the time sale financing of cars sold by General Motors dealers, and, in addition, introduced evidence of the cancellation of his dealership because of his refusal to use

petitioner to introduce the judgments in the prior Government case and such additional evidence as would show the impact of the conspiracy on petitioner.[94] This the petitioner did.

The instruction requiring *de novo* proof as to the existence of conspiracy in Baltimore may have resulted, in part, from the doubt expressed by the trial Court that petitioner could rely on the *Paramount* judgments since the original findings of fact in that case showed the situation as of 1945 (SR. 200-203) whereas petitioner didn't request first-run until January 1948. (R. 10a).

The mere fact that the findings in the *Paramount* case showed the situation generally as of 1945, whereas petitioner made its first request for first-run product in January 1948, in no way deprives petitioner of the right to rely upon the decrees eventually entered in that case as prima

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the financing facilities of a finance company affiliated with General Motors in the time-sale financing of cars sold by him at retail. This Court held such to be sufficient to prove a prima facie case for the plaintiff. (340 U. S. 558)

[94] In the only case other than the instant case in which a Court of Appeals has ruled directly upon the admissibility of the judgment in the *Paramount* case, the plaintiff alleged it had been driven out of business as a result of the earlier conspiracy proved by the Government in the *Paramount* case. Evidence had been introduced showing that the defendants had employed practices in plaintiff's locality and in treating with plaintiff similar to those practices which had been found in the *Paramount* case to have been used to further the nationwide conspiracy. The trial Court summarized the findings of fact in the *Paramount* case, and charged that if any of the practices found there "have been proved by plaintiff to have occurred with respect to the Brookside Theatre, you have the right to conclude without further proof on the part of the plaintiff that such acts or things were done by defendants pursuant to their conspiracy or illegal business practices in violation of the Sherman [illegible] described and established in the *Paramount* case." *Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp.*, Transcript of Record, pp. 2609-2610. Judgment for plaintiff was affirmed. *Twentieth Century Fox Film Corp. v. Brookside Theatre Corp.*, 194 F. 2(d) 846 (C. A. 8, 1952). The defendants' petition for certiorari, a main ground of which was the ruling regarding the admissibility of the judgments, was denied. (343 U. S. 942)

facie evidence of conspiracy here. The damage period in this case was from Fbruary 1949 to March 1950. (R. 260a). Final decrees were not entered against Loew's, Fox, Warner, Universal, Columbia and United Artists until February 8, 1950, more than two years after petitioner's original request which was made in January 1948 (R. 1001). Consent judgments after remand were entered against RKO on November 8, 1948, and against Paramount on March 3, 1949.[**] Since there was no evidence of abandonment the law presumes that the conspiracy continued until the entry of the final judgment which enjoined the condemned conduct. *Hyde* v. *United States*, 225 U. S. 347, 368, 370 (1912); *United States* v. *Perlstein*, 126 F. 2(d) 789, 798 (1941), cert. den. 316 U. S. 678. There is no presumption, however, that upon entry of judgment in a Government antitrust suit the defendants ceased their unlawful conduct. In the absence of clear proof to the contrary, abandonment of an unlawful conspiracy in violation of the Sherman Act

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[**] The following is the chronology of the *Paramount* litigation. The case went to trial in November 1945. The first decision by the Statutory Court was made on July 26, 1946 (66 F. Supp. 323). The judgment on this decision was entered on December 31, 1946, and the supporting findings are reported in 70 F. Supp. 53. In May, 1948, this Court affirmed the findings relating to liability, vacated the provisions of the decree which were inconsistent with the theatre divestiture sought by the Government, and remanded the case for further consideration of such relief (334 U. S. 131). In July, 1949, the Statutory Court held the Government was entitled to theatre divestiture against the five theatre-owning defendants in order to end the conspiracy (85 F. Supp. 881, 893-894, 895-898). New findings were entered on February 2, 1950 (85 F. Supp. 881, 888-889), and on the same day two judgments in accordance with such findings were entered, one against Fox, Loew, and Warner, theatre-owning defendants, the other against Columbia, Universal, and United Artists, non-theatre-owning defendants. The judgment against Loew, Fox and Warner was appealed and such judgment affirmed per curiam on June 5, 1950 (339 U. S. 974). The consent judgment against RKO, dated November 8, 1948, after remand from this Court, was entered without the taking of additional testimony. A similar judgment against Paramount was entered on March 3, 1949, after the taking of additional evidence on remand.

will not be presumed even after entry of judgment. *Local 167* v. *United States*, 291 U. S. 293, 297-298 (1934). This is particularly true where, as here, respondents had settled into a continuing pattern of antitrust violations. *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1951).[96]

The attitude of the trial court with respect to the *Paramount* case and the construction to be given Section 5 are illustrated by his remarks during argument of counsel on the admissibility of the decrees. He characterized the clear and unambiguous language of Section 5 as "clumsy," "inadequate," and "inartistic" (SR. 942); "that it confused the issue by bringing in a lot of subtle language which does not make sense when applied to a concrete situation" and that it would merely "befuddle the jury." (SR. 1000). While admitting that Section 5 required him to permit petitioner to call the jury's attention to the *Paramount* decrees and to explain that they were prima facie evidence of conspiracy, the Court said "it does not amount to anything, it has no force, no probative value unless they (the jury) find a concert of action;" that whether the decree was admissible for any purpose is "a close case;" that "it may be a twilight zone case." (R. 236a). Although his attention was called to this Court's instructions in the *Emich* case requiring that a trial judge, in dealing with the effect of judgments obtained by the Government in antitrust suits should "examine the record of the antecedent case to determine the issues decided by the judgment,"[97] the trial judge said, "That was a pretty big order, wasn't it?" SR. 219). Subsequently, in commenting on the same requirement, he said, "Well, I am not disposed to examine the record anymore than I have done from the papers that have been given me and the copies of the de-

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[96] This Court in the *Paramount* case had recognized the past proclivity of these respondents to unlawful conduct. 334 U. S. 131, 147.

[97] 340 U. S. 558, 572.

cree." (SR. 917). Although he admitted to having read this Court's opinion in the *Paramount case* (SR. 177) there is no indication that he read either of the two Statutory Court decisions or the findings of fact and conclusions of law upon which the final decrees were based.

After remarking that "Congress apparently did not know the hornet's next they were getting into" in passing Section 5, the Court then said that the mere fact that petitioner had a right to use the decrees in the prior Government suit as prima facie evidence of illegal conduct did not mean that petitioner could thereby "cast the whole burden on the defendants of showing that clearances in this particular case are valid" and that to so interpret Section 5 would be "absurd" (SR. 997). Such a construction misconceives the purpose of Section 5. The decrees in the prior Government suit are to be treated only as prima facie evidence of the existence of illegal conduct. Admittedly such presumption is rebuttable by proper evidence.

The trial Court's misconstruction of the purpose of Section 5, as well as his failure to grasp the full scope and effect of the *Paramount* case, manifested itself in other ways in his charge. Illustrative is his instruction relating to burden of proof with respect to establishing the reasonableness of clearances imposed upon the Crest. The decrees in the *Paramount* case provide that whenever any clearance provision is attacked as illegal the burden of proof is upon the distributor to sustain its legality (SR. 1003). The decrees require that each respondent individually must assume such burden of proof. They do not require evidence of conspiracy between two or more distributors before such burdens attaches. Nonetheless the Court instructed the jury that the burden shifts to respondents to prove legality of clearance *only* if the jury finds that petitioner has proved a conspiracy. (R. 273a-274a)

The most striking example of the trial Court's failure to grasp the purpose, scope and effect of the *Paramount* judg-

ments was his instruction, over objection, that Loew and Warner, both of which own and operate first-run houses in downtown Baltimore, had the absolute legal right to place their own pictures in their own theatres, on any terms they saw fit. (R. 271a) This unqualified statement is clearly erroneous.

Petitioner, in accordance with the provisions of the *Paramount* decrees which prohibited the granting of any clearance between theatres not in substantial competition (SR. 1003), had sought an instruction to the effect that if the jury found that the Crest was not in substantial competition with the Loew and Warner downtown houses, then clearance between those theatres and Crest would be improper (R. 302a-303a).

Refusal of this request left the jury uninformed on the whole problem of day and date first-run exhibition, a crucial issue in the case. In addition, the instruction given was erroneous because it ignored completely the factual situation at the time of trial. Loew and Warner had been found guilty of conspiring with others to violate the anti-trust laws in the prior Government litigation. To terminate such illegality this Court required that the five theatre-owning distributors, which included Loew and Paramount, divest themselves of their theatre-owning affiliates as a step toward eliminating discriminations against independent exhibitors.[**] In this setting the Court's instruction is contrary to the well-established principle that unrestricted freedom to select customers for self-sufficient reasons loses its protection when the choice is made in concert with others. *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312; *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565, 572-574; *United States* v. *Pacific & A. R. & N. Co.*, 228 U. S. 87.

In support of the Court's charge respondents cite (Br. in Opp. p. 11) the provisions of Paragraph 5 of the decrees

[**] 334 U. S. 131, 166-177. On remand the Statutory Court ordered divestiture. 85 F. Supp. 881, 895-896.

entered in the *Paramount* case against Loew and Warner which suspend for the period allowed for theatre divestiture the anti-discrimination provisions relating to runs and clearances and permit these two companies during such period to license pictures in their own theatres, in such manner, and upon such terms and conditions as may be satisfactory to them.[99] But the suspension of the anti-discrimination provisions merely gives respondents immunity from contempt action by the Government during the period allowed for theatre-divestiture. It does not relieve them from liability to a private suitor who was injured prior to the effective date of the suspension. The damage period here was February 1949 to March 1950. (R. 260a). The final decrees were entered on February 8, 1950.

In instructing the jury that Loew and Warner had the legal right to show their own pictures in their own theatres exclusively, as and when they saw fit, the Court analogized the situation to a person selling his own homegrown farm products in his own grocery store (R. 267a). The weakness of any such analogy lies in the fact that respondents produce the desirable feature pictures on which operators of first-run theatres throughout the United States are dependent if they are to remain in business. *White Bear Theatres Corp.* v. *State Theatre Corp.*, 129 F. 2(d) 600, 603 (C. A. 8, 1942); *William Goldman Theatres, Inc.* v. *Loew's, et al*, 150 F. 2(d) 738, 741 (C. A. 3, 1945). The operations of a single farmer can hardly be compared to the effect of restrictions imposed by a group of the most powerful concerns in the nation.

---

[99] This paragraph, read into the record by petitioner at respondents' request, provided that (SR. 1003): "Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for the completion of the plan of reorganization provided for in Section IV, to license, or in any way provide for, the exhibition of any or all of the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or through subsidiaries."

One further point should be noted in connection with the trial Court's handling of the *Paramount* judgments. Although they were offered at the opening of the trial (SR. 220-222), and again at the close of petitioner's case in chief (SR 482), they were not admitted until all the evidence on both sides was in and the Court was ready to charge the jury (SR. 1002-1004).

If the decrees were to serve as prima facie evidence of conspiracy or of anything else, petitioner was entitled to have them before the jury as a part of its case in chief. If the decrees were admissible at all they were admissible as part of petitioner's prima facie showing of liability. The whole cast and character of the case at trial depended upon getting the decrees into evidence at the earliest possible time. By permitting petitioner to read into the record four paragraphs from the decrees only a brief moment before the Court delivered his charge to the jury on the entire case, no opportunity was afforded the jury to evaluate the evidence relating to the local situation in Baltimore against the background of the Government's lengthy litigation with these same respondents.

The prejudicial situation created by the wholly inadequate and erroneous instructions given by the Court, purporting to explain what the decrees meant as well as their relevance in the instant case, was compounded by the last minute acceptance of the decrees. It strains credulity to believe that, under such circumstances, the jury could possibly have grasped the significance of the prior Government case insofar as it bore on the issues of the case submitted to it for decision.

In the Court below as well as in their Brief in Opposition to the Petition for Certiorari (p. 9), respondents insisted that petitioner made no objection to the Court's proposed charge relating to the *Paramount* case. The record itself is sufficient answer. In accordance with this Court's construction of Section 5, petitioner submitted sixteen proposed instructions relating to the scope and purpose of the

*Paramount* judgments, and their effect upon the factual situation present in the instant case. (See pages 20 to 22, *supra*). These instructions were designed to give petitioner the benefits arising from the prior Government litigation as contemplated by Section 5. They dealt particularly with problems of runs and clearances which were the instruments employed by respondents to deprive petitioner of an opportunity to compete for first-run product.

All of these proposed instructions were refused (R. 277a, 280a-282a). Both Court and counsel had spent an entire afternoon in consideration of instructions proposed by both sides. After the charge to the jury both sides sought additional instructions. Petitioner renewed its request for instructions on the *Paramount* case which was refused (R. 282a). These proposed instructions were read into the record. (SR. 1114-1117). The trial Court's annoyance with petitioner's insistence upon proper instructions is exemplified in the comment that "We have been over all this. Everything in the charge was discussed almost into the night, *ad nauseum*, almost I think you might say." (R. 280a).

## CONCLUSION

We submit that since the admitted and undisputed facts constituted a violation of the Sherman Act as a matter of law, and since the instructions to the jury with respect to the Government's prior litigation in the *Paramount* case were insufficient to afford petitioner the benefits of that litigation as provided by this Court's construction of Section 5 of the Clayton Act, the judgment below should be reversed.

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# APPENDIX

## Clayton Act

*Section 4* (38 Stat. 731, 15 U. S. C. 15) *(Treble damage Suits)*

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

*Section 5* (38 Stat. 731, 15 U. S. C. 16) *(Judgments in Favor of Government Prima Facie Evidence)*

That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

*Section 16* (38 Stat. 737, 15 U. S. C. 26) *(Suit for Injunction by Party Damaged)*

That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions

and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

## Sherman Act

*Section 1* (26 Stat. 209, 15 U. S. C. 1) *(Contract, Combination or Conspiracy in Restraint of Interstate Commerce Illegal)*

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

*Section 2* (26 Stat. 209, 15 U. S. C. 2) *(To Monopolize, Attempt to Monopolize, Combine or Conspire)*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1953 No. ~~819~~ 19

THEATRE ENTERPRISES, INC.,
*Petitioner,*

vs.

PARAMOUNT FILM DISTRIBUTING CORP.,
LOEW'S INCORPORATED,
RKO RADIO PICTURES, INC.,
TWENTIETH CENTURY-FOX FILM CORPORATION,
UNIVERSAL FILM EXCHANGES, INC.,
UNITED ARTISTS CORPORATION,
WARNER BROS. PICTURES DISTRIBUTING CORP.,
WARNER BROS. CIRCUIT MANAGEMENT CORP.,
COLUMBIA PICTURES CORPORATION,
*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952 No. 649

THEATRE ENTERPRISES, INC.,
*Petitioner,*

vs.

PARAMOUNT FILM DISTRIBUTING CORP.,
LOEW'S INCORPORATED,
RKO RADIO PICTURES, INC.,
TWENTIETH CENTURY-FOX FILM CORPORATION,
UNIVERSAL FILM EXCHANGES, INC.,
UNITED ARTISTS CORPORATION,
WARNER BROS. PICTURES DISTRIBUTING CORP.,
WARNER BROS. CIRCUIT MANAGEMENT CORP.,
COLUMBIA PICTURES CORPORATION,
*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

### *Statement of the Case*

The petition in this case seeks review of a unanimous decision of the United States Court of Appeals for the Fourth Circuit (201 F.2d 306) affirming a jury verdict in favor of defendants. The case below was an action for damages alleged to have been inflicted on the plaintiff's

poorly located neighborhood Crest Theatre because of the defendants' allegedly conspiratorial action in refusing to license pictures for first-run exhibition in Baltimore in the Crest Theatre. Instead each defendant continued to license its pictures for first-run exhibition in Baltimore in large downtown first-run theatres. There are nine centrally located first-run downtown theatres in Baltimore, six of which are operated by exhibitors who do not have and never have had any affiliation with any of the defendants.

In *Bordonaro Bros. Theatres v. Paramount Pictures*, 176 F.2d 594 (C.A. 2, 1949) the Court stated (p. 596):

> "The central issue here, as in our recent case of Fifth and Walnut, Inc. v. Loew's Inc., 2 Cir., 176 F. 2d 587, is whether the admitted inability of plaintiffs to obtain first-run films for their theatre sprang from a conspiracy to exclude them from the first-run field or whether it was the natural result of independent business judgments as to the relative value of their exhibition facilities."

The above statement is equally true as to this case.

The statement of the "matter involved" on pages 2-22 of the Petition is neither fair nor accurate, nor does it even purport to be a complete summary of the evidence upon which the verdict for the defendants was based. It recites only that portion of the evidence which petitioner considers favorable, as if the trial court had disregarded that evidence and had directed a verdict for the defendants. Petitioner completely ignores the fact that the case was hotly contested on all basic factual issues. Both parties introduced a substantial body of evidence.

The plaintiff's President was its sole witness. His credibility was severely impeached. The defendants offered

nineteen witnesses whose testimony categorically denied conspiracy and fully explained the business reasons leading each defendant independently to act as it did. The trial court submitted to the jury the factual issues thus presented. The jury found in favor of each defendant. The Fourth Circuit Court of Appeals unanimously affirmed, saying at page 313 of 201 F.2d:

> "We think that there was evidence to support both of the inferences drawn by the opposing parties to the case and thus an issue was presented which was necessarily submitted to the jury for decision."

The petitioner takes special issue with this holding. Its petition (page 16) states that the "petitioner in the present case contends that the Court of Appeals for the Fourth Circuit erred in affirming the trial judge's submission of the issue of conspiracy to the jury." It thus contends for the unusual proposition that a verdict should have been directed for the plaintiff on the issue of conspiracy in a case where the only basis for a finding of conspiracy would be inferences to be drawn from circumstantial evidence.

The opinion below summarized the evidence on behalf of the plaintiff and then set forth in summary form the testimony offered by the defendants. So it is not necessary to include in this brief any detailed statement of the facts.

In its brief before the Fourth Circuit, petitioner admitted that the policy of each defendant was to try, wherever it could, to license films distributed by it in the manner that would yield it the greatest return, and that each defendant acted on the idea that "playing first run in a theatre like the Crest located outside of the downtown section of Baltimore would not and could not be successful." Whether petitioner's inability to obtain pictures for first run ex-

hibition was the result of a conspiracy among the defendants, or the result of separate and independent exercise of business judgment in the selection of customers, was a typical jury question. The jury decided this issue in favor of the defendants.

Petitioner argues that unless this case is reversed neighborhood theatres everywhere are doomed to a subsequent-run status. This case stands for no such doctrine. The jury in this case simply decided on the evidence that in the single City of Baltimore, the action of these defendants in preferring to license their pictures for first-run exhibition in centrally located downtown theatres, in preference to the petitioner's poorly located neighborhood Crest Theatre, was the result of independent judgment in solving a common business problem.

Petitioner's statement (page 6) that the twelve points, which it has carefully excised from the evidence, were "accepted" by the Court of Appeals in its opinion is simply not correct. What the opinion below did was to summarize the evidence offered by both parties and to hold that the factual issues had been properly submitted to the jury. It was the jury which "accepted" the evidence introduced by the defendants.

## I.

## The Fourth Circuit Court of Appeals Correctly Approved The Submission of the Factual Issue of Conspiracy to the Jury.

Petitioner cites no case in which any court has directed a jury verdict for plaintiff in a case under the anti-trust laws. The only decision on this point in a motion picture case is in accord with the decision below. In *Fifth and Walnut, Inc., et al v. Loew's, Inc., et al*, 178 F.2d 587 (C.A.

2, 1949) cert. den. 338 U. S. 894 (1950), reh. den. 338 U. S. 940 (1950) plaintiff had charged that the defendants had conspired in violation of the anti-trust laws to deny first run to plaintiff's theatre in Louisville, Ky. The case was submitted to the jury and from a verdict in favor of defendants an appeal was taken. In affirming, the Court said (p. 590):

> "It is of the essence of plaintiff's argument that 'but for the fact that a Jury had to pass upon the question of damages,' a directed verdict would have been required. This contention, which we must reject, is the basis for their objections to the charge and the refusals to charge. Obviously what the plaintiffs are doing is to confuse evidence of conspiracy, to be evaluated by the jury, with demonstrated proof, to be accepted as final by the Court."

In attempting to create the appearance of a conflict between circuits, petitioner relies upon three Third Circuit non-jury cases: *William Goldman Theatres v. Loew's, Inc.*, 54 F. Supp. 1011 (D.C.E.D. Pa., 1944) rev'd., 150 F.2d 738 (C.C.A. 3, 1945); *Ball v. Paramount Pictures*, 67 F. Supp. 1 (D.C.W.D. Pa., 1946) rev'd. 169 F.2d 317 (C.C.A. 3, 1948); and *Milgram v. Loew's, Inc., et al.*, 94 F. Supp. 416 (D.C.E.D. Pa., 1950) aff'd. 192 F.2d 579 (C.A. 3, 1951). There is absolutely no justification for petitioner's statement that these non-jury cases are in conflict with the decision below.

It should be noted that Chief Judge Parker who sat in the Circuit Court of Appeals for the Third Circuit in the *Goldman* case, had submitted to him in the instant case, and with his colleagues unanimously rejected, the very argument now being made by petitioner as to the meaning of the Third Circuit cases.

In each of the three cases relied upon by petitioner the Court, *sitting without a jury*, was called upon to determine whether or not the evidence introduced supported a finding of fact as to the existence of conspiracy. These cases were considered by the court below and it determined that no one of these cases is in conflict with its opinion. These cases do not hold that certain conduct is equated with conspiracy. This is clearly demonstrated by the decision in the last of the three cases relied upon by petitioner, the *Milgram* case, where the Court of Appeals said (182 F.2d at p. 583):

> "An experienced trial judge has heard the evidence and passed upon the credibility of the witnesses in this case; his conclusion is that an inference of joint action on the part of the distributors is warranted. The sole question now before us on this appeal is whether the trial judge's *findings of fact* are clearly erroneous." (Emphasis supplied).

Petitioner was not entitled to a directed verdict on the conspiracy issue. It was, at most, only entitled to have the fact issue of whether a conspiracy existed decided by the jury. This was done. Petitioner's assertion of error is devoid of merit. There is no conflict between the opinion below and any decision of any other Court of Appeals as to the necessity of submitting the issue of the existence of a conspiracy to the trier of fact.

## II.

## There was no Error in the Charge as to the Paramount Case.

The only other point stressed by petitioner is that the trial judge did not properly instruct as to the effect of the decrees entered in *United States v. Paramount Pictures*, 334 U. S. 131 (1948) (hereinafter referred to as the *Para-*

mount case) excerpts from which decrees, as offered by petitioner, were received in evidence. Here again petitioner is far from candid in its statements as to the charge given, and entirely omits reference to the circumstances surrounding the giving of the instructions.

*First:* The record in the *Paramount* case was never made available to the trial judge. Nevertheless, the trial judge carefully analyzed the *Paramount* decisions to determine the issues decided, despite the facts that (a) nothing was decided in the *Paramount* case which related to Baltimore and (b) the *Paramount* case related to 1945 or prior thereto, whereas petitioner's theatre was not ready to open until February, 1949.

*Second:* The trial judge in his instructions, at the time the decrees were admitted and during the charge, reconstructed the *Paramount* case in the manner and to the extent that he deemed necessary to acquaint the jury with the issues determined in that case, insofar as they were applicable in the instant case. In so doing, the trial court exercised its judicial discretion in the light of facts and issues involved in the instant case. Petitioner apparently overlooks the following in *Enoch v. General Motors Corporation*, 340 U. S. 530 (1951) where this Court said (p. 571):

> "As to the manner in which such explanation should be made, no mechanical rule can be laid down to control the trial judge, who must take into account the circumstances of each case. He must be free to exercise 'a well-established range of judicial discretion'."

*Third:* Petitioner fails to set forth the true picture showing how the problem of the decrees was considered and handled by the trial judge. As soon as the opening state-

ments were concluded, petitioner's counsel offered in evidence certain decrees entered in *United States v. Paramount, et al.* (CA 38-9).* Objection was made to the admissibility of the decrees (CA 39-40) and, after full argument, the trial judge excluded the decrees but without prejudice to the right of petitioner to renew its offer (CA 210-17).

At the conclusion of all of the evidence there was a further hearing concerning the admissibility of the decrees. Prior to this hearing petitioner's counsel had submitted typewritten excerpts from the decrees (PX 97), merely setting forth four of the injunctive provisions, and petitioner's counsel said (CA 1362):

> "* * * These are the four things which we claim fit the present case directly within the issues that were raised and found in the Paramount case as to which these defendants have been enjoined."

The following colloquy took place at this hearing between Judge Coleman and petitioner's counsel (CA 1363-4):

> "(The Court) As I understand it, leaving out the exact words of the decree, you want to be able to argue to the jury as to putting in these decrees, that these parties were enjoined from doing the four things which you gave me on this special memorandum brief?
>
> "(Mr. Rome) That is correct, sir, as a result of there having been a finding they were violative of the Anti-trust laws, in the Paramount case they were enjoined from doing those things, and we would ask leave to say that to the jury."

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*("CA" refers to the Record in the Fourth Circuit Court of Appeals. Other page references are to the "Transcript of Record" in this Court.)

Before ruling that the excerpts of the decrees which petitioner had offered would be received in evidence, the trial judge stated petitioner's position and petitioner's counsel agreed. The following is the colloquy (CA 1400-1):

> "(The Court) * * *-Now, here, all Mr. Rome is asking is that I give to him the benefit of having the jury know that there was this decree, and that it is prima facie evidence.
>
> "(Mr. Watkins) But prima facie evidence of what, Your Honor?
>
> "(The Court) Prima facie evidence that these, — first, that the jury is entitled to know that these defendants have been restrained from doing certain things, and that among the things, the category of things that they were restrained from doing, was conspiring to institute clearances in restraint of trade. Mr. Rome contends that he can show, convince the jury that the clearance here is in that category of prohibitive clearances if he can show that there was conspiracy by concert of action in doing that. Isn't that in A, B, C, language what you are asking?
>
> "(Mr. Rome) Yes, sir."

Having resolved the argument in favor of petitioner, the Court instructed the jury, just prior to the closing of the evidence, as to the background of the decrees, and their effect as prima facie evidence (238-339). No exception was taken by petitioner. Petitioner's counsel then read to the jury his excerpts from the *Paramount* decrees (CA 1509-12).

Thereafter, the Court stated to counsel what it proposed to charge the jury with respect to the *Paramount* case (340-342). He asked if counsel wished to say anything but petitioner's counsel made no objection. This statement by the Court with respect to the *Paramount* case was repeated almost verbatim in the charge to the Jury (272a-274a).

Having stated that what he wanted was an opportunity to argue the injunctive provisions of the decrees to the jury, petitioner's counsel proceeded to make a lengthy argument based on those provisions (CA 1546-7; 1632-3; 1641-2; 1644; 1646; 1655-6).

The Trial Court considered the admissibility of the injunctive provisions of the *Paramount* decrees to be at best a "borderline" case (CA 1401). Following the clear ruling of this Court in the *Emich* case, the Trial Court exercised its judicial discretion in reconstructing the *Paramount* case for the jury. In so doing, the Trial Court relied on the statements made by petitioner's counsel and petitioner is in no position now to complain because the Court did so. The decision below that there was nothing detrimental to petitioner in the instructions on the *Paramount* decrees was clearly correct.

Petitioner asserts (petition, pp. 18-19) that the trial court failed to instruct that if the downtown first run theatres and the Crest Theatre were not in substantial competition, "then clearance between those theatres would be improper." Once again petitioner is guilty of extreme lack of candor. The fact of the matter is that the *only objection* made by petitioner to the court's charge with respect to substantial competition related to the inadvertent omission from the court's statement of plaintiff's claim, of the word "substantial" (280a-281a). The jury was recalled and this omission was rectified (280a). In addition, the Trial Court instructed that reasonable clearance is not a violation of the Anti-Trust laws, but that:

> "Where the clearance granted is unreasonable, in either time or extent, or where it is granted as part

> of an arbitrary system of clearances, or where it is granted for the purpose of suppressing competition, the granting of such a clearance becomes a violation of the Sherman Act * * *" (269a).

Further, petitioner argues that the trial court told the jury that Loew's and Warner's had the "unqualified" or "absolute" legal right to do with their pictures what they chose (petition, pp. 18 and 19). What the court actually said was that Loew's and Warner's had a legal right to show their own pictures in their own theatres, as and when they saw fit, and to prefer their own theatres as customers, and that the action of each in so doing was not, "*in and of itself*", proof of any conspiracy or any illegal action (271a). This instruction followed the provisions of Paragraph 5 of the decree entered in the *Paramount* case against Loew's and Warner, as offered in evidence and read to the jury by appellant* (CA 1512). *Dipson Theatre, Inc. v. Buffalo Theatres, Inc.*, 190 F.2d 951 (C.A. 2, 1951) cert. den. 342 U. S. 926 (1952) also supports this instruction.

The last argument made by petitioner is equally lacking in merit. Petitioner urges that the instruction concerning the burden of proof respecting clearance was improper. There was no error and the argument by petitioner comes with ill grace for: (I) Petitioner reserved no exception to the language used; (II) Petitioner was not attacking clearance provisions in Baltimore, — had it secured the run it

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* "Nothing contained in this decree shall be construed to limit, in any way whatsoever, the right of each major defendant bound by this decree, during the three years allowed for the completion of the plan of reorganization provided for in Section IV, to license, or in any way to provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such defendant has a proprietary interest, either directly or through subsidiaries."

wanted, it would have expected to receive the existing clearances; (iii) The defendants proved that substantial competition existed between petitioner's theatre and the downtown theatres. There were in evidence in this case actual surveys which conclusively demonstrated the fact of substantial competition. They confirmed the opinions of respondents' witnesses and refuted the unsupported opinion of petitioner's only witness.

The balance of the Petition consists of completely unsupported statements that if the decision below is permitted to stand the respondents will be able to circumvent the injunctive provisions of the decrees in the *Paramount* case. This case and the *Paramount* case bear no factual similarity. In the case below, petitioner conceded that no conspiracy existed between the defendants and any of the independent exhibitors operating six of the nine first-run theatres in Baltimore or any of the exhibitors operating subsequent run theatres in Baltimore (CA 1232). During the three years preceding the institution of this suit, sixty-three percent of the first-run exhibitions in Baltimore were held in independent theatres.

The good faith of petitioner's few offers for specific first run pictures was completely discredited by the Court of Appeals (201 F.2d at p. 311).

Petitioner's theatre was a neighborhood theatre built to round out a neighborhood shopping center, and no consideration had been given to building the theatre at that location "aside from being part of a general business development" (CA 1298). Petitioner's theatre was certainly no better structurally than, and not as well located as, other neighborhood theatres.

The facts involved in this case with respect to the purely local situation in Baltimore were fully developed before the jury and petitioner cross-examined defendants' witnesses as to their conduct and compliance with the decrees. The verdict of the jury, which heard the evidence and which saw the witnesses, was for the defendants.

## CONCLUSION

For the foregoing reasons it is submitted that there is no occasion for this Court to exercise its power of supervision in this case to review a unanimous decision of the Court of Appeals affirming a jury verdict for the defendants. The petition for a writ of certiorari should be denied.

Respectfully,

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SUPREME COURT, U.S.

FILED

NOV 23 1953

HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

No. 19

THEATRE ENTERPRISES, INC.,

*Petitioner,*

*v.*

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, UNIVERSAL FILM EXCHANGES, INC., UNITED ARTISTS CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORP., WARNER BROS. CIRCUIT MANAGEMENT CORP., COLUMBIA PICTURES CORPORATION,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF FOR THE RESPONDENTS

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IN THE

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OCTOBER TERM, 1953

THEATRE ENTERPRISES, INC.,
*Petitioner,*

*v.*

PARAMOUNT FILM DISTRIBUTING CORP., LOEW'S INCORPORATED, RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, UNIVERSAL FILM EXCHANGES, INC., UNITED ARTISTS CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORP., WARNER BROS. CIRCUIT MANAGEMENT CORP., COLUMBIA PICTURES CORPORATION,
*Respondents.*

No. 19

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF FOR THE RESPONDENTS

### OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported in 201 F. 2d 306. As the case was tried before a jury, there was no opinion in the District Court.

## JURISDICTION

Certiorari was granted on May 25, 1953 to review the judgment of the Court of Appeals. 345 U. S. 965. The jurisdiction of this Court rests upon Section 1254 (1) of the Judicial Code, 62 Stat. 928, 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED

1. Did the court below err in holding that the trial court properly denied petitioner's motion for a directed verdict on the issue of conspiracy?

2. Did the court below err in holding that the trial court correctly instructed the jury concerning the probative effect of the decrees in *United States* v. *Paramount Pictures, Inc.*?

## PRELIMINARY STATEMENT

Petitioner is the owner and operator of the Crest Theatre, a neighborhood motion picture house located in a partially developed district, six miles from the downtown section of Baltimore, Maryland. Petitioner brought suit for treble damages and an injunction, charging respondent motion picture companies with a conspiracy to deny its theatre "first run" pictures.[1]

There is no dispute about the fact that the Crest did not receive a first run. Petitioner's claim that this was the re-

[1]The complaint also contained a second cause of action alleging a conspiracy to discriminate against petitioner's theatre in licensing pictures for exhibition on first neighborhood run in Baltimore. The appeal on this cause of action was abandoned in the court below and the matter is not presented for review in this Court.

sult of a conspiracy, however, was flatly denied by responsible sales executives of respondents, each of whom testified to the business reasons which had prompted his company, acting separately and independently, to refuse petitioner's request for first run product.

After a trial of three weeks, petitioner requested a peremptory instruction requiring the jury to return a verdict in its favor "in such amount as you estimate the plaintiff's loss to have been" (R. 973, 46).[1] Treating this request as tantamount to a motion for a directed verdict, the trial court denied the motion (R. 973), and submitted the case to the jury.

The jury returned a unanimous verdict in favor of all respondents (R. 1120-21).

No motion was made by petitioner either for a new trial or for judgment notwithstanding the verdict.[2]

On appeal the Court of Appeals, after an extended review of the evidence, unanimously concluded that the case presented issues of fact requiring submission to the jury and that petitioner's motion for a directed verdict had been properly denied. The Court considered petitioner's numerous objections to the trial court's charge and held that the instructions to the jury were free of error. Accordingly, it affirmed the judgment entered in favor of respondents on the jury's verdict (R. 75-91).

---

[1]The complete transcript of record printed pursuant to respondents' designation is referred to as "R". The symbols PX and DX denote "Plaintiff's (Petitioner's) Exhibit" and "Defendants' (Respondents') Exhibit", respectively. No reference is made in this brief to the incomplete appendices used below which petitioner has designated as its record here, and to which petitioner refers in its brief as "R" in conjunction with the letter "a" after the page number. These appendices contain mere excerpts of testimony which can only be properly evaluated in the light of the record as a whole.

Petitioner's brief will be referred to herein as "Br."

[2]Cf. *Johnson v. New York, New Haven & Hartford R. Co.*, 344 U. S. 48 (1952).

## STATEMENT OF FACTS

Both in its petition for certiorari and in its brief on the merits, petitioner has presented to this Court an incomplete, inaccurate and distorted statement of facts. Liberally sprinkled throughout the brief is the gratuitous characterization of certain key facts as "admitted" or "undisputed". Many of the facts so characterized are neither admitted nor undisputed. On the contrary, they are sharply controverted or have no support in the record. By coupling these false characterizations with question-begging epithets, petitioner insidiously creates an erroneous and truncated picture of the record which does not reflect the actual facts or the true question to be decided.

The essential question in this case was whether respondents acted separately and independently in denying a first run to the Crest, or whether their refusals sprang from conspiracy. This question was submitted to the jury as a question of fact for its determination. While paying lip service to the settled rule that in determining the correctness of the denial of a motion for a directed verdict an appellate court views the evidence and all inferences therefrom in the light most favorable to the non-moving party, petitioner in reality completely disregards the rule. Thus it ignores or distorts the voluminous proofs submitted by respondents and draws every conceivable inference from the evidence in its *own* favor, without mentioning the contrary inferences which the jury was warranted in drawing in favor of respondents. Petitioner then adds insult to injury by labeling the inferences so indulged by it as "admitted" and "undisputed" facts.

Under the circumstances, in order to place the case in its proper perspective, it is essential to outline in some detail

the substantial body of evidence which compelled the denial of petitioner's motion for a directed verdict and which fully supports the jury's verdict in favor of respondents.

**The Theatre Situation in Baltimore**

Baltimore is a city having a population of around 950,000 persons (R. 540). Including the surrounding suburbs the total population approximates 1,250,000 (R. 540). There are upwards of 90 motion picture theatres within this area (R. 528, 614). Some are located in the downtown shopping district, including the eight first run downtown houses referred to below; others are scattered throughout the city and its suburbs (R. 528, 614; PX 67, R. 291-92). At the time of the trial five of the eight downtown first run theatres were operated by exhibitors having no connection with any of the respondents.[1] Two of them were operated by Loew's,[2] and one by Warner.[3] The latter three theatres accounted for only 37% of the first run exhibitions in Baltimore (R. 874), and approximately 75% of the playing time of each of these theatres was devoted to the exhibition of its own product (R. 620, 863). Between 22 and 30 neighborhood theatres, many having appointments

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[1]The Hippodrome and Town by Mr. Rappaport; Keith's by Mr. Schanberger; the New by Mr. Mechanic; and the Mayfair by Mr. Hicks. (R. 120-21). The diversification of the distribution of the product of the several respondents among the first run theatres is charted on DX 29 (R. 871-74). The facts contained in this exhibit are totally ignored by petitioner; instead it relies wholly on Myerberg's incomplete testimony in stating the facts at page 4 of its brief. The implication that there was any agreement for the division of product among these theatres (Br. 4) is utterly without support in the record. No such claim was made at the trial; no such evidence was adduced.

[2]The Century and Valencia (R. 120-21). Contrary to the innuendo in petitioner's brief (p. 8, fn. 5), respondent United Artists had no interest in either of these theatres. The United Artists Theatre Circuit, Inc., referred to by petitioner, has no connection or affiliation whatever with respondent United Artists.

[3]The Stanley (R. 121).

equal if not superior to petitioner's theatre, and located in more populous areas with a larger draw, exhibited pictures on a first neighborhood run (R. 294, 580, 642, 701, 858, 901).[1] Petitioner's theatre exhibited pictures on this run (R. 167-68). The remaining theatres operated on later runs.

**The Crest Theatre**

In the latter part of 1946 petitioner's president, Harry D. Myerberg, and his brothers purchased 12 to 15 acres of land located in a corner of northwest Baltimore about six miles from the downtown area (R. 124-25, 292). After building between 50 and 65 homes the Myerbergs decided to erect a shopping center on the site consisting of 15 stores (R. 125, 509-10). The Crest Theatre was included in the center and its construction was begun early in 1948 (R. 127).

A survey of the shopping center in which the Crest is located was made by Dr. Edward Hawkins, Dean of the School of Business and Professor of Marketing of Johns Hopkins University (R. 505, 509). Dr. Hawkins was particularly qualified for this task by reason of his experience as director of a research project on retail shopping centers for the Baltimore City Planning Commission (R. 506). Dr. Hawkins divided shopping centers into three classifications: Primary, secondary and neighborhood.

A primary shopping center has from 60 to 150 stores, including at least one large and several smaller department stores. A center of this type will draw up to a distance of

[1]Myerberg himself testified that two of these theatres, the Edmondson and Northwood, like his own Crest, received International Awards from a trade magazine for being among the finest theatres constructed in the western hemisphere (R. 435-36, 170-71), and he also grouped the Uptown and Ambassador in the same class as the Crest (R. 418-19).

50 miles (R. 506). There is only one such center in Baltimore—the downtown business district (R. 508).

Secondary centers have 20 to 50 stores, including at least one department store, and draw trade for perhaps five miles (R. 506). There are a number of these secondary centers in Baltimore, such as Edmondson Village, Waverly, Northwood and Belvedere-York Road (R. 508).

A neighborhood shopping center has up to 15 stores, consisting in the main of "convenience stores", such as groceries, restaurants, and personal service establishments, but does not have a department store (R. 506). The Hilltop Shopping Center in which the Crest is located falls into this last category (R. 509-10, 172).

The prospective draw area of the Crest, according to Myerberg's pretrial testimony, was generously fixed at 175,000, allegedly on the basis of a survey which was never offered in evidence (R. 126). At the trial, however, Myerberg reduced his estimate to 105,000 (R. 126). An aerial photograph taken of the claimed draw area, introduced in evidence by respondents, discloses a large wooded tract just west of the Crest, other undeveloped sections to the north and a neighboring cemetery (DX 9, R. 498-502, 453). The only public transportation facility available to serve the Crest is a single bus line running in a north-south direction, with no east-west service whatsoever (R. 298).[1]

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[1]Notwithstanding the uncontroverted testimony that the Crest was located in a small neighborhood shopping center with inadequate public transit facilities, petitioner seeks to create the impression that the Hilltop Shopping Center was a city within a city—a thriving integrated community with a life of its own (Br. 45). Not even an advocate's usual latitude of hyperbole would justify such a description of this third class shopping center. In this connection Mr. Zimmerman testified: "Mr. Myerberg described this very unique character of the Crest territory. He indicated that there was an enormous shift of population, almost like the center of gravity of Baltimore had shifted.

By Myerberg's own admission there were seven neighborhood movie houses in the same competitive area within a mile or two of the Crest location, one of which—the Uptown—is comparable to the Crest in every respect except size (R. 291-92, 297, 417, 418-19).[1] Evidence was adduced that with the addition of the Crest the area became overseated (R. 768-69, 902).

**Runs and Clearance**

Since the present case relates to the run of the Crest Theatre, a few words in explanation of runs and clearance may be appropriate.

This Court in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 144-45 (1948), defined runs as "successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on." Clearance was defined as "the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres." The District Court upheld the legality of runs and clearances as necessary and reasonable business arrangements,[2] and this ruling was not

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I was very interested to see if there was in effect a new downtown area being created, a second city in Baltimore. If there was that very unique and special situation, of course we might reconsider our decision. Actually, Mr. Brecheen and Mr. Folliard went there and said it was a very nice area, a perfectly nice community, period. But it is a neighborhood area" (R. 562-63).

[1] The Crest had 1600 seats (R. 131); the Uptown had a seating capacity of 1100 (R. 315).

[2] 66 F. Supp. 323, 341-42 (S. D. N. Y., 1946). Other discussions of the economic necessity for and the legality of staggered runs and clearances may be found in *Westway Theatre* v. *Twentieth Century-Fox F. Corp.*, 30 F. Supp. 830 (D. Md., 1940), aff'd 113 F. 2d 932 (4th Cir., 1940); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388 (D. Md., 1950), aff'd 189 F. 2d 797 (4th Cir., 1951); and *Fanchon & Marco* v. *Paramount Pictures*, 100 F. Supp. 84 (S. D. Cal., 1951).

challenged on appeal. This Court in its opinion quoted the criteria enunciated by the District Court in determining the reasonableness of a clearance, including:

> "(2) The character and *location* of the theatres involved, including size, type of entertainment, appointments, *transit facilities*, etc.; . . .
>
> "(5) The extent to which the theatres involved compete with each other for patronage; . . .
>
> "(7) There should be no clearance between theatres not in substantial competition" (334 U. S. at 145-46) (emphasis added).

The propriety of runs and clearance is not contested in this litigation. Not only did Myerberg expressly state that he was not attacking runs and clearance as such, but he frankly admitted that if his theatre had received a first run he would have expected the usual 21-day clearance protection over competing theatres (R. 332, 840). Further, he readily conceded that theatres in substantial competition should not have simultaneous runs (R. 315-16). Petitioner's sole claim is that the preferred run that it sought was denied as a result of an alleged conspiracy.

**Substantial Competition Between the Crest and Downtown Theatres**

Myerberg claimed at the trial that there is no substantial competition between the Crest and the downtown theatres (R. 326-27, 332-33), presumably in order to establish that the Crest should have been awarded a "day and date" first run, i.e., a first run showing simultaneously with an identical showing in the downtown area. This opinion evidence by an interested witness was not supported by any facts and

was directly refuted by a large body of evidence adduced by respondents. In addition, it was plainly inconsistent with Myerberg's initial demands for an exclusive first run for the Crest (see pp. 11-12 and 19-20, *infra*), since an exclusive first run, with a concomitant clearance, is appropriate only between substantially competitive theatres. In the absence of substantial competition, Myerberg's request for an exclusive first run and clearance over the other theatres in the area would have been entirely improper.

The fact is, however, as the proofs overwhelmingly demonstrate, that substantial competition did exist between the Crest and the downtown first run theatres, and the jury was clearly warranted in so finding.

Dr. Hawkins of Johns Hopkins described a survey made by him of attendance at the six leading downtown first run theatres to determine where their patrons resided. The results of this survey clearly show that from the draw area claimed by petitioner, the downtown theatres obtain 16.34% of their patronage. They further show that from the combined Waverly-Northwood-Belvedere areas the downtown attendance is 15.16%, and is 7.89% from Edmondson Village (R. 511-16, DX 10). Thus these outlying districts alone account for 39% of the business done by the downtown first run theatres.

Another patronage survey was made by the management of Warner's Stanley Theatre on varying dates and at both afternoon and evening hours (R. 604). This was done by plotting the addresses of 2,555 patrons on a postal zone map of Baltimore. It developed that 19.5% of the Stanley's patrons lived in postal zone 15, which was wholly within the draw area claimed by the Crest. Addresses located in other postal zones partially within the Crest area

were omitted in making this computation (R. 604-06, DX 16).

Loew's conducted a similar survey of its Century Theatre (R. 853). The 2,673 addresses thus obtained were plotted on a postal zone map of Baltimore (R. 854-55, DX 28). While no attempt was made to allocate any percentage of the downtown draw to the claimed Crest area, DX 28 demonstrates that the Century attracts a substantial number of patrons from every part of the city, including the region surrounding the Crest.

These surveys supplied persuasive support to the testimony of several witnesses for respondents, each having vast experience in the marketing of motion pictures, to the effect that there is substantial competition between the Crest and the downtown theatres (R. 572, 626, 856).

Perhaps the most graphic corroboration of these surveys, and illustration of the effect of lack of public transportation upon movie attendance, was furnished by the 1951 transit strike in Baltimore. "Quo Vadis," one of the most expensive and lavish pictures ever produced, opened at the Century in downtown Baltimore just at the time of the strike (R. 860-61). In every other city in the country the first week of "Quo Vadis" far outgrossed the earlier picture of similar character, "Gone with the Wind." This situation was reversed only in Baltimore, where attendance was materially affected by the strike (R. 861).

**Myerberg's Attempts to Obtain a First Run for the Crest and the Reasons for His Failure**

Myerberg initially sought an exclusive first run for the Crest, that is, the right to be the first exhibitor of a picture in Baltimore, with 21-day clearance over every other

theatre in that city. In his efforts to obtain first run product, Myerberg separately approached each of the respondents. Acting independently, each turned him down for cogent and compelling reasons.

Thus early in October, 1948, at a time when construction of the Crest was nearing completion, Myerberg conferred separately in Washington with representatives of seven of the eight distributors (R. 128).[1] A week or so later Myerberg sent substantially identical letters—referred to during the trial as the "World Premiere" letter—to each of these seven distributors (R. 138, 141, 142, 143, 145). In this letter he described the Crest as "the finest showcase for films in the State of Maryland" and requested for its opening a "world premiere" consisting of

> "the finest picture available from your company, a first-run film which has received more than the usual pre-exhibition publicity—preferably one which is waited for by the movie-going public with anticipation; one already causing excitement and creating discussion." (PX 1, R. 130-32).

*Warner* was the recipient of such a letter despite the fact that its Washington district manager, Smeltzer, had previously unequivocally denied Myerberg's request for an exclusive first run on the ground that Warner had its own theatre, the Stanley, in downtown Baltimore, which exhibited its first run product—a position which Myerberg had said he understood (R. 631-33).

*Loew's*, within a week of its receipt of Myerberg's World Premiere letter, refused an exclusive first run on the ground

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[1]The lone exception was Columbia, which was not approached by Myerberg until November, 1949 (R. 147, 732, 733-34).

that it operated two first run theatres in downtown Baltimore (R. 879).

*RKO's* decision was made in December, 1948 by William Zimmerman, assistant to the vice-president in charge of distribution, following a personal conference with Myerberg in New York, and after consulting RKO's branch manager and another representative of the company, both of whom had made a thorough inspection of the Crest's location (PX 21, R. 164, 525-30, 562, 580). As Zimmerman explained to Myerberg during their November conference:

> "... in marketing our pictures in the large cities, the key cities, we found that it was preferable to license our first run in the downtown area for a number of reasons: First of all, a theatre in the downtown area is centrally located, it is located where the masses of the people are found for their entertainment. It is easily accessible from all areas of the city. It is in the mind of the public, in the minds of the exhibitors, that an important picture has its first run in a large city in the downtown show case. If the picture is shown first run in a large city in a neighborhood house, it is tagged as an inferior picture. So that on subsequent runs, instead of getting large film rental, we get small film rental. We must think in terms, when we are marketing a picture in a large city, like Baltimore, we must think not only of the first run exhibitions, we must think of all the subsequent run exhibitions....
>
> "... I think I did mention in that conference, I mentioned the fact, for example, talking of the immediate desirability of a downtown theatre first-run, as against a neighborhood house, is the fact that you get a pretty substantial matinee business in your downtown theatres, because it is your pri-

> mary shopping center, the people are found there, and they come in, they are shopping, and they take an odd hour or so and go into the downtown theatres." (R. 527-29).

*Fox's* branch manager, Norris, who had seen the Crest on several occasions during various stages of construction, promptly rejected Myerberg's request at their preliminary meeting because the location of the theatre was such that it was suitable for only a neighborhood operation (R. 693-94). Several weeks later Fox's eastern division manager, Moon, who also visited the theatre (R. 707), confirmed this decision in a conference with Myerberg in Baltimore (R. 696).

*Paramount* wrote petitioner on November 1, 1948 reaffirming an earlier decision by its branch manager, Benson, not to grant petitioner a first run for the reason that "the business and financial interests of Paramount will be served best by the continued exhibition of Paramount pictures first-run Baltimore in theatres situated in the downtown business and shopping area of that city rather than in a theatre located in a suburban area" (PX 35, R. 233-34).

*Universal's* decision was made after Meyers, its eastern division sales manager, had come to Baltimore for the express purpose of inspecting the Crest (R. 774). On the basis of his inspection Meyers concluded that the theatre was badly located, even for a neighborhood house (R. 768-69).

*United Artists*, when first approached by Myerberg in October, 1948, had no pictures available for release, having licensed them all through the first of the year (R. 144). Thereafter the company accepted the recommendation of

its branch manager, Price, who had visited the Crest in the interim and decided that the theatre was not suitable for first run exhibition because of its poor location (R. 682-83).

*Columbia*, the only distributor not to receive a World Premiere letter (R. 147, 732), was not approached by petitioner until November 1, 1949, after the Crest had been in operation for eight months (R. 733-34). It then received a letter from petitioner's attorney, as did each of the other seven distributors, requesting it to experiment with the Crest as a first run outlet (PX 50, R. 261-62, 281, 732). Following an inspection of the theatre by Galanty, its division manager, Mr. Josephs, assistant to the general sales manager, decided against the experiment in view of the Crest's limited draw area, and the highly satisfactory treatment accorded Columbia pictures in downtown Baltimore over a period of years by Mr. Rappaport in the Hippodrome and Town Theatres (R. 733, 749).

Each distributor produced one or more responsible officials—either the person who made the final decision not to grant the Crest a first run, or the person whose recommendation was acted upon, or both—who flatly denied the charge of conspiracy, and testified that his decision or recommendation was reached separately and independently, without discussion or consultation with any other distributor, and was based on his own belief of what was in the best business interest of his company. For Loew's, such testimony was furnished by Rodgers, its general sales manager and top policy maker in regard to distribution (R. 896, 900), and Adams, its branch manager (R. 877, 890); for RKO, by Zimmerman, assistant to the vice-president in charge of domestic distribution (R. 520, 541), and Brecheen, its branch manager (R. 575, 588); for Columbia,

by Josephs, assistant to the general sales manager (R. 749, 753), and Galanty, division manager covering the Washington, Cincinnati, Pittsburgh and Cleveland branches (R. 731, 739); for Paramount, by O'Shea, its assistant general sales manager (R. 783, 813-14); for Universal, by Meyers, its eastern division sales manager (R. 765, 771); for Warner, by Smeltzer, its district manager (R. 631, 638); for Fox and United Artists, by Norris and Price, their respective branch managers (R. 692, 713; 681, 683-84).

Putting to one side Warner and Loew's, each of which denied petitioner's request for an exclusive first run because it operated its own first run theatre in downtown Baltimore (R. 631-33, 879), the basic reasoning which impelled each of the other distributors to refuse to license the Crest on a first run basis may be summarized as follows: The Crest, no matter how glowingly described, was inconveniently located six miles from downtown Baltimore, in a neighborhood community having a small draw area and serviced by wholly inadequate public transportation facilities; as such it could not compare in grossing ability or exploitation value with any of the downtown theatres, each of which, by reason of its central location in the heart of the city's primary shopping and amusement district, drew patrons from every corner of Baltimore and furnished an ideal "showcase" which not only maximized first run film rentals, but also "established" the picture for the entire area and produced the greatest subsequent run revenue as well (R. 164, 525, 527-29, 549-51, 580, 693-95, 233-34, 462-65, 695, 733, 749, 768-69, 683, 287-88).[1]

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[1]As we have seen, the claimed draw area of the Crest was 105,000 as compared with the downtown theatres which drew from a popula-

As Paramount wrote petitioner's counsel in November, 1949 in rejecting the latter's invitation to experiment with the Crest:

> "That large first run theatres are situate in the downtown business and shopping areas is not the result of accident, but rather due to the careful consideration of various business factors, such as location, transportation, the audience, exploitation and prestige, among others.
>
> "Every community, whether it is a city, town or village, has a hub, which is the center of all activity. . . . In the large cities and towns the large first run theatres are located in the very heart of these centers where are to be found the great masses of the population.
>
> "All highways are designed to reach and all public transportation, subways, trolleys and buses lead to these centers of population.
>
> ". . . The fact that the large first run theatres are situate in the centers of activity where are to be found the great masses of population is valuable not only from the standpoint of attracting first run patronage, but of even greater value from the standpoint of achieving wide spread publicity and prestige for a picture so as to arouse the interest of potential theatre goers where they will see the picture either on first or subsequent run.

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tion of 1,250,000 persons. Petitioner, by lifting a portion of O'Shea's testimony out of context, insinuates that any theatre having a draw of 100,000 is a suitable first run outlet (Br. 7). As a matter of fact, O'Shea testified that he knew of a "tiny community" of 350 people that exhibits pictures first run (R. 813). But this is obviously a far cry from saying that where a distributor is confronted with a choice in a large metropolis such as Baltimore between licensing its first run product to a theatre which draws patronage from the entire city, and one whose draw is only one-tenth as great, it should exercise that choice in behalf of the theatre with the smaller draw.

> ". . . They feel further, based upon their many years of experience, that it is unfair to ask them to conduct the experiment which you urge when all factors are so definite and clear cut as to indicate only one possible result, namely, a loss not only to Paramount but also to your client." (R. 463-65).

The "showcase" theory of first run exhibition is neither a recent development nor peculiar to motion pictures. It had its origin before the advent of motion pictures in the days of vaudeville, when Loew's used to play its "stellar acts" initially in its "flagship or State theatre," and RKO "always played the Palace before they went around to the other theatres in the vicinity" (R. 897). With the inception of motion pictures, at a time when no distributors owned any theatres, it was carried over to this related form of entertainment, and has been followed there ever since (R. 637-38, 674-75). It is also applied to Broadway stage productions (R. 557-58); as one witness testified: ". . . you would never think of opening a legitimate show in the Windsor Theatre, in Flatbush; you would certainly play it downtown first run" (R. 897).

The validity of the "showcase" theory was graphically illustrated by Norris' testimony as to Fox's experience in Richmond, where the company was unable to obtain a downtown outlet for its first run product:

> "I am constantly faced with and embarrassed by the fact that in small towns, in the small communities surrounding Richmond . . . in an area of 50 to 75 miles, where the people are directly influenced by the Richmond newspapers, where they are within the general shopping draw of the City of Richmond,—I find it difficult to obtain a film rental for our pictures that our customers tell me they can afford to pay for certain competitive pictures.

> "They explained their reason for this discrepancy by the fact that some of our pictures are not as valuable to them as pictures from competitive distributors as being that when patrons, people who live in their town and their community and patronize their theatre, attend a theatre in Richmond, which they quite often do in communities of that type, they invariably go to one of the two big downtown theatres to see the pictures, and our pictures never play in either one of those two theatres because we cannot sell them. At least up to this point we have been unable to, and as a result our pictures have less value to us in the smaller communities surrounding Richmond than the pictures playing first run in those big downtown theatres" (R. 712).

Indeed, in an exchange of correspondence between Fox and petitioner's counsel, the latter went so far as to say: "While our opinions differ we can understand your view concerning the advisability of serving a downtown theatre with your first run pictures rather than a suburban theatre" (PX 52, R. 263). And Myerberg himself expressly recognized the "showcase" theory in his World Premiere letter when he bragged that the Crest was the "finest showcase for films in the State of Maryland" and supported his demand for an exclusive first run by representing that the Crest was "advantageously located from a population and transportation viewpoint" (PX 1, R. 130).

**Day and Date First Run**

When it became apparent to Myerberg that his goal of securing an exclusive first run could not be attained,[1] for

[1]Myerberg's bland denial that he had ever sought an exclusive first run (R. 841) is overwhelmingly and conclusively refuted by his own letters and the letters of his attorney (PX 1, R. 130-32; PX 12, R.

the reasons we have just explored, he sought in the alternative to license pictures first run from respondents "day and date," or simultaneously, with a downtown theatre—despite the fact, as we have already seen, that the Crest was in substantial competition with the downtown houses. Myerberg himself readily conceded that theatres in substantial competition with one another should not have simultaneous runs, and expressly recognized the necessity for and reasonableness of clearance between competitive theatres (R. 315-16, 473-74). Since Myerberg's fundamental premise in asking for a "day and date" first run was that the Crest was not in substantial competition with the downtown theatres—a premise without foundation in fact—it follows that there was a valid economic reason for the denial of that type of run. The simple explanation for his failure to receive a day and date run thus lies in the existence of substantial competition between the Crest and the downtown theatres, and not in any sinister action on the part of respondents.

Furthermore, there were other highly practical reasons for the refusal of respondents to experiment with multiple first runs, as requested by petitioner. In the first place, the exhibition of pictures on first run day and date in two or more theatres involves problems such as (a) selection of the opening date of the exhibition, (b) determination of the length of the run, and (c) sharing in and control of advertising (R. 759-60, 664-65, 599). Where the theatres in question are operated by different exhibitors, these problems can only be resolved by the concurrence of all exhibitors concerned. Thus in Cincinnati, where Fox tried such a

152; PX 14, R. 154; PX 22, R. 165; PX 30, R. 227-28; PX 31, R. 228; PX 50, R. 261-62; PX 52, R. 263-64). This is but one of the many inconsistencies, contradictions and inaccuracies in Myerberg's testimony which tended to discredit him in the eyes of the jury.

scheme for a short time, the company "had all sorts of difficulties," such as the fact that "some of the theatres only wanted to play the pictures three days, while others would play it for a full week, which was the provision of the contract" (R. 665).

But an even more basic impediment to granting the Crest a day and date first run with a downtown theatre was that in view of the existence of substantial competition, no downtown exhibitor would waive its clearance and agree to such simultaneous showings. Fox soon found this out from a survey of Baltimore and other large cities which was designed to determine the practicability of inaugurating a system of distribution whereby a number of neighborhood houses would play day and date first run with a large downtown theatre (R. 700-01). As a result of this survey, Fox was compelled to discard the idea as unworkable (R. 701-02).[1] Myerberg himself admitted that Schanberger and other downtown exhibitors refused to play day and date with the Crest (R. 838-39). And Norris of Fox testified to similar refusals by Mechanic and Rappaport (R. 718). *None of these exhibitors was made a defendant or named as a co-conspirator, and Myerberg unequivocally stated that he was not claiming that any independent exhibitor in Baltimore was a party to the alleged conspiracy* (R. 837-38). Obviously no distributor could have instituted the type of day and date first run requested by Myerberg without the consent of a downtown exhibitor. Such con-

[1]Petitioner takes a sentence from Norris' testimony out of context in an endeavor to insinuate concerted activity by respondents (Br. 14). All the witness testified was that the plan of multiple first runs being impractical, Fox continued distributing its product on a successive run basis—which was the basis of distribution of other distributors (R. 700-01). In that sense only his company "did what everyone was doing".

sent having been refused, Myerberg's request for a day and date first run was tantamount to a demand for an exclusive first run—a demand to which no distributor would accede for the economic reasons summarized above.[1]

**National Policy**

In its brief petitioner harps on what it terms the "national policy" of each distributor to confine first run showings of its films in urban areas to the downtown theatres. Its thesis is that if there is such a national policy, the conclusion inevitably follows that there is a conspiracy as a matter of law. Manifestly, individual policy, whether nationwide or not, is not synonymous with concerted action. Yet petitioner bridges this crucial gap without supporting proof of any kind, indulging in its usual device of conjuring up fictitious admissions.

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[1]Norris summarized Fox's position as follows: "I cannot sell a day and date run without taking into consideration two different exhibitors, and I cannot sell a day and date run without selling at least two exhibitors. Otherwise, it cannot be day and date. I did not want to sell the Crest Theatre exclusive first-run, because, for obvious reasons, it is not a suitable first-run showcase for pictures. I could not sell it a day and date run, because I couldn't get another suitable theatre to go with it" (R. 720-21).

There being substantial competition between the Crest and the downtown theatres, clearance and the granting by any distributor of an exclusive first run were entirely lawful under *U. S.* v. *Paramount Pictures, Inc., supra.* But even if a downtown exhibitor had waived its right to clearance protection in favor of the Crest, other neighborhood theatres with equal or better appointments, location and seating capacity would have insisted upon a day and date first run also. The practical difficulties adverted to in the text would thus have been immensely compounded. Moreover, multiple first runs mean the abandonment of exclusive first run and clearance, the abandonment of the "showcase" theory of distribution, and raise the danger of a substantial diminution of subsequent run revenue. This was the view of the witnesses whose testimony was accepted by the jury. That the jury had the right to accept this testimony is indisputable.

Thus it asserts (Br. 25): Respondents "also admitted that their decision to deny first-run to the Crest resulted from the application of their national policy to confine first-run exhibition to downtown theatres and had no necessary relationship to the particular circumstances involving the Crest Theatre."[1] Not only was there no such admission, there was no such evidence. The witnesses did not testify that their decisions resulted from any rigid application of a national policy, without regard to the particular circumstances of the Crest. On the contrary, as we have already shown, the testimony was that the individual decisions of the distributors were specifically based on the particular circumstances of the Crest, notably its location, limited draw area, and inadequate public transit facilities.[2]

The evidence makes it perfectly plain that the goal of each distributor was to distribute its films in such a manner as to produce the greatest return. Each distributor individually believed that it would maximize its total revenue by licensing pictures for exhibition initially in a "showcase" theatre located in the downtown area of a city. It was felt that such a theatre, conveniently located in the heart of the main shopping and amusement district at the focal point of converging transportation facilities, would not only yield the greatest first run revenue, but by appropriate exploitation would also enhance the subsequent exhibition value of the films. There is nothing strange about the fact that each company pursued this objective wherever it did busi-

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[1]Like statements appear at pp. 10, 12, 29, 35-36 and 40 of petitioner's brief.

[2]In so far as it is suggested that it was the national policy of any distributor to have the films of its competitors, and not merely its own, exhibited first run in downtown theatres (Br. 17), the short answer is that there is not a scintilla of evidence to that effect.

ness, and in this sense it had a "national policy". However, the pursuit of this objective never hardened into an undeviating practice on the part of any individual distributor, much less concerted action on a nationwide or any other scale by all distributors. Special local conditions often made it necessary or expedient for a particular distributor to license its pictures in a different manner (R. 673, 763, 569).

Sometimes, for example, a distributor was simply unable to secure a downtown outlet for first run exhibition, as in the case of Fox in Roanoke[1] and Richmond (R. 711-12), and for a time in Cincinnati (R. 664-65). Under the circumstances, Fox did what it considered to be the next best thing in those cities and licensed two or more suburban houses to play first run simultaneously[2] (R. 711-12, 665). RKO had similar experiences in Roanoke, Richmond and Norfolk (R. 580-82), and on occasion Fox and Columbia

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[1]Fox's branch manager, Norris, testified (R. 714-15): "As a matter of fact, Mr. Rome, I lived in Roanoke for seven years, which was my home, and I represented Twentieth Century-Fox in that area. The operator of the American Theatre was one of the best friends I had and have in the City of Roanoke, personally. We played golf together, we played bridge together, were members of the same club. I explained to Mr. Hines on many, many occasions that I had dedicated my business life to the proposition of selling him at least one picture for his American Theatre before I died. At this point I still haven't sold that picture." The American Theatre is the only acceptable first run outlet in Roanoke (R. 714).

[2]Fox's multiple run experiment in Cincinnati was not successful and continued only until the company was again able to license first run in a downtown theatre (R. 665).

RKO experimented with a day and date first run with a neighborhood theatre in Wichita, a city of about 150,000 with relatively few subsequent run theatres, where the "penalty" was not "too strong revenue-wise" (R. 540). The results indicated that "where you play your picture first-run downtown, your overall revenue in the area is better than when you play a picture in a first-run suburban area, or day and date with downtown" (R. 540-41).

found themselves in that position in Washington, D. C, (R. 708-09, 736). However, no such shortage of first run houses existed in downtown Baltimore. In Baltimore each of the distributors was able to achieve its business ideal of licensing all of its films on an exclusive first run basis to one or another of the downtown "showcase" theatres.

In an effort to impugn the honesty of the business reasons advanced by each distributor to justify its refusal to grant petitioner a first run, petitioner in its brief points to a number of other instances outside of Baltimore in which some of the respondents granted a neighborhood theatre first run product. This is nothing more than a broadside attack on the veracity of respondents' witnesses—a question which the jury passed upon after hearing the particular respondent involved in each of these exceptional cases explain the peculiar local factors which prompted its action.

In Washington, D. C., for example, the Ontario Theatre was located only 2½ miles from the center of town in the heart of an extensive apartment area having considerably more population than the area of the Crest Theatre, and superior transportation facilities (R. 244, 247, 610, 636-37, 710). Even so, the Ontario was not a success in the exhibition of pictures on an exclusive first run (R. 709-11, 736-39, 796-97, 805).

As for Hollywood and Los Angeles proper, they "are practically two separate cities" (R. 750-51, 903-04, 553).

In the case of Boston, Loew's plays its own theatre in the Back Bay section day and date first run with its downtown outlet, but Back Bay is "a different community entirely" (R. 904).[1]

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[1]Petitioner relies on the theatre situations in Washington, D. C., Los Angeles and Boston, to support its categorical and all-inclusive statement that first run showings in neighborhood houses in the cities

**The Opening of the Crest**

The Crest opened on February 26, 1949 and continued thereafter as a first neighborhood run house playing pictures approximately 21 days after the conclusion of the downtown run (R. 167-68). Pictures were made available to the Crest at the same time that they were licensed to the more than twenty other first neighborhood run houses in Baltimore (R. 641, 706, 768-69, 252, 294).

**Petitioner's Offers to Four of the Respondents**

Petitioner's discussion of its offers is typical of its unfair method of stating the facts. Among the "admitted" and "undisputed" facts set forth by petitioner in its brief on the merits (pp. 25, 35), and its version of the first question presented for review (Petition, 23-i), is the statement that "Petitioner was willing to pay and had offered to pay by certified check film rentals equal to or greater than those actually received by respondents from their existing first-run accounts in Baltimore"—the implication being that offers of such film rentals were made to all the respondents and were uniformly rejected by them.

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in which such occurred "had proved successful" (Br. 17-18). As we point out in the text, all of these cities involved wholly distinguishable, peculiar local conditions. Moreover, there is no support in the record for the plain implication of petitioner's statement that all the distributors licensed their films in the same manner throughout the country. The record, on the contrary, demonstrates striking diversity in this respect. (*Kansas City:* R. 809, 689, 663-64; *Richmond:* R. 806, 864, 580-81, 712, 735, 766-68; *Norfolk:* R. 684, 806, 735, 581, 642; *Cincinnati:* R. 644-45, 810; *Roanoke:* R. 806, 581, 684, 711, 735.)

Actually, petitioner made offers to *four* of the respondents,[1] proposing the licensing to petitioner of eight different pictures on a first run basis. No such offers were made to the other respondents.[2]

At the trial these four respondents adduced persuasive evidence that petitioner's offers were not made in good faith and that there were sound business reasons for their rejection. The issue of petitioner's lack of good faith was submitted to the jury (R. 1106), and there is ample evidence in the record to support a finding in respondents' favor. At no point in its brief does petitioner make any mention of this significant evidence or of the fact that the jury passed upon the issue.

The evidence shows that petitioner, through its counsel, wrote Columbia on December 20, 1949 stating that "for the exclusive first run exhibition in Baltimore" of "Jolson Sings Again," petitioner would post a $10,500 guarantee against 40% of gross "in the form of a certified check if this is deemed desirable" (PX 30, R. 227-28). The offer could not possibly have been made in good faith since "Jolson Sings Again" had already been exhibited first run in Baltimore, and this first run had concluded some two months before the bid was made (R. 751).

Columbia was not the only company which had reason to view petitioner's offers as insincere. Petitioner, again through its counsel, made an offer to Paramount for an

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[1] Paramount, Columbia, RKO and Universal.

[2] A partial retreat from its untenable position is made by petitioner in another passage of its brief: "Myerberg made specific offers to Universal, RKO, Columbia and Paramount, for particular pictures for first-run exhibition. These offers included substantial guarantees of film rental and a readiness to post certified checks. Such offers were either rejected or ignored" (Br. 9). The text makes clear that specific guarantees were not offered or certified checks tendered in each case.

"extended first run" of "Samson and Delilah." The offer included a guarantee of $35,000 against 50% of gross (PX 48, R. 255). Myerberg, admitting that guarantees are related to expected gross receipts, testified that the $35,000 guarantee "was not picked out of the hat", that the picture would have played at the Crest for eight to ten weeks, and that it would have grossed well over $80,000 (R. 395).

On cross examination, however, he conceded that in order to have grossed over $80,000 the Crest would have had to play to 80,000 or 90,000 of his estimated 105,000 population in the area (R. 409). He claimed that he had penciled notes in his files which he had made prior to the submission of the offer and stated that he would produce those notes (R. 410). The following morning he testified that he had examined the notes but had forgotten to bring them with him. He stated that he was "mistaken" on the $80,000 gross; that the figure indicated by his notes was actually $50,000; and that instead of an eight to ten week run, the picture would have played for only five weeks (R. 449-50). Myerberg never did produce the penciled notes.

Here again, then, it is obvious that Myerberg was playing fast and loose with figures and that his offer was not made in good faith.

For a first run of "Hamlet" petitioner offered Universal 50% of the first $7,850 of gross receipts and 65% of any excess, with a "reasonable" guarantee to be negotiated (PX 28, R. 769, 777). Universal rejected the offer because it considered "Hamlet" to be a highly specialized picture suitable only for exhibition in a small art theatre catering to a limited class of theatre-goers (R. 770; see also R. 902-03). The picture was actually licensed first run downtown to

the Little Theatre, an independent 300-seat specialty house, where it played for seven weeks and brought Universal a film rental of $7,872.82 (R. 778).

Three other offers by petitioner were rejected because they were deemed insufficient in comparison to downtown potentials (R. 529-30, 752, 754-55, 793, 818). In each of these cases the distributor's judgment was confirmed by the fact that the film rental received from first run exhibition in a downtown theatre exceeded petitioner's bid.[1]

The remaining two offers, both to Paramount, though in excess of what the company later earned downtown,[2] were regarded as far beyond the power of the Crest to fulfill (R. 788, 793), and the record shows that where negotiated minimum guarantees are not actually earned the exhibitor generally seeks, and frequently obtains, a rebate from the distributor (R. 530, 709-11, 737-38, 256). Moreover, in evaluating any offer for first run product, the distributors considered not only the first run film rental offered, but also

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[1]RKO rejected an offer for "Joan of Arc" which would have given it 55% of the first $8,000 grossed and 65% of any additional gross (PX 20, R. 163, 529). The offer did not contain a specific guarantee, but invited negotiations for a "reasonable" guarantee. By licensing the film first run to the independent Town Theatre, RKO netted approximately $21,000 in film rental (R. 530).

Columbia refused a $7,000 guarantee against 40% of the gross for an exclusive first run of "All the Kings Men," winner of the Academy Award, and an alternative $4,000 guarantee against 40% of the gross for the picture on a day and date basis (PX 31, R. 752, 754). The film, though somewhat of a box office disappointment in Baltimore because of a premature release date, nevertheless netted Columbia $7,182.52 playing first run downtown (R. 754-55).

Paramount declined a $10,000 guarantee against 40% of the gross for "Sorrowful Jones" (PX 45, R. 249-50, 793) and realized $10,053 in rental from Keith's (R. 256).

[2]Petitioner offered $12,500 and $10,500 for "Top o' the Morning" and "The Heiress," respectively (PX 47, R. 252; PX 48, R. 255). Each of these films produced a rental slightly in excess of $4,000 playing first run in downtown Baltimore (R. 256).

the potential subsequent run revenue to be derived from the picture, and each distributor felt that its subsequent run revenue would be enhanced by first run exhibition and exploitation in a downtown "showcase" theatre (R. 464, 527-28, 552-53, 567-68, 643-44, 695, 712, 743; FX 47, R. 251-53).[1]

**Petitioner's Claimed Injury**

The only evidence indicating that petitioner sustained injury because of its inability to obtain first run product was Myerberg's unsupported opinion testimony. When examined before trial Myerberg denied any knowledge of how the damage figures in the complaint were computed, stating, "The computations were made by my attorney, were left entirely up to him" (R. 378, 380-81). Despite this initial confession of ignorance, at the trial Myerberg suddenly blossomed forth as an expert on the subject and testified as to how he had calculated what the Crest would have earned as a first run house. At the outset Myerberg made it clear that in his opinion the Crest would have made the same profit on an exclusive first run as it would have made playing day and date with a downtown theatre (R. 364-

[1]In this connection it may be noted that although the first run film rental received by Paramount for "Top o' the Morning" and "The Heiress" was only a little over $4,000 in each case, this was supplemented by subsequent run rentals of $9,961 and $9,097, respectively (R. 256).

The $15,000 offer at the trial for "Diplomatic Courier", referred to at page 9 of petitioner's brief, was clearly stage play. The Court characterized the incident as a "sort of behind-the-scenes affair and did not have anything to do with the case. I did not object to it, but I do not think present-day bargaining has anything to do with the issues in the case" (R. 758-59). Contrary to petitioner's contention, respondents did not reject its check when it was tendered in the course of the trial. The record discloses that the court directed petitioner to conclude its business negotiations outside the courtroom (R. 759). There is no evidence that petitioner ever resumed the negotiations.

365). He then proceeded to make two separate computations of petitioner's damages.

First, he took the gross admissions which the Crest actually received from exhibiting "The Stratton Story" on first neighborhood run over a four-day period (R. 365, 368). He then calculated what this gross would have been at first run downtown admission prices, assuming an undiminished audience at those prices (R. 367). Next, Myerberg went on to suppose that the Crest would actually have increased its patronage by 25% on first run product (R. 367)—an increment which he plucked out of thin air without a semblance of evidentiary support. The result of this four-day experience, with Myerberg's adjustment for first run admission prices, plus the extra 25%, was then projected on a yearly basis to arrive at an annual gross (R. 367; PX 92, R. 1150). This of course presupposed—again without supporting evidence—continuity of films of the calibre of "The Stratton Story" for an entire year (R. 429-30). According to these compounded speculative assumptions, the Crest would have grossed $436,800 during the first year of its operation (PX 92, R. 1150), or approximately $30,000 more than was grossed over the same period by Warner's Stanley Theatre (R. 607), which was located in the heart of downtown Baltimore and had ten times the draw area (R. 506, 508, 540, 126) and twice the seating capacity of the Crest (R. 131, 121).

In his alternative computation Myerberg baldly assumed that at first run downtown prices the Crest would have played to a capacity house ten times a week throughout the year (R. 368-69; PX 93, R. 1151). How Myerberg divined the figure ten, he never bothered to explain. Since the amount of damages arrived at by this method was roughly the same as that calculated under the first method, con-

ceivably Myerberg obtained the figure by working backwards.[1]

Respondents countered this testimony with evidence showing that if the Crest had received a first run it would have lost as much or even more than the $12,000 it lost playing first subsequent run (R. 348-49). At the trial petitioner attempted to make much of the fact that in Washington, D. C., the Warner Theatre, located downtown, played certain pictures day and date with the Ambassador Theatre, which was two and one-half miles away but in a heavily populated apartment district having a much larger draw area than the Crest. The ratio of seats between the Warner and Ambassador theatres in Washington and the Stanley and Crest in Baltimore is about the same (R. 608). During the same period in which damages were claimed by the Crest, the gross of the Ambassador Theatre in Washington was 48.5% of the gross received at the downtown Warner (R. 609-10). Despite opinion evidence that the Crest in Baltimore would not have grossed 48.5% of the Stanley's gross playing day and date (R. 610), petitioner was given the benefit of the doubt by applying the same percentage to the Crest in order to determine its prospective gross receipts (R. 610-11). After deducting from this gross figure the expenses which, according to Myerberg, the Crest would have incurred as a first run house,[2] the theatre was left with a loss of $11,911.33 (R.

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[1]Under his first theory Myerberg claimed approximately $205,000 in damages (PX 92, R. 1150); under his second, $215,000 (PX 93, R. 1151).

[2]Myerberg testified that there would be little increase in the Crest's operating expenses (other than film rental) if it played pictures on first run rather than first neighborhood run, and that the only substantial increase would be for advertising (R. 350). In his pretrial deposition he estimated the increase in advertising expenses at $100-$200 per week "at the outside" (R. 452). At the trial he changed his estimate to $500-$600 per week (R. 289, 450). This represented an upward revision of $20,000 per year on a single item of expense.

611; DX 19, R. 1165). This same method of computation, applying a percentage of 47% based on the experience of the two Washington theatres over a six-year period, disclosed that the Crest would have lost $15,872.83 during the claimed damage period (R. 612-13; DX 21, R. 1172).

The results of these arithmetic comparisons afford striking corroboration of the opinions of respondents' witnesses that the Crest, because of its poor location and limited draw area, could not have operated profitably as a first run theatre (R. 865-66, 787-88, 644).

## SUMMARY OF ARGUMENT

### I.

The central issue in this case was whether respondents, in refusing to grant a first-run to petitioner's Crest Theatre, acted separately and independently or pursuant to a conspiracy. That is an issue of fact.

Since the essential facts relating to that issue, as well as the inferences therefrom, were in sharp conflict, the trial court was under a clear duty to deny petitioner's motion for a directed verdict and submit the case to the jury. In determining the correctness of the trial court's action in this respect, an appellate court must view the evidence and all inferences therefrom in the light most favorable to respondents.

In an attempt to circumvent this rule, petitioner distorts the record. It gratuitously characterizes, as "undisputed" and "admitted", matters which were either vigor-

ously controverted or which are not contained in the record at all. Respondents' proofs are either ignored or blandly dismissed as irrelevant. The more glaring distortions are discussed at pages 41 to 46, *infra*.

The actual record, as distinguished from petitioner's fanciful version of it, discloses a firm evidentiary basis for the jury's verdict on the issue of conspiracy.

Responsible officials of respondents, having knowledge of the facts, denied the claim of conspiracy, testified that they had arrived at their respective decisions concerning the Crest Theatre separately and independently, and explained the business reasons which had prompted their action.

It was established that the Crest was situated in a third-class shopping center, in a partially developed section of Baltimore, six miles from the business and entertainment center of the city; that the population in its prospective draw area was less than 10% of that of the downtown theatres; and that it was served by a single bus line running north and south only.

It was further established, by overwhelming evidence, that the downtown theatres were in substantial competition with the Crest. That being so, clearance was entirely appropriate. The choice confronting each distributor, therefore, narrowed down to granting a first-run either to a centrally located downtown theatre or to the Crest.

Each distributor, acting separately and independently, exercised that choice in favor of a downtown theatre for the following reasons: The Crest, by reason of its inaccessible location and limited draw area, could not approximate the grossing potentials of any of the first-run down-

town theatres and was not a suitable "showcase" in which to exploit a picture so as to maximize total film rentals from both first and subsequent runs; the downtown theatres, on the other hand, by reason of their centralized location and a draw that was co-extensive with the city of Baltimore itself, were best suited not only to maximize first-run film rentals, but also to "establish" the picture for the entire area and thereby produce the greatest subsequent run revenue as well.

The cogency of these business reasons, coupled with respondents' denials, completely refuted any inference of conspiracy and fully justified a conclusion that each distributor acted independently in response to elementary concepts of good business in exercising its clear legal right to select its own first-run customers.

In arguing that there was no question to be submitted to the jury, petitioner equates conscious uniformity of action with conspiracy. None of the cases cited by petitioner upholds its sweeping and novel theory. Uniform action, when fully explained and the claim of conspiracy denied by responsible officials having knowledge of the facts, as here, does not constitute conspiracy as a matter of law.

## II.

The decrees in *United States* v. *Paramount* were admitted in evidence over respondents' objections. The Government litigation related to facts occurring in 1945 and prior years. A decree was entered in 1946 enjoining the defendants in the *Paramount* case from conspiring with

respect to runs and clearances. Those portions of the decree became effective upon their affirmance by this Court in May, 1948.

The facts upon which the present claim is based occurred several years after the *Paramount* trial and at a time when the injunction was operative. Thus, the damage period in this case runs from February, 1949, when the Crest opened, to March, 1950, when the complaint was filed.

Obviously, the alleged wrongdoing upon which the present action is predicated was not distinctly put in issue or necessarily determined in the Government suit. Hence there would be no estoppel between the parties as to the existence of a conspiracy during petitioner's claimed damage period, and the decrees in the *Paramount* case were not admissible as *prima facie* evidence under section 5 of the Clayton Act to prove such a conspiracy.

Nor were the decrees admissible under section 5 as *prima facie* proof of a 1945 conspiracy from which the later conspiracy charged in the complaint might be inferred, since the doctrine of estoppel does not permit an adjudication of a fact in one litigation to be used in a subsequent litigation as proof of an intermediate fact from which an ultimate fact may be deduced.

Since the conspiracy adjudged in the *Paramount* case with respect to runs and clearances was effectively enjoined from and after May, 1948, there can be no presumption of continuance of that conspiracy after that date. On the contrary, there is a presumption that the decrees have been observed.

As the decrees should not have been admitted in evidence at all, the trial judge's instructions on the *Paramount*

case could not have deprived petitioner of any advantage to which it is entitled under section 5. But even if the decrees were admissible, the trial judge accorded petitioner the maximum benefit to be derived from section 5 when he instructed the jury that the excerpts of the decrees selected by petitioner were *prima facie* evidence of the conspiracy found in the Government suit, and that the jury might consider this evidence together with all the other proof in determining whether there had been a conspiracy in Baltimore during the claimed damage period.

Petitioner's complaint that these instructions required it to prove the issue of conspiracy *de novo* is without substance. Manifestly, nothing adjudicated in the *Paramount* case obviated the necessity of proving a conspiracy during the period of petitioner's business existence. Indeed, petitioner's counsel at the trial conceded that he had to adduce independent evidence of conspiracy after petitioner went into business. Petitioner's present theory, that having offered the decrees in evidence its sole evidential burden was to prove impact and damage, is clearly untenable in view of the differences between the two actions.

The judge correctly refused petitioner's requests for instructions on the *Paramount* case, as they were either improper, repetitious or adequately covered. Moreover, no appropriate objection, as required by Rule 51 of the Federal Rules of Civil Procedure, was taken by petitioner. Hence the propriety of the refusals is not subject to review here.

The Court of Appeals properly held that there was nothing detrimental to petitioner in the trial court's instructions on the *Paramount* case.

## ARGUMENT

### POINT I

**PETITIONER'S MOTION FOR A DIRECTED VERDICT WAS PROPERLY DENIED AND THE EVIDENCE FULLY SUPPORTS THE JURY'S VERDICT IN RESPONDENTS' FAVOR.**

The existence of a conspiracy is an issue of fact.[1] Petitioner nevertheless is asking this Court to disregard the jury verdict, to find that there is no evidence in the record from which a jury might reasonably conclude that there was no conspiracy, and to hold respondents guilty of conspiracy as a matter of law.

#### A. The Scope of Appellate Review

It is settled law in the federal courts that in passing upon a motion for a directed verdict, the trial court must assume "that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them"; it must submit to the jury any issues that "depend

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[1] *U. S.* v. *Oregon State Medical Society*, 343 U. S. 326, 330-32 (1952); *U. S.* v. *National Asso. R. E. B.*, 339 U. S. 485, 495-96 (1950); *U. S.* v. *Yellow Cab Co.*, 338 U. S. 338, 341-42 (1949); *American Tobacco Co.* v. *U. S.*, 328 U. S. 781, 809-10 (1946); *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F. 2d 891 (7th Cir., 1941); *Chorak* v. *RKO Radio Pictures*, 196 F. 2d 225 (9th Cir., 1952); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 189 F. 2d 797 (4th Cir., 1951); *Lowlor* v. *Loewe*, 187 Fed. 522, 527 (2d Cir., 1911).

on the credibility of witnesses, and the effect or weight of evidence". *Gunning* v. *Cooley*, 281 U. S. 90, 94 (1930). The motion must be denied unless the "evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict". *Brady* v. *Southern R. Co.*, 320 U. S. 476, 479 (1943).[1]

As is pointed out in *Berry* v. *United States*, 312 U. S. 450, 453 (1941), this "exclusive power of juries to weigh evidence and determine contested issues of fact" is derived from their status as "the constitutional tribunal provided for trying facts in courts of law". For the Seventh Amendment not only preserves the right to trial by jury, but "discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of re-examination existing under the common law, and to that end declares that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law' ". *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 657 (1935).

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[1]See also, *Lavender* v. *Kurn*, 327 U. S. 645, 653 (1946); *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, 35 (1944); *Lumbra* v. *U. S.*, 290 U. S. 551, 553 (1934); *Wilkerson* v. *McCarthy*, 336 U. S. 53, 57 (1949); *Corsicana National Bank* v. *Johnson*, 251 U. S. 68, 72 (1919); *Noble* v. *U. S.*, 98 F. 2d 441, 442 (8th Cir., (1938); *Lloyd* v. *Thomas*, 195 F. 2d 486, 489-90 (7th Cir., 1952); *Roche* v. *New Hampshire Nat. Bank*, 192 F. 2d 203, 205 (1st Cir., 1951); 5 Moore's Federal Practice, § 50.02[1], pp. 2313-15 (2d ed., 1951).

In *U. S.* v. *W. T. Grant Co.*, 345 U. S. 629, 634 (1953), this Court, in reviewing the refusal of the court, without a jury, to grant an injunction, stated: "But the Government must demonstrate that there was no reasonable basis for the District Judge's decision." A like burden rests on petitioner. It cannot rely on any conflicting inferences in its favor; it must demonstrate that there was *no reasonable basis* for the verdict.

Thus the weight of the evidence is not before this Court.[1] The sole question here is whether, viewing all of the evidence and the inferences in the light most favorable to respondents, there is evidence in the record supporting the verdict, thus justifying submission of the case to the jury.[2]

Petitioner has made no effort to bring its case within these accepted rules.

**B. The Claim of Conspiracy**

The central issue of fact in this case was whether each distributor acted separately and independently in refusing a first run to the Crest, or whether they acted in concert. Absent conspiracy, the antitrust laws do not restrict the right of distributors to select their own first run customers. "It is the right, 'long recognized,' of a trader engaged in an entirely private business, 'freely to exercise his own independent discretion as to the parties with whom he will deal.'" *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565, 573 (1924), and cases cited. See also, *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312 (1923).

**(1) *Petitioner's Distortions***

In an effort to convert the pivotal issue of conspiracy into a question of law, petitioner has presented the case to this Court as though all the pertinent facts were either "admitted" or "undisputed". This it does by misstating

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[1] *Phoenix Railway Co.* v. *Landis*, 231 U. S. 578, 581 (1913); *Troxell* v. *Delaware L. & W. R. R. Co.*, 227 U. S. 434, 444 (1913); *N. Y., L. E. & W. R. Co.* v. *Estill*, 147 U. S. 591, 617 (1893).

[2] *Lumbra* v. *U. S.*, 290 U. S. 551, 553 (1935); *Gunning* v. *Cooley*, 281 U. S. 90, 94 (1930); *Ewing's Lessee* v. *Burnett*, 36 U. S. 41, 50-51 (1837); *Noble* v. *U. S.*, 98 F. 2d 441, 442 (8th Cir., 1938); *Kraus* v. *Reading Co.*, 167 F. 2d 313, 314 (3d Cir., 1948); *Shell Oil Co.* v. *State Tire & Oil Co.*, 126 F. 2d 971, 972 (6th Cir., 1942).

the record; by indulging only those inferences favorable to itself and ignoring the conflicting inferences favoring respondents; and by dismissing respondents' proofs as irrelevant.

Using broad strokes of the brush to cover up a deficiency in proof, petitioner represents as established facts that in denying petitioner a first run, respondents disregarded the particular circumstances of the Crest Theatre, and mechanically applied in Baltimore a joint national policy to confine first run product to downtown houses; that this common policy could only be effectuated by common action on the part of all the distributors; that the business reasons assigned by respondents for denying the Crest a first run were not their real reasons, as is attested by the "fact" that had the Crest been owned by any of the respondents it would have received a first run despite its neighborhood location, and by the further "fact" that petitioner's offers of rentals, equal to or higher than those obtained by the downtown theatres, were rejected; and that the underlying economic motivation for both the national policy and its local application in Baltimore was the desire of respondents to protect their investments in downtown theatres.

*Not a single one of these fancied facts was admitted or undisputed.* On the contrary, each of them is completely refuted by the record.

It becomes important for us to discuss these misstatements at the outset in order that the Court have a clear picture of the true question presented for decision.

Thus petitioner asserts:

1. Respondents "also admitted that their decision to deny first-run to the Crest resulted from the application of their national policy to confine first-run ex-

hibitions to downtown theatres and had no necessary relationship to the particular circumstances involving the Crest Theatre" (Br. 25, 35-36).

Witness after witness testified that a physical inspection of the Crest was made by them; that their decisions were specifically based on the particular circumstances of the Crest, notably its poor location, limited draw area, and totally inadequate public transit facilities.[1] There was no testimony that the decision of any company resulted from a rigid application of a national policy unrelated to the particular circumstances involving the Crest Theatre. Indeed, one witness indicated that if there had in fact been a shift in the "center of gravity of Baltimore" to the area in which the Crest was located, as Myerberg had represented, petitioner might have been accorded access to first run product (R. 562-63).

Petitioner's statement thus was neither "undisputed" nor "admitted". The jury was plainly entitled to find that the particular circumstances of the Crest were carefully weighed by each distributor, and that the Crest was denied first run on the merits.[2]

Petitioner asserts:

> 2. "Respondents admitted . . . that each knew that the common policy of all could not be maintained in the absence of common action by all of them" (Br. 24, 36-37).

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[1]See pp. 13 to 16, *supra*.

[2]Moreover, even if each distributor had automatically applied a national policy without reference to the particular circumstances of the Crest, an issue of fact would still remain for the determination of the jury as to whether such application resulted from a concert of action.

There was no such admission; there was no such evidence; and petitioner makes no effort to document its statement by any reference to the record.

It is self-evident that any distributor could have granted the Crest a first run without affecting any other distributor in the slightest. Indeed, Fox actually conducted a survey of the theatre situation in Baltimore in order to determine the feasibility of instituting day and date first runs between one or more neighborhood theatres and an independent downtown theatre. Fox ultimately had to reject the idea as unworkable because no downtown theatre would agree to waive its clearance protection over any other theatre in the same competitive area (R. 700-02, 718). The significant point, however, is that Fox seriously contemplated instituting a novel method of distribution in Baltimore and that it was thwarted not by any other distributor, but by independent downtown exhibitors who exercised their clear legal right to clearance and who, according to Myerberg's own concession, are not charged with participating in the alleged conspiracy (R. 837-38). Furthermore, the record affirmatively discloses that the various distributors employed different methods of first run distribution in numerous cities throughout the country (*Kansas City*: R. 809, 689, 663-64; *Richmond*: R. 806, 864, 580-81, 712, 735, 766-68; *Norfolk*: R. 684, 806, 735, 581, 642; *Cincinnati*: R. 644-45, 810; *Roanoke*: R. 806, 581, 684, 711, 735). In the face of this evidence petitioner's statement that each respondent knew that common action was required by all is bared as a complete myth.

Petitioner asserts:

3. "Respondents admitted that had the Crest . . . been owned by one of the respondents in its present loca-

tion, it would have been afforded an opportunity to compete for first-run product" (Br. 35).

This reiterates the statement made by petitioner in the first question presented for decision in the petition for certiorari (p. 23-h). Both statements are completely unfounded. Since the testimony by respondents' witnesses indicated that the question of ownership of the Crest would not have made any difference (R. 828-29, 653-54; cf. R. 856-57, 866), the statement is neither factual nor undisputed but sheer invention.[1] What the record does indicate is that first-run product would have been made available to the Crest if it had been located downtown (R. 550-51, 589, 759, 771-72, 828), rather than in an inaccessible corner of Baltimore having one-tenth the drawing power of any of the downtown theatres.

Petitioner states:

> 4. "The undisputed evidence disclosed . . . that petitioner was willing to pay and had offered to pay by certified check film rentals equal to or greater than those actually received by respondents from their existing first-run accounts in Baltimore" (Br. 25).

This categorical assertion, which is another holdover from the petition (p. 23-i), is not supported by the record. Petitioner conveniently overlooks the evidence showing that

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[1]Nor is there any basis in the record for petitioner's watered-down statement that Smeltzer "hinted that the Crest even in its present location might have been able to license first-run day and date pictures if Warner had owned it" (Br. 7, 40). Smeltzer's answers to the question whether the Crest would have been granted a day and date first-run if it had been owned by Warner were, "I don't think so" (R. 653), and "I am not positive we would play day and date" (R. 654). And when further pressed as to whether he would have any "doubts" about the matter, his answer was "Yes" (R. 654).

these offers to four—not all—of the respondents were made in bad faith for the purpose of promoting a lawsuit and not with an honest intention that they be accepted; that the issue of whether petitioner acted in good faith was expressly submitted to the jury; and that there were substantial business reasons for the rejection of these offers.[1]

5. From the foregoing false premises petitioner concludes that the business reasons advanced by respondents are not to be credited and that the real economic motivation underlying the Crest's inability to obtain a first run was that respondents feared the competition to their own first-run houses from the Crest and other neighborhood theatres throughout the country (Br. 43). Even if there were any substance to petitioner's unfounded factual premises, at most the question as to respondents' motivation was susceptible to conflicting inferences.[2] The evidence adduced by respondents afforded solid support for the inference that the Crest was denied a first run by each distributor on the merits. Moreover, there was ample testimony that the showcase

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[1] See pp. 27 to 30, *supra*.

[2] Petitioner purports to find something incriminating (Br. 13) in the testimony of Warner and Loew's to the effect that if the Crest had been granted a day and date first run with the downtown Stanley or Century, neighborhood houses comparable or superior to the Crest would have demanded and have had to be accorded similar treatment, with the result that the business of the downtown theatre would be diluted to a point where its continued operation would no longer be profitable (R. 626, 641-42, 901, 907). But one of the cardinal purposes of having successive runs and clearance is to avoid diminution of overall film rentals by spreading them too thin over a number of theatres in the same competitive area, to the inevitable injury of all concerned (R. 673-74). It is to prevent precisely such an intolerable situation that theatres in substantial competition, as Myerberg admitted, should not have simultaneous runs. Since such competition existed in Baltimore between the downtown theatres and the Crest, it is hardly suprising that these witnesses were not anxious to cast aside the clearance protection of their theatres.

theory of first run exhibition was prevalent in show business long before the advent of motion pictures, and that it was applied to motion pictures from their very inception—long prior to any affiliation between a distributor and exhibitor (R. 637-38, 674-75, 897). In view of the jury verdict, it is the inference in favor of respondents, rather than the one drawn by petitioner, that must be accepted. It was clearly within the province of the jury to determine respondents' true motivation.[1]

**(2) *The Actual Record***

The actual record, as distinguished from petitioner's fanciful version of it, discloses a firm evidentiary basis for the jury's verdict on the issue of conspiracy.

As to the claim of conspiracy with respect to refusing petitioner a day and date first run with a downtown theatre, the overwhelming evidence of substantial competition between the Crest and the downtown houses, coupled with Myerberg's admission of the simple economic truth that theatres in substantial competition should not have simultaneous runs,[2] fully warranted a finding that in denying petitioner this type of run each respondent was guided by an elementary principle of motion picture distribution, and was not carrying out any collusive agreement. When to this

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[1]Similarly, petitioner asserts that "each respondent followed a course of conduct over a period of years with the deliberate purpose and intent of excluding petitioner and others similarly situated from a substantial part of the market" (Br. 36). There is no evidence supporting this assertion and no record references are given. It is pure argument based on an inference that petitioner urged the jury to draw and that the jury rejected.

[2]As stated by the District Court in *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323, 342 (S. D. N. Y., 1946): ". . . exhibitors would find extremely perilous the acceptance of licenses for the exhibition of films without assurance by the distributor that a nearby competitor would not be licensed to show the same film either at the same time or so soon thereafter that the exhibitor's expected income . . . would be greatly diminished."

proof is added the evidence showing the necessity of obtaining the consent and cooperation of all interested exhibitors in order to play day and date, and the admittedly non-conspiratorial refusal of any independent downtown exhibitor to operate on such a basis, this finding becomes unassailable.

The question is therefore narrowed to whether there was any evidence upon which the jury could reasonably have concluded that there was no concerted action by respondents in denying petitioner an exclusive first run.

Both Warner and Loew's frankly told Myerberg at the very outset that his request for an exclusive first run could not be entertained as they were licensing their product to their own first run downtown houses. In *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 190 F. 2d 951, 960 (2d Cir., 1951), where it was claimed, among other things, that two distributors had conspired to favor theatres in which they had a large financial interest, Judge Augustus Hand, in an opinion affirming a judgment for the distributors, stated:

> "Officers of both Loew and Paramount testified that it was the policy of each to favor theatres in which they had an interest, all other things being equal. This was to be expected, and the fact that they did so is no evidence that they conspired to do so jointly rather than doing so individually."[1]

Surely the jury in the instant case was entitled to reach the same conclusion as that reached by the trial court and the Court of Appeals for the Second Circuit in the *Dipson* case.

The remaining distributors, none of whom had any interest in the downtown theatres in Baltimore, rejected peti-

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[1]Significantly, Judge Hand also wrote the original opinion of the District Court in *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323 (S. D. N. Y., 1946), and the further opinion of the Court, 85 F. Supp. 881, upon remand after the decision of this Court in 334 U. S. 131.

tioner's request for an exclusive first run for different reasons. Basically, each of them felt that by reason of its remote location and limited draw area the Crest could not approximate the grossing potentials of the first run downtown theatres and that it was not a suitable "showcase" in which to exploit a picture so as to maximize subsequent run film rentals. Located in a partially developed community six miles from the heart of the downtown amusement and primary shopping center, inconveniently situated from the standpoint of the movie-going public, possessing only meager shopping facilities, serviced by a single bus line and having a draw area which Myerberg himself confined to 105,000, the Crest was obviously ill-suited to replace any of the downtown theatres as a first run house—theatres which because of their centralized location had a draw area co-extensive with the city of Baltimore itself, or over ten times that of the Crest. In the light of these readily observable facts, it is hardly surprising that experienced distributors, each of them motivated by the same desire to maximize its revenue, were not convinced by Myerberg's blithe assertion that the Crest was "the finest showcase for films in the State of Maryland" (R. 131).

In view of this testimony, together with respondents' denials of concerted action, the jury had every right to find that the refusal of each distributor to select the Crest as its exclusive first run outlet in preference to a downtown theatre, sprang not from a conspiracy but from an independent exercise of sound business judgment.[1]

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[1]Despite all this evidence, petitioner still has the temerity to state:

> "This is not a case in which the alleged conspirators offered evidence that they acted independently from some motive unrelated to restraint of trade. On the contrary, respondents not only knew that their common course of conduct would un-

### *(3) Relevancy of Business Reasons*

Petitioner, however, after giving a distorted summary of the business reasons assigned by the witnesses for the action of their respective companies (Br. 38-39),[1] makes the astounding contention that this evidence was entirely irrelevant (Br. 26, 39, 43). Petitioner thus states (Br. 26): "Since evidence showing merely that respondents had a common business purpose for excluding petitioner from the first-run market is irrelevant to a showing that they did not conspire to do so, there was no relevant evidence from which the jury could have drawn an inference that respondents did not conspire." Petitioner's *ipse dixit* that the evidence is irrelevant does not make it so. The argument defies common sense and is contrary to authority and reason. The cases draw a basic distinction between individual and joint refusals to deal. *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565, 573 (1924).[2]

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reasonably restrain competition, but by their explicit admission, they deliberately intended to restrain the trade of independent neighborhood theatres. Their defense was merely that it was convenient and economically profitable to do so." (Br. 42)

Since petitioner's distortions and misrepresentations are so patent, there is no need to make any further comment on this extraordinary assertion.

[1]Petitioner endeavors to create the impression that it failed to receive first-run product because, among other reasons, the distributors practiced rigid favoritism toward long standing customers (Br. 41-42). As shown by testimony which petitioner itself elicited, had the Crest been located in the downtown amusement center, it would have been granted access to first-run films irrespective of the nature of relationships with existing customers (R. 550).

[2]See also, *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919); *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85, 99-100 (1920); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 721-723, 728-729 (1944); *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 190 F. 2d 951, 957 (2d Cir., 1951); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 189 F. 2d 797, 798-799 (4th Cir., 1951); *Westway Theatre* v. *Twentieth Century-Fox F. Corp.*, 30 F. Supp. 830, 836-837 (D. Md., 1940), aff'd 113 F. 2d 932 (4th Cir., 1940).

As proof of their defense that each distributor acted separately and independently, respondents explained the reasons for the refusal of each distributor to grant a first run to the Crest. Not only were such explanations relevant, but in *Interstate Circuit v. United States*, 306 U. S. 208, 225-26 (1939), the Court held that the failure to give such testimony warranted an adverse inference by the trier of the facts against the defendants.[1] If petitioner's contention were correct, no distributor under any circumstances would ever be justified in rejecting a demand for a first run even by theatres with antiquated appointments, inferior location and inadequate seating capacity, so long as the other distributors responding to the same reasons acted the same way.[2]

Petitioner, assuming that a conspiracy had been proved, then argues that business necessity, good intentions, or economic motives constitute no justification (Br. 42, 39). This argument, of course, begs the question. The testimony as to the reasons animating each distributor was not offered in excuse of conspiracy; rather it was offered in

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[1]See also, *Dipson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 190 F. 2d 951, 956 (2d Cir., 1951); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 189 F. 2d 797, 799 (4th Cir. 1951); *Fanchon & Marco* v. *Paramount Pictures*, 100 F. Supp. 84, 100, 103-104 (S. D. Cal., 1951).

[2]Petitioner blows hot and cold. Evidence that respondents were seeking to maximize their revenue from the rental of their films is said to be irrelevant. Yet the rejection of petitioner's offers is deemed highly relevant and, indeed, weighty evidence of conspiracy (Br. 40). If apart from relevancy, petitioner is attacking the honesty of the business reasons and the credibility of the witnesses, the short answer is that was a question for the jury—a question which the jury resolved against petitioner.

disproof of conspiracy and was clearly relevant for that purpose.

**(4) *The True Question Presented***

What, then, is the real question for decision presented by this record?

The question is not whether consciously uniform action is admissible as evidence of conspiracy, for proof of such action was admitted and fully considered by the jury; nor whether such evidence, without more, would have entitled petitioner to go to the jury on the issue of conspiracy, for that issue was submitted to the jury.

Nor is the question whether proof of consciously uniform action, in the absence of any explanation, and in the absence of direct denials of conspiracy by responsible officials of respondent companies, would have justified a directed verdict in favor of petitioner, for this record contains the explanations of respondents' witnesses and their denials of concerted action.

The sole question presented, thus, is whether consciously uniform action, although fully explained, and the claim of conspiracy denied, is nevertheless of such potent probative force that the issue of conspiracy may not as a matter of law be submitted to the jury.

Both authority and common sense require a negative answer to this question.

There is no basis either in the words of the Sherman Act, its legislative history or its construction over a period of more than six decades for treating consciously uniform action in and of itself as a violation of law, without regard

to the context and reasons for such action. What the statute interdicts is not uniformity, even though conscious, but uniformity resulting in a restraint of trade which is the product of a collusive understanding. It is immaterial whether such understanding is denominated conspiracy or concerted action. Either label necessarily means joint, planned, united, associated, collective action—a group scheme for cooperative law-breaking or a partnership in unlawful purposes. This is the meaning consistently accorded the statutory terms "combination" and "conspiracy" by this Court since the enactment of the statute.[1] No case holds that conscious uniformity, when fully explained (as it was here) as the result of separate, individual and unassociated action, is itself the equivalent of conspiracy or concerted action. No case dispenses with the need for showing collusion.[2] On the contrary, the cases without deviation hold that mere uniformity, conscious or otherwise, is not the substantive equivalent or conclusive proof of conspiracy, as contended by petitioner.

*Cement Mfrs. Protective Asso.* v. *United States*, 268 U. S. 588 (1925), and *Maple Flooring Mfrs. Asso.* v. *United States*, 268 U. S. 563 (1925), are square holdings that proof of conscious price uniformity does not establish conspiracy as a matter of law.[3]

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[1] *United States* v. *Kissel*, 218 U. S. 601, 607-608 (1910); *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 465-66 (1921); *American Column & Lumber Co.* v. *U. S.*, 257 U. S. 377, 399 (1921); *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 253-54 (1940); *U. S.* v. *U. S. Gypsum Co.*, 333 U. S. 364, 394 (1948).

[2] Collusion, of course, may be proved by circumstantial evidence. *American Tobacco Co.* v. *U. S.*, 328 U. S. 781, 809-10 (1946).

[3] In the *Cement* case the Government sought to curb certain practices of a trade association, including the dissemination among its members of information relating to the production, price and transpor-

In *Chorak* v. *RKO Radio Pictures*, 196 F. 2d 225 (9th Cir., 1952), the plaintiff objected to the clearance and run given his theatre and charged the distributors with conspiracy. The trial court, without a jury, upheld the reasonableness of the clearance and found no conspiracy. The Court of Appeals affirmed, stating (pp. 230-31):

> "Judge Harrison thus had before him a most revealing record and it convinced him that all of the clearance negotiations and arrangements of the distributor-appellees resulted from nothing more than common business solutions of identical problems in a highly competitive area. So viewed, he concluded

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tation costs of cement, charging that the purpose of these practices was to control the price of cement. There was no claim or evidence of any agreement to fix prices; but instead, the government relied on proof of substantial price uniformity in support of its charge of conspiracy. The District Court granted an injunction, but this Court reversed in an opinion by Mr. Justice Stone, stating (p. 606):

> "We realize . . . that uniformity of price may be the result of agreement or understanding, and that an artificial price level, not related to the supply and demand of a given commodity, may be evidence from which such agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred. But here the government does not rely upon agreement or understanding, and this record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement to which we have referred, and it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action."

Similarly, in the *Maple Flooring* case, 268 U. S. at 585-86, this Court drew a critical distinction between "concerted action," which "constitutes a restraint of commerce and is illegal, and may be enjoined," and the exchange of statistical information among members of a trade association having a stabilizing effect on price, which, in the absence of proof of concert of action, was held to be perfectly legal. See also: *United States* v. *International Harvester Co.*, 274 U. S. 693, 708-09 (1927).

that the totality of circumstances required the conclusion that the conspiracy charged in the complaint was not established by the evidence. . . .

"If it can be said that somewhat parallel business practices were revealed by the record, it is certain that these facts wholly failed to achieve a significance which convinced the experienced trier of the facts that they were the product of any sort of concerted action among the distributors. He dealt with a record of conflicting claims on the conspiracy issue and we cannot say that he erred when he believed, or refused to believe, any part of the testimony relative to this matter."

*Fanchon & Marco* v. *Paramount Pictures,* 100 F. Supp. 84 (S. D. Cal., 1951), a case cited with approval by the Ninth Circuit in *Chorak* v. *RKO Radio Pictures, supra,* is in accord. The plaintiff claimed that its Baldwin Theatre in suburban Los Angeles had been refused a first run and uniformly granted a playing date twenty-one days after the Los Angeles first run by reason of a conspiracy among the defendant distributors and the associated exhibition companies. Judge Yankwich, who heard the case without a jury, found that the clearance was "warranted by special conditions which reasonable persons may take into consideration in determining their action," and that conspiracy had not been established. On the subject of uniform action Judge Yankwich observed (p. 91):

". . . similarity of action, at times, may be the result not of previous agreement, but of solving an identical situation in a similar manner."

To the same effect are *Westway Theatre* v. *Twentieth Century-Fox F. Corp.,* 30 F. Supp. 830, 833 (D. Md.,

1940), aff'd 113 F. 2d 932 (4th Cir., 1940); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388 (D. Md., 1950), aff'd 189 F. 2d 797 (4th Cir., 1951); *United States* v. *Borden Co.*, 111 F. Supp. 562, 579-80 (N. D. Ill., 1953).

There is no inconsistency between the foregoing authorities and those relied on by petitioner, namely, *Interstate Circuit* v. *United States*, 306 U. S. 208 (1939); *United States* v. *Masonite Corp.*, 316 U. S. 265 (1942); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944); *American Tobacco Co.* v. *United States*, 320 U. S. 781 (1946); and *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948). These cases are not applicable here and do not stand for the following proposition which petitioner purports to deduce from them:

> " . . . evidence sufficient to establish a combination or conspiracy in violation of the Sherman Act exists when it is proved that members of an industry have participated in a particular course of conduct under circumstances which indicate that each must have known that the others would do or had done the same things, and the necessary result of their common, though separate, acts is to impose a restraint of trade of the character prohibited by the Sherman Act." (Br. 36-37)

In the *Interstate Circuit* case, the dominant exhibitor of motion picture theatres in several Texas cities, sent a letter to each of the defendant distributors proposing that they comply with certain demands as to the manner in which films should be leased in Interstate's competitive territory. These demands required the imposition of price-fixing and other restrictions on Interstate's subsequent-run competitors.

Each distributor was made aware of the fact that the same proposal was made to every other distributor, since the names and addresses of all appeared as addressees on each copy of the circular letter. Ultimately, every distributor complied with Interstate's demands.

The trial court specifically found as a fact that Interstate and the distributor defendants had conspired to impose these unlawful restrictions upon the subsequent-run exhibitors. This Court held that the finding of agreement among the distributors was supported by the evidence, but went on to say "that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy, [it being] enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it" (306 U. S. at 226-27). The Court added that it was "elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators" (306 U. S. at 227).

Since each distributor became a co-conspirator when it joined the scheme initiated by the exhibitor, it was not necessary to establish a separate agreement among the distributors themselves. In holding that the knowing adoption by each of the distributors of the existing conspiratorial plan rendered them co-conspirators, even though they did not conceive the plan or join in it simultaneously, Mr. Justice Stone enunciated a doctrine no more novel than that contained in the famous charge to the jury of Mr. Justice Coleridge in *Regina* v. *Murphy*, 8 C. & P. 297, 311 (1837):

> "It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is

it necessary that they should have originated it. If a conspiracy be already formed, and a person joins it afterwards, he is equally guilty."

There is no suggestion in *Interstate* that conscious uniformity is the equivalent of conspiracy. On the contrary, the Court's language on its face shows that concerted action is a *sine qua non* to the existence of a conspiracy. Thus it is said that where a concert of action is contemplated and invited, acceptance of the invitation by adherence to and participation in the scheme is proof of conspiracy.[1] It is clear, therefore, that what was condemned was collusive action, not similar independent action.[2]

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[1]Not only was there an express invitation to join the plan, in the form of Interstate's letter to all the distributors jointly, but the plan involved a "radical departure" from normal business practices in the industry, and its success depended on the cooperation of all the distributors. The fact that all did participate in the plan under these circumstances, coupled with the failure of the distributors to offer any reasonable explanation for the unanimity of their unusual action, and their further failure to call as witnesses those officers who had authority to act and knew whether their company had acted pursuant to an agreement, was stressed by this Court in affirming the finding of conspiracy.

None of these facts is present in the case at bar. Here there was no invitation to join in a plan; there was no change in customary business practices by the distributors, much less a radical change; there was no necessity for cooperative action among the distributors, since it did not make the slightest difference to any distributor whether any other granted petitioner a first run; a full and valid explanation was given by each distributor justifying its refusal to entertain petitioner's request; and these explanations, together with denials of conspiracy and assertions of separate and independent action, were provided by high and responsible officials having knowledge of the facts.

[2]This is confirmed by subsequent application of the *Interstate Circuit* case by this Court. *United States* v. *Masonite Corp.*, 316 U. S. 265, 275 (1942); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 723 (1944); *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394 (1948); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 142 (1948). In all these cases the finding of conspiracy rested upon proof of concerted action.

In *Masonite*, a series of unlawful agreements were entered into by Masonite with its competitors, taking the form of a *del credere* agency contract. Each separate agreement violated the antitrust laws since it involved illegal vertical price control by the seller. As each agreement was made, Masonite informed the other party of the existence and terms of like agreements which Masonite had previously made with its other competitors. Upon the execution of each contract, Masonite sent copies to the companies which had previously entered into similar contracts.[1] The basic plan was contrived by Masonite; others were invited to participate and gave their adherence to the scheme knowing that concerted action was contemplated and invited. As the Court pointed out:

> "The fixing of prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as the fixing of prices by direct, joint action." (316 U. S. at 276)

In *American Tobacco*, where the only question presented was whether actual exclusion is necessary to the crime of monopolization, and where it was assumed for the purpose of decision that a conspiracy had been established, the Court in considering the meaning of conspiracy, said:

> "Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the

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[1]Later on, modifications of the agreements were executed and placed in escrow pending delivery to all signatories. New agreements made in 1941 were negotiated by a committee of purchasers and were only completed after meetings at which all of the defendants attended.

conclusion that a conspiracy is established is justified." (328 U. S. at 810)[1]

In *Bausch & Lomb*, there was a specific finding of an agreement between the seller and purchaser to maintain resale prices (321 U. S. 707, 720).[2]

In a vain effort to bring itself within the ambit of *Interstate Circuit* and *Masonite*, petitioner intimates that the

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[1]The trial court in its instructions had defined conspiracy in terms of "a mutual agreement or understanding", and specifically charged that:

> "The same or similar actions by two or more persons, as the result of and pursuant to independent plans and purposes of each of them, without prior agreement, arrangement or understanding between them so to act, in and of themselves do not constitute conspiracy, even though they be substantially concurrent in time and place and tend toward the accomplishment of the same end." (R. 6350)

[2]Petitioner also makes passing reference to three non-jury cases decided by the Third Circuit, namely: *Milgram* v. *Loew's, Inc.*, 192 F. 2d 579 (3d Cir., 1951); *Ball* v. *Paramount Pictures*, 169 F. 2d 317 (3d Cir., 1948); and *William Goldman Theatres* v. *Loew's, Inc.*, 150 F. 2d 738 (3d Cir., 1945). The opinion below discusses these cases in detail, points out that each contains a factual finding of conspiracy, that not one held that evidence of conscious uniform action dispenses with the necessity of proving a conspiracy or that such evidence in and of itself establishes a conspiracy as a matter of law, and concludes that they are not inconsistent with the case at bar (201 F. 2d at 312-13). This reconciliation of these cases is especially significant because Chief Judge Parker, who joined in the opinion below, also sat and concurred with the Third Circuit in the *Goldman* case.

In summary, the most that these cases hold is that the trier of the facts *might* infer conspiracy from the evidence. They do not hold, as petitioner appears to contend, that conscious uniformity is of itself a violation of the antitrust laws. Indeed, the Third Circuit in the *Milgram* case expressly recognized that while uniformity "forms the basis of an inference of joint action, [this] does not mean . . . that in every case mere consciously parallel business practices are sufficient evidence, in themselves, from which a court may infer concerted action" (192 F. 2d at 583). Directed verdicts were not granted in these cases, and they are no authority for the proposition that a directed verdict is proper where, as here, the evidence is susceptible of conflicting inferences on the issue of conspiracy.

separate action of each distributor in denying a first run to the Crest and in granting an exclusive first run to a downtown outlet was in itself an unlawful restraint of trade. Indeed, this assumption of separate illegality is the premise on which its argument rests. The premise is erroneous. The right of each distributor, acting separately and not in concert with others, to license its films on an exclusive first run basis and to grant reasonable clearance protection to first run customers was sustained in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948). The law is settled, as we have seen, that a single trader is privileged to select his own customers. Neither the granting of an exclusive first run to a downtown outlet nor the denial of such a run to the Crest was tainted with any illegality. Admittedly, an exclusive first run with concomitant clearance necessarily involves a *pro tanto* exclusion of others. Nevertheless the exclusion is a lawful restraint so long as it is reasonable. Petitioner's premise being faulty, its conclusion is necessarily erroneous.

In view of Myerberg's concessions on the stand that he was not attacking clearance and runs as such in this case, and that a 21-day clearance was reasonable (R. 332, 840), it is quite extraordinary that an argument should be made on this appeal which implicitly challenges the legitimacy of runs and clearances as employed by any distributor acting separately.

With a like purpose of bringing itself within the ambit of *Interstate Circuit* and *Masonite*, petitioner asserts at various parts of its brief (Br. 24, 36) that respondents admitted that each knew that the common policy of all could not be maintained in the absence of common action by all of them. We have already pointed out that there was no such admission, that there was no such evidence,

and that, on the contrary, this record demonstrates that it was a matter of entire indifference to each of the distributors whether or not its competitors granted the Crest first run. Unlike *Interstate Circuit*, unanimity of action was not essential for the accomplishment of the business purpose of each distributor.

A rule making uniformity of itself unlawful would have far reaching and drastic repercussions throughout the business world. This is because uniform action is so typical of normal human and business behavior and results from individual and not joint impulses. Sometimes, for example, uniformity is the instinctive reaction of human beings to the same situation, as when in a rainstorm people use umbrellas, and as when there is a loud noise everyone looks in the direction of the sound. Sometimes it is the common sense response to the same business situation, as when all department stores with good credit departments refuse to extend credit to the same bad risk, or when all fire insurance companies refuse to sell insurance to a known fire bug. Cf. *Ruddy Brook Clothes* v. *British & Foreign Marine Ins. Co.*, 195 F. 2d 86 (7th Cir., 1952). Most frequently it is the result of competition, as when competing department stores have furniture sales or white goods sales in the same month, or sell the same merchandise at the same price.

To hold that conscious uniformity of business behavior not resulting from agreement is unlawful, irrespective of the cogency of the reasons producing it, would place businessmen in a hopeless dilemma. If several distributors had granted a first run to the Crest, would they then be guilty of a conspiracy against their former first run customers, the downtown theatres, because they consciously and uniformly rejected their requests for a first run? Were this so, distributors would be guilty of an antitrust violation

and subject to suit whether they gave first run to the Crest or to the downtown theatres. The Sherman Act plainly does not create such an intolerable situation. It does not require diversity merely for the sake of diversity, even though it be contrary to sound business judgment. Can it be said that one must operate his business uneconomically because his competitor previously adopted a sound business policy? Is there to be a race as to who acts first? And is the first actor to be condemned as a conspirator because others have responded similarly to a common stimulus?

Undoubtedly these are the reasons why up to now no court has ever said that mere conscious uniformity of action is of itself sufficient to compel a finding of conspiracy. If such conduct were conspiracy, then all sellers would act at their peril in exercising a judgment which to them is sound, the moment they know that their competitors have exercised their judgment the same way. Such clearly is not the law.

To bolster its case, petitioner urges that the events which occurred during the claimed damage period should be "measured against the background and findings in the *Paramount* case" (Br. 28). In Point II of this brief we demonstrate that the decrees in the *Paramount* litigation were erroneously admitted in evidence; that the *Paramount* case related to a state of facts existing in 1945 and prior years; that the conspiracy found in that case respecting runs and clearances was effectively enjoined from May, 1948, prior to any denial of first run pictures to petitioner; that there is no presumption that the earlier conspiracy continued up to the time plaintiff entered business; that the *Paramount* case dealt with conduct in the country as a whole and contained no finding with respect to the theatre situation in Baltimore; that runs and clearances in Baltimore

were not attacked by the Government; that there was no determination of any impropriety in the granting of first run to downtown theatres in Baltimore, or elsewhere, and no decree requiring the licensing of first run films to theatres outside the downtown areas irrespective of the merits; that five of the eight first run downtown theatres in Baltimore, accounting for 63% of first run exhibitions, are owned by independent exhibitors having no affiliation with any of the respondents; and that the decrees, if admissible at all, would at best be *prima facie* evidence of the earlier conspiracy and would not obviate the necessity of proving subsequent conspiratorial action by respondents during the claimed damage period.

The post-decree evidence consisted, as we have seen, of mere conscious uniformity and did not establish a conspiracy as a matter of law. Since the decrees themselves were at best only *prima facie* evidence of a conspiracy that existed in 1945, and since evidence which is *prima facie* means only that it is sufficient to go to the jury, it follows that even if the decrees were admissible there would be no basis for a directed verdict.

In summary, the conflict in the testimony on the issue of conspiracy, the differing inferences which the parties drew from the evidence, the questions of credibility presented by the testimony, all raised triable issues requiring submission of the case to the jury. Since conscious uniformity is not conclusive proof of conspiracy where the reasons prompting such uniformity are fully explained, as they were here, and since the *Paramount* decrees were not admissible, or if admissible were at best *prima facie* evidence only, the trial court was under a clear duty to deny petitioner's motion for a directed verdict and permit the jury to pass upon the issue of conspiracy.

## POINT II

### THE COURT BELOW DID NOT ERR IN UPHOLDING THE CHARGE TO THE JURY CONCERNING THE PARAMOUNT DECREES.

This case is *not* the *Paramount* case all over again.

In *United States* v. *Paramount Pictures, Inc.*,[1] it was held that respondents' conduct in the country as a whole during the year 1945 and previous years violated the antitrust laws. In the case at bar, petitioner sought to establish that respondents' conduct in the City of Baltimore during the period February, 1949 to March, 1950, also violated those laws, with resultant injury to petitioner.

At petitioner's insistence, and over respondents' objections (R. 116-17, 482-83, 1002), the *Paramount* decrees were admitted in evidence (R. 942-43) and the trial court instructed the jury as to their *prima facie* effect under section 5 of the Clayton Act (R. 1001-02, 1104-05). Petitioner contends that these instructions were inadequate.

We shall demonstrate that the *Paramount* decrees should never have been admitted in evidence in the first place and hence petitioner was not entitled to *any* assistance from them; but that even if the decrees were admissible, the trial court's instructions accorded petitioner the maximum probative advantage conferred by section 5. In neither event is petitioner in a position to complain.

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[1] 66 F. Supp. 323 (S. D. N. Y. 1946), aff'd in part and rev'd in part, 334 U. S. 131 (1948); opinion on remand 85 F. Supp. 881 (S. D. N. Y. 1949).

**A. The Paramount decrees should not have been admitted in evidence.**

It has consistently been respondents' position that the *Paramount* decrees should not have been admitted in evidence. The Court of Appeals was not required to pass upon their admissibility since it found no error in the trial court's charge. However, respondents' right to urge this additional ground in support of the decision below is clearly established.[1]

The decrees were offered and ultimately received as *prima facie* evidence under section 5 of the Clayton Act. That section authorizes a plaintiff in a treble damage action to use a Government decree adjudicating that a defendant has violated the antitrust laws as *prima facie* evidence against the same defendant "as to all matters respecting which said . . . decree would be an estoppel as between the parties thereto."[2] As this Court pointed out in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 568 (1951):

> "The evidentiary use which may be made under § 5 of the prior [judgment] is thus to be determined by reference to the general doctrine of estoppel."

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[1] *Walling* v. *General Industries Co.*, 330 U. S. 545, 547 (1947); *Public Service Commission of Puerto Rico* v. *Havemeyer*, 296 U. S. 506, 509 (1936); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 560 (1931); *Langnes* v. *Green*, 282 U. S. 531, 538 (1931).

[2] Were it not for the provisions of section 5, a judgment rendered in an antecedent Government proceeding would not be admissible in a later treble damage action. *Buckeye Powder Co.* v. *Du Pont Powder Co.*, 248 U. S. 55, 63 (1918); cf. *Tidewater Optical Co.* v. *Witthamp*, 179 Va. 545, 19 S. E. 2d 897 (1942). In any event, no question as to the admissibility or effect of the *Paramount* decrees, apart from section 5, can be raised on the present record since the decrees were offered by petitioner and received by the court solely under that section.

There are two conditions which must be satisfied before the doctrine of estoppel may be invoked: (1) the matter must have been "distinctly put in issue and directly determined" in the prior suit;[1] and (2) the matter must be "determinative" of an ultimate fact in the second suit.[2]

Application of these principles to the case at bar requires, therefore, a comparison of what was determined in the *Paramount* case with what petitioner had to establish in order to recover in this case.

**(1) *The Paramount case was an adjudication of a 1945 conspiracy, whereas petitioner had to prove a conspiracy in 1949-50.***

Although the decrees that were introduced in evidence were not entered until 1948, 1949 and 1950, the violations of law to which they attest all took place in 1945 and prior years.[3] Petitioner expressly concedes that "the findings in

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[1] *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 569 (1951). See discussion and additional authorities cited *infra*, pp. 67-68.

[2] *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 459 (1922); *The Evergreens* v. *Nunan*, 141 F. 2d 927 (2d Cir. 1944). See discussion and additional authorities cited *infra*, pp. 68-73.

[3] The *Paramount* action was instituted on July 20, 1938, and came to trial in 1945. The decision of the District Court adjudicating that the defendants had violated the Sherman Act was handed down in June, 1946 [66 F. Supp. 323 (S. D. N. Y. 1946)]. A decree was entered the following December which enjoined the defendants, among other things, from conspiring with respect to runs and clearances [70 F. Supp. 53 (S. D. N. Y. 1946)]. This decree was stayed by order of Mr. Justice Reed in April, 1947, pending "final disposition of the cases by this Court." In May, 1948, this Court affirmed the District Court's findings and injunctive provisions relating to runs and clearances, but remanded the cause to the District Court for reconsideration of the relief to be granted [334 U. S. 131 (1948)]. Upon this affirmance, the injunction with respect to runs and clearances became effective. The order on mandate was entered on June 25, 1948.

On remand the District Court conducted further hearings, which began on November 8, 1948. On the same date it approved a consent

the *Paramount* case showed the situation generally as of 1945" (Br. 53).

The Crest Theatre did not open until February 26, 1949 (R. 167-68). Petitioner's claimed damage period is February, 1949, to March, 1950 (PX 92, R. 1150).

Petitioner could not have been damaged by a conspiracy antedating its existence. *Buckeye Powder Co.* v. *Du Pont Powder Co.*, 248 U. S. 55, 63-64 (1918). As petitioner itself recognized below, it could not rest its case on the *Paramount* conspiracy; it had to "go beyond, and show the conspiracy" in the later years (R. 930).

***(2) The Paramount decrees were not admissible to establish prima facie the ultimate fact of a 1949-50 conspiracy.***

The first condition that must be met before the doctrine of estoppel can come into play is that the question of fact sought to be established by estoppel in the second action

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decree entered against RKO, prior to the reception of any evidence on remand. During the course of such hearings, on March 3, 1949, a consent decree against Paramount was approved. On July 25, 1949 the District Court handed down its decision on remand [85 F. Supp. 881 (S. D. N. Y. 1949)]. Pursuant thereto the Court on February 8, 1950, entered findings of fact and conclusions of law as well as two decrees, one against the "major" defendants (Loew's, Warner's and Fox) and a second against the "minor" defendants (Columbia, Universal and United Artists). Appeals were taken by the majors only from the injunctive provisions concerning divorcement and divestiture, and the decree against them was affirmed in *Loew's, Inc.* v. *United States*, 339 U. S. 974 (1950). The minors acquiesced in the decree and took no appeal.

Evidence of conspiracy in the *Paramount* case was all presented prior to the conclusion of the trial in 1945. Hearings held subsequent to that date were not concerned with the presence or absence of conspiracy, but only with the nature of the relief to be afforded. Petitioner does not dispute this (Br. 32-33).

must have been "distinctly put in issue and directly determined" in the first action.[1]

It is self-evident that events occurring in 1949-50 could not possibly have been distinctly put in issue or directly determined in an action based on evidence relating to a period ending in 1945. Hence the adjudication in the *Paramount* case could not operate as an estoppel between the parties as to an alleged conspiracy occurring in the subsequent period of 1949-50.

There being no estoppel, it follows under section 5 that petitioner could not utilize the *Paramount* adjudication to establish *prima facie* a later conspiracy in 1949-50.

***(3) The Paramount decrees were not admissible to establish prima facie a 1945 conspiracy as a mediate fact from which the ultimate fact of a 1949-50 conspiracy might be inferred.***

It remains to consider whether the decrees, though not *prima facie* evidence of the 1949-50 conspiracy charged in this case, might nevertheless be admissible as *prima facie* evidence of a 1945 conspiracy, from which a 1949-50 conspiracy might be inferred.

Admissibility for this purpose is not sanctioned by section 5 because the general doctrine of estoppel does not permit a fact established in a prior litigation to be used to establish a *mediate* fact in the second litigation from which an *ultimate* fact can be deduced. It only permits a fact necessarily determined in the first action to be used to establish an identical ultimate fact in the second. The most

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[1]See *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 569 (1951); *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 38 (1950); *Commissioner* v. *Sunnen*, 333 U. S. 591, 597-98 (1948), and cases cited.

illuminating exposition of this aspect of the doctrine of estoppel is given by Judge Learned Hand in *The Evergreens* v. *Nunan*, 141 F. 2d 927, 928 (2d Cir., 1944):

> "It is of course well-settled law that a fact, once decided in an earlier suit, is conclusively established between the parties in any later suit, provided it was necessary to the result in the first suit. . . . However, a 'fact' may be of two kinds. It may be one of those facts, upon whose combined occurrence the law raises the duty, or the right, in question; or it may be a fact, from whose existence may be rationally inferred the existence of one of the facts upon whose combined occurrence the law raises the duty, or the right. The first kind of fact we shall for convenience call an 'ultimate' fact; the second, a 'mediate datum'. 'Ultimate' facts are those which the law makes the occasion for imposing its sanctions."

*Evergreens* involved a determination of the tax basis of certain cemetery lots, some of which were improved and others of which were unimproved. A prior adjudication had established the value of the improved lots. It was conceded that the adjudication was binding on the Commissioner in the subsequent case. The taxpayer further contended, however, that the value of the improved lots as conclusively established by the prior suit should be used to arrive at the value of the unimproved lots in the second suit by deducting from the previously adjudicated value of the improved lots the cost of the improvements. The Court of Appeals for the Second Circuit rejected that argument, stating (141 F. 2d at 930-31):

> ". . . we do not hesitate to hold that . . . no fact decided in the first [suit] . . . conclusively establishes any 'mediate datum' in the second, or anything except a fact 'ultimate' in that suit."

The *Evergreens* doctrine was followed in *Grandview Dairy* v. *Jones*, 157 F. 2d 5, 10 (2d Cir., 1946) and *United States* v. *Five Cases*, 156 F. 2d 493 (2d Cir., 1946), and its applicability to the problem at hand was recognized in *Bordonaro Bros. Theatres* v. *Paramount Pictures Inc.*, 203 F. 2d 676 (2d Cir., 1953). The latter case involved the second of two actions brought by the same plaintiff against the motion picture companies to recover treble damages under the antitrust laws. The first suit was brought in 1946 and alleged a conspiracy, with consequent injury to plaintiffs, in prior years. That case resulted in a jury verdict for plaintiff which was affirmed by the Court of Appeals. 176 F. 2d 594 (2d Cir., 1949). In 1948 plaintiff brought a second suit to recover further damages for the period between September, 1946 and March, 1948. The jury again returned a verdict for the plaintiff, but in the amount of only $7,500. Plaintiff, disappointed with the jury's verdict, appealed to the Court of Appeals and ascribed the jury's niggardliness to certain errors of law committed during the course of the trial. Judge Clark characterized and disposed of the first of those assigned errors as follows:

> "... The first assigned error was the refusal of binding instructions in favor of the plaintiff based on the finding of conspiracy in the previous case. But the judge properly—we might say inevitably—ruled that the plaintiff must prove that the conspiracy continued from 1946 to 1948, and so charged. *The judge actually went far in the plaintiff's favor when he told the jury that the former judgment 'is conclusive proof that there was a conspiracy between the defendants prior to September 16, 1946,' cf. The Evergreens* v. *Nunan*, 2 Cir., 141 F. 2d 927, 930, 931, 152 A. L. R. 1187, certiorari denied 323 U. S. 720, 65 S. Ct. 49, 89 L. Ed. 579; *but in any*

*event the plaintiff cannot complain.*" 203 F. 2d at 678. [Emphasis added.]

In *Shotkin* v. *General Electric Co.*, 171 F. 2d 236, 238 (10th Cir., 1948), a treble damage action, the court made the following pertinent observation in the course of its opinion dismissing the complaint:

> "And the complaint contained further allegations relating to a criminal prosecution against some of the defendants in the United States Court for Illinois, *but that was long prior to the time plaintiff entered business at Denver and it had no bearing whatever upon any justiciable issue appropriate for determination in this case.*" [Emphasis added.]

The Restatement of Judgments has specifically adopted the rule of the *Evergreens* case. Section 68 provides that where a question of fact essential to the judgment is actually litigated and determined, such determination is conclusive between the parties as to the ultimate facts in a subsequent action. Comment *p* of this section (1948 Supplement) reads as follows:

> "*Evidentiary facts.* The rules stated in this Section are applicable to the determination of facts in issue, i.e., those facts upon whose combined occurrence the law raises the duty or the right in question, but not to the determination of merely evidentiary or mediate facts, even though the determination of the facts in issue is dependent upon the determination of the evidentiary or mediate facts."[1]

While this Court has never had occasion explicitly to apply the *Evergreens* rule, it has often used language that

[1] See also, Note, *Developments—Res Judicata*, 65 Harv. L. Rev. 818, 843 (1952).

fully supports that rule. Thus in *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 459 (1922), it stated:

> ". . . to determine the effect of a former judgment pleaded as an estoppel, two questions must be answered: (1) Was the former judgment rendered on the same cause of action? (2) If not, was some matter litigated in the former suit *determinative* of the matter in controversy in the second suit." [Emphasis added.]

Similarly, in *United States* v. *Moser*, 266 U. S. 236, 241 (1924), the doctrine of estoppel by judgment was formulated in this manner:

> ". . . whether the point or question *presented for determination in the subsequent action* is the same as that litigated and determined in the original action." [Emphasis added.]

And in *New Orleans* v. *Citizen's Bank*, 167 U. S. 371, 396 (1897), estoppel was said to exist:

> ". . . when *the question upon which the recovery of the second demand depends* has under identical circumstances and conditions been previously concluded by a judgment between the parties. . . ." [Emphasis added.]

In summary, the doctrine of estoppel would not authorize use of the 1945 conspiracy found in the *Paramount* case to establish in a subsequent litigation a 1945 conspiracy as a mediate fact from which the ultimate fact of a 1949-50 conspiracy might be inferred. Since section 5 does not purport to confer any greater advantage than the general

law of estoppel,[1] it follows that petitioner had no right under that section to prove that mediate fact *prima facie* by introduction of the decrees.

There is nothing in the legislative history of section 5 to suggest that Congress intended to sanction the use of government decrees by persons who were not even in existence, much less injured, during the period covered by the Government action. The plain words of the statute, referring to the doctrine of estoppel, clearly bespeak a purpose to limit such use to those injured by the acts condemned in the government litigation.

**(4) *The Paramount decrees were not admissible to establish a proclivity on the part of the respondents to violate the anti-trust laws.***

The record discloses that petitioner sought to introduce the decrees, and actually utilized them when admitted, for the purpose of showing that respondents had a "proclivity" to violate the antitrust laws. Its case was based upon the familiar "bad man" theory. As counsel for petitioner put it in summation, since the decrees show a past violation, respondents "are perfectly capable of coming in and committing conspiracy again" (R. 1085). It is readily apparent that petitioner's object in introducing the decrees was to arouse in each juror the "deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught." *1 Wigmore on Evidence*, 456 (3d ed. 1940).

When the *Paramount* case was before the Court in 1948, some of the defendants had urged that the decree of

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[1] *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 568 (1951).

the District Court be construed, or if necessary, modified, in such manner as to accord them greater freedom with respect to runs and clearances. The Court refused this request on the ground that it might provide the defendants with the means of continuing the conspiracies found by the District Court, stating:

> "That is too potent a weapon to leave in the hands of those whose proclivity to unlawful conduct has been so marked." 334 U. S. at 147.

In employing that language the Court was commenting upon facts disclosed by the record before it; and its comment was directed solely at the propriety of the remedy devised by the District Court. It was not commenting upon a "proclivity" demonstrated by facts *dehors* the record. Nor was it the Court's intention to suggest that respondents' past acts should be evidence of alleged future misconduct.

In short, petitioner's use of the decrees to show an unlawful proclivity was not only "alien to our conception of fair trial,"[1] but wholly without the sanction of section 5.

**(5) *Continuation of the Paramount conspiracy into petitioner's claimed damage period may not be presumed.***

Finally, petitioner attempts to span the crucial gap between 1945 and 1949 by invoking a presumption of continuance. It argues that it may rely upon the decrees "as prima facie evidence of conspiracy here" because it can be *presumed* that the 1945 conspiracy continued until it was

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[1] Judge Hastie, dissenting in *Milgram* v. *Loew's, Inc.*, 192 F. 2d 579, 595 (3d Cir., 1951): "My concern about this kind of proof is very great. . . . To imply new wrongdoing from past wrongdoing is in itself alien to our conception of fair trial."

enjoined by the entry of the decrees of November 8, 1948, March 3, 1949, and January 8, 1950 (Br. 53-55). This argument is untenable both as a matter of fact and as a matter of law.

In the first place, petitioner is in error in assuming that the *Paramount* conspiracy was not enjoined as to all respondents until 1950. Actually, it was enjoined no later than May, 1948, when this Court handed down its decision in the *Paramount* case affirming the injunctive provisions relating to runs and clearances.[1] For at this point Mr. Justice Reed's stay of the 1946 decree expired by its own terms.

Among the decretal provisions approved and rendered effective by the Court's decision were paragraphs II 2, II 3, and II 4 of the 1946 decree.[2] Those provisions were identical with the corresponding paragraphs of the decrees introduced below.[3] While it is true that this Court also directed modification of the 1946 decree with respect to competitive bidding, such modification in no way affected the injunctive

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[1]In any event, the injunction became effective not later than June 25, 1948 when the order on mandate was entered in the District Court. On remand, Judge Hand observed that this Court had affirmed the District Court's findings with respect to runs and clearances (see 334 U. S. at 144-45) and expressly stated that "our disposition of clearances was in no way altered by the Supreme Court." 85 F. Supp. 881, 885, 897. Accordingly, the injunctive provisions of the 1946 decree concerning runs and clearances were left intact.

[2]This is apparent from the following passage of this Court's opinion paraphrasing these injunctive provisions: "The District Court enjoined defendants and their affiliates from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances, or from granting any clearance between theatres not in substantial competition, or from granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. In view of the findings this relief was plainly warranted." *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 147 (1948).

[3]Compare 70 F. Supp. 53, 73 with R. 1003.

provisions respecting runs and clearances which took effect immediately upon their affirmance. *People ex rel. Platt* v. *Rice*, 144 N. Y. 249, 262, 39 N. E. 88 (1894); *Hathorn* v. *Natural Carbonic Gas Company*, 137 App. Div. 557, 121 N. Y. Supp. 683 (3rd Dep't. 1910); *Securities and Exchange Commission* v. *Okin*, 137 F. 2d 862 (2d Cir., 1943).

Clearly, there is no rule of law that would permit continuation of the *Paramount* conspiracy to be presumed after the injunction became effective in 1948. On the contrary, the high degree of obedience that is given antitrust decrees was pointed out by Mr. Justice Reed in *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 601, 604 (1951):

> "An injunction was entered by the District Court to prohibit the continuation of the objectionable contracts. Violation of that injunction would threaten the appellant and its officers with civil and criminal contempt. . . . The paucity of cases dealing with contempt of Sherman Act injunctions is, I think, an indication of how carefully the decrees are obeyed."

See also *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 729 (1944).[1]

Far from presuming continuance of a conspiracy in the wake of its prohibition, the law presumes compliance with its mandates. *American Ry. Exp. Co.* v. *Lindenburg*, 260 U. S. 584, 589 (1923); *Missouri Pac. R. R.* v. *Prude*, 265

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[1] If the conspiracy found in the *Paramount* case had in fact continued after the decree, respondents would be in violation of the injunction and guilty of contempt. No claim has been made by the Government of any such violation. Under the decree the District Court expressly reserved jurisdiction for such further orders as might be necessary or appropriate for the enforcement of compliance therewith and the punishment of violations thereof. That jurisdiction has never been invoked.

U. S. 99, 101 (1924); *Athens Roller Mills* v. *Com'r of Internal Revenue*, 136 F. 2d 125, 128 (6th Cir. 1943).[1]

Even if no injunction had been entered in the *Paramount* case until 1950, the decrees would still be inadmissible under the *Evergreens* doctrine. A decree has two functions: looking backward, it determines what has been done; looking forward, it prohibits the performance of certain acts in the future. It is only in its backward-looking aspect that the decree is of significance under section 5.[2] The sole

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[1] *Local 167* v. *U. S.*, 291 U. S. 293, 297-98 (1934), and *U. S.* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952), cited at page 55 of petitioner's brief, are not to the contrary.

In *Local 167* the defendants had previously been found guilty in a criminal proceeding of violating the antitrust laws. Thereafter, the Government brought an equity suit to restrain the violation, adduced evidence to show continuation of the conspiracy subsequent to the prosecution, and secured an injunction. This Court affirmed, rejecting defendants' contention that the proof showed that they had abandoned the conspiracy.

In *Oregon State Medical Society* the evidence disclosed illegal practices eight years before the trial, but did not convince the trier of the facts that there had been any subsequent illegality. This Court approved the denial of an injunction, stating that "conduct discontinued in 1941 does not warrant the issuance of an injunction in 1949" (343 U. S. at 334).

In neither case had continuation of the prior illegal conduct been enjoined, as it was here. In each case the Court's statement that abandonment of a conspiracy will not be presumed in the absence of proof was made in determining whether the possibility of *future* transgressions was such that in order to forestall them injunctive relief was necessary. The Court at no point intimated that *actual* wrongdoing might be established by a presumption of continuance. This distinction was recently made clear in *U. S.* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953), where the Court said: "... power to grant injunctive relief survives discontinuance of the illegal conduct. [Citing cases.] The purpose of an injunction is to prevent future violations [citing cases], and, of course, it can be utilized even without a showing of past wrongs."

[2] In the case of a criminal judgment, which is also admissible under section 5, the judgment necessarily performs only the backward-looking function. Obviously, there is no justification either in the words or purpose of section 5 to give any broader effect to a decree in equity.

reason for admitting the decree in a later treble damage action is to show, not what the defendant was restrained from doing, but what he did to give occasion for an injunction, and the only significance that may be ascribed to the injunctive provisions themselves is the extent to which they illuminate the determination of what has been done in the past. That fact is quite apparent from the express terms of section 5, which sanctions introduction of "a final judgment or decree . . . to the effect that a defendant *has violated* [the antitrust] laws . . ." (Emphasis added). And there is no presumption of continuance of a violation adjudicated in a Government suit which would obviate the need to prove by independent evidence a conspiracy which injured the plaintiff during the damage period. Such evidence could not be supplied by the decrees, which are not proof of their own violation.

**B. The charge gave petitioner the maximum probative advantage conferred by Section 5.**

We have demonstrated that the *Paramount* decrees were inadmissible. But even if the decrees were admissible, the trial court's instructions gave petitioner the maximum probative advantage conferred by section 5.

The passages of the trial court's charge relating to the *Paramount* case are as follows:

> "The law further provides, I instruct you, that if any of the acts prohibited by the Anti-Trust laws which are alleged to have damaged the plaintiff have previously been established against these same defendants by a decree obtained by the United States Government, in either a criminal or a civil, that is, an equity proceeding, under these Anti-Trust laws, then the plaintiff may, in aid of its present case, rely

upon such judgment or decree previously obtained by the Government, in proving the existence of the prohibited acts to the extent that the law provides that such previously obtained judgment or decree is prima facie evidence against the defendants in a suit of the present nature brought by the plaintiff against them—that is prima facie evidence, not conclusive evidence, as to all matters involved in the present case that were decided by the previous decree.

"I instruct you that in the previous equity suits between the Government and these same defendants, which have been referred to as the Paramount case,—you will recall I allowed the decree in that Paramount case to be introduced in evidence by the plaintiff,—I instruct you that in that case, which was a suit between the Government and the same defendants, which was decided and covered by the decrees in that case, these same defendants had, at a time previous to the opening of the Crest Theatre, conspired together in restraint of trade in violation of these same Anti-Trust laws, in restricting to themselves first run and in establishing certain clearances in numerous places throughout the United States. Thus, these proven facts, I instruct you, become prima facie evidence in the present case, which the plaintiff may use in support of its claim that what the defendants have done since those decrees, in the present case in Baltimore, is within the prohibition of those earlier decrees. However, this is only prima facie evidence. There was not before the Court in the prior case the present factual situation which is before you now with respect to Baltimore theatres. Therefore, it is still necessary in the present case, in order for the plaintiff to recover, for it to prove to your satisfaction, by the weight of the credible evidence, that these defendants, or some of them, have conspired in an unreasonable manner, to keep first run exhibitions from the plaintiff, or have

conspired to restrict plaintiff to clearances which are unreasonable." (R. 1104-05).

**(1) *The instruction that the Paramount case did not present the same factual situation as the case at bar.***

Petitioner's sole objection in the trial court to the foregoing instructions was:

> "... with regard to your statement to the Jury, concerning the fact that the factual situation in Baltimore was not raised in the Paramount case, that the Jury be advised that there was no necessity on the part of the Government to prove the factual details with regard to that situation but that, on the contrary, the Government need not do that, and the Jury might still conclude that the evidence in the Paramount case is to be prima facie evidence." (R. 1113)

It now renews that objection, alleging that the challenged instruction "required petitioner to retry the issue of conspiracy previously resolved against respondents", whereas "[t]o establish a prima facie case under the ruling in the *Emich* case it was only necessary for petitioner to introduce the judgments in the prior Government case and such additional evidence as would show the impact of the conspiracy on petitioner" (Br. 52-53).

Such an argument rests on the assumption that the conspiracy which petitioner had to prove in this case was the identical conspiracy adjudicated in *Paramount*. That assumption, which permeates petitioner's entire brief, is clearly wrong.

Actually, the conspiracy charged by petitioner here was strikingly different from that found in the *Paramount* case. There were at least three significant differences:

(a) *The time difference.*

*Paramount* adjudicated a 1945 conspiracy, while it was incumbent upon petitioner to show a 1949-50 conspiracy. Even if the time difference did not render the decrees wholly inadmissible, at the very least it made them inadequate to establish the later conspiracy charged by petitioner. See *Bordonaro Bros. Theatres* v. *Paramount Pictures*, 203 F. 2d 676, 677 (2d Cir. 1953). Petitioner's counsel conceded as much in the course of argument in the trial court (R. 930).

(b) *The place difference.*

*Paramount* was an adjudication of illegal conduct in the country as a whole.[1] With the exception of a limited number of references to New York City,[2] the District Court did not make, and specifically disclaimed making, any findings as to the conduct of the defendants in any particular city.[3]

An adjudication of antitrust violations over such a broad area cannot serve, without more, to establish a cause of action in favor of a particular plaintiff in a particular city. Manifestly, whatever conspiracy was found to exist in *Paramount* had to be related spatially as well as temporally

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[1] *United States* v. *Paramount*, 85 F. Supp. 881 (S. D. N. Y., 1949).

[2] See 1950 Findings of Fact 154(d) and 154(f) and 1950 Conclusions of Law 16.

[3] 66 F. Supp. 323, 342 (S. D. N. Y., 1946). There are references in the findings of fact to first run competition obtaining in ten named cities (Boston, Chicago, Los Angeles, Philadelphia, St. Paul, Washington, Nashville, Louisville, Indianapolis and St. Louis); but those references were included for the sole purpose of illustrating the extent of affiliation of first run theatres with the distributor defendants. See 1950 Findings of Fact 148. The 1946 Findings are reported in 70 F. Supp. 53 (S. D., N. Y. 1946). The 1950 Findings are unreported, but can be found in the record in *United States* v. *Loew's et al.*, October Term, 1949, No. 847.

to the alleged damage suffered by petitioner. This is demonstrated by *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*, 190 F. 2d 951, 958 (2d Cir., 1951), where Judge Augustus Hand, speaking for a unanimous court, said:

> ". . . There is also no showing that evidence of the Buffalo situation was introduced or relied upon by the government in proving the conspiracy in the Paramount case. Therefore we must look to the record in this case to see if Dipson has shown that the general conspiracy found to exist in the Paramount case, or some other conspiracy, had as one of its objects or effects the monopolization of the first and second run exhibition of pictures in the Buffalo area and that he suffered injury as a result."

(c) *The subject matter difference.*

The *Paramount* case dealt with a number of trade practices in the movie industry. But petitioner does not, and cannot, show a single instance in which either the District Court or this Court in the *Paramount* case condemned, or even considered, the propriety of licensing first run pictures to downtown theatres, rather than neighborhood houses.

In view of these three significant differences between what was adjudicated in *Paramount* and what petitioner had to prove here, it was clearly incumbent upon the court to explain to the jury that "the present factual situation which is before you now with respect to Baltimore . . . was not before the Court in the prior case." This is the incontrovertible truth, and failure to have so informed the jury would have been grossly misleading.

The court, therefore, told the jury in substance that the *Paramount* case was an action in equity brought by the Government against respondents under the antitrust laws

at a time prior to the opening of the Crest Theatre; that respondents were found to have conspired in restraint of trade to restrict first run product to themselves, and to establish clearances, in numerous places throughout the United States; that these proven facts were *prima facie* evidence in the present action of that conspiracy; and that the jury was entitled to consider those facts in determining whether respondents, in denying the Crest a first run in Baltimore subsequent to the *Paramount* case, acted in concert.

If the decrees were admissible at all, this was the most that petitioner was entitled to by way of instructions under section 5. The instructions by no means eliminated the decrees from the case, as petitioner contends. What they did was to limit the decrees to their maximum permissible significance: *prima facie* proof of a 1945 conspiracy, which then became a fact in the case like any other fact, to be considered with all the evidence in determining whether a later conspiracy had been proved in Baltimore.

Petitioner's contention that these instructions were too restrictive, because the jury should have been told that the decrees were *prima facie* evidence of the identical conspiracy charged in the complaint, is untenable.

The *Emich* case, which is a classic example of the proper application of section 5, does not help petitioner, for there the plaintiffs had been in business during the existence of the very conspiracy covered by the Government action and had been victims of that conspiracy. Indeed, one of plaintiffs' officers had testified in the Government action as to the acts performed by the defendants which injured plaintiffs' business. For that reason, this Court held that the decrees were sufficient to establish a *prima facie* case of conspiracy, which plaintiffs had to supplement only by inde-

pendent proof of impact and damage. Obviously, nothing decided in *Emich* holds that a plaintiff in a treble damage action, who was not in business during the period covered by the prior Government suit, and who therefore must prove a subsequent conspiracy, may discharge its burden by the mere introduction of a decree attesting to an earlier conspiracy.[1]

In summary, the contested charge clearly did not require petitioner to retry the *conspiracy found in the Paramount case*. It did require petitioner to prove the *later conspiracy in Baltimore* on which it sought to recover. As such, the instruction was clearly proper.

**(2) *The alleged brevity of the charge.***

Petitioner further assails the charge as too "superficial and limited". Since it made no such objection below, the question is not properly before the Court.[2] In addition, there is no substance to the contention.

Counsel for petitioner referred to the *Paramount* litigation in his opening statement (R. 108, 109), and offered the decrees in evidence at the beginning of his case (R. 116-17). A lengthy hearing was then held outside the presence of the jury (R. 175-222), at the conclusion of which the trial court ruled against admissibility, but invited petitioner to renew its proffer at a later stage of the trial (R. 218-22).

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[1] *Twentieth Century-Fox Film Corp.* v. *Brookside Th. Corp.*, 194 F. 2d 846 (8th Cir., 1952), cited by petitioner (Br. 53, fn. 94), is distinguishable on the same ground, since the plaintiff had been in business in 1937. Nevertheless, it is interesting to note that the trial court instructed the jury as follows: "In admitting these findings in evidence for your consideration, you are charged that they of themselves do not establish any fact as to the activities of these defendants in Kansas City, Missouri. They cover a nationwide situation of which the Government complained." These instructions were approved by the Court of Appeals (194 F. 2d at 853).

[2] *Tyrrell* v. *District of Columbia*, 243 U. S. 1 (1917); Rule 51, Fed. Rules Civ. Proc.

Petitioner again offered the *Paramount* decrees at the end of its case. The trial court adhered to its ruling against admissibility, but without prejudice to petitioner's right to offer the decrees at the close of all the evidence (R. 482-3). Nothwithstanding that ruling, the court permitted counsel for petitioner to propound questions on cross-examination of various witnesses for respondents, so phrased that their obvious purpose, and necessary effect, was to apprise the jury of the previous government litigation (e.g., R. 559, 574, 619, 671-2, 762, 830).

At the close of all the evidence further argument was held as to the admissibility of the decrees (R. 914-46). Prior to this argument, petitioner's counsel had submitted typewritten portions of the decrees setting forth only four injunctive provisions (R. 914). During the argument the following colloquy occurred between the trial court and counsel for petitioner:

> "MR. ROME: . . . Those are the four things which we claim fit the present case directly within the issues that were raised and found in the Paramount case as to which these defendants have been enjoined. . . .
>
> "THE COURT: As I understand it, leaving out the exact words of the decree, you want to be able to argue to the jury as to putting in these decrees, that these parties were enjoined from doing the four things which you gave me on this special memorandum brief?
>
> "MR. ROME: That is correct, sir, as a result of there having been a finding they were violative of the Anti-trust laws, in the Paramount case they were enjoined from doing those things, and we would ask leave to say that to the jury.
>
> "THE COURT: . . . What you want to do, I suppose, is to have them in the record so you can summarize.

> "MR. ROME: Exactly, sir. That is exactly the point. . . . Your Honor has caught my point exactly of what I have asked leave to do, and what I think we are permitted to do within Section 5 of the Clayton Act, sir, is *to make a summary reference to the Paramount case* and point out what we consider to be its impact upon the present situation." (R. 915-16). (Emphasis added.)

After hearing these arguments the court stated that the admissibility of the decrees presented a "twilight zone" case (R. 943), and, resolving its doubts in favor of petitioner, changed its ruling and held that those excerpts from the decrees selected by petitioner would be received in evidence (R. 942-43; PX 97, R. 1157-61).

Petitioner never furnished the court with the record in the *Paramount* case, nor requested that it be read by the court.[1]

After ruling that the decrees were admissible, the court recalled the jury and delivered preliminary instructions as to the background of the decrees and their nature as *prima facie* evidence (R. 1001-02). Specifically, the jury was told that respondents had been enjoined from conspiring

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[1]Petitioner now complains of the court's failure to examine the *Paramount* record as allegedly required by *Emich* (Br. 48).

*Emich* was a criminal case. Examination of the record was necessary in order intelligently to determine what had been decided. However, there was no necessity to go through the thousands of pages in the *Paramount* case in view of the detailed findings of facts and conclusions of law that were made by the District Court and the comprehensive opinions in the case.

Petitioner quotes the judge as saying: "Well, I am not disposed to examine the record anymore than I have done from the papers that have been given me and the copies of the decree". But petitioner neglects to quote the very next sentence: "If I did, we would have to adjourn this case until the Fall term" (R. 917).

Petitioner's failure to provide the court with the *Paramount* record attests to its own belief that examination of the record was not necessary.

to maintain a system of clearances, from granting clearances between theatres not in substantial competition, and from licensing pictures on any run in any manner other than on a theatre-by-theatre basis "solely upon the merits;" and that the decrees were to be taken as *prima facie* evidence of conspiracy. Counsel for petitioner did not object to these instructions but remained silent, thereby indicating his approval. It was respondents who objected (R. 1002). Thereupon petitioner's counsel read his selection of excerpts from the decrees to the jury (R. 1002-05).[1]

Before delivering its charge to the jury, the trial court read to counsel its proposed instructions relating to the *Paramount* decrees (R. 1040-41). These instructions were in all material respects identical to those ultimately given to the jury. After reading its proposed charge, the court asked, "Do counsel want to say anything?" Again counsel for petitioner had no objection or suggestion, as indicated by his silence. And again respondents objected (R. 1041-2).

Petitioner, having been accorded precisely the opportunity it sought—to argue to the jury concerning the in-

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[1]Petitioner's contention that it was prejudiced by the court's delay in admitting the *Paramount* decrees is devoid of any merit. No exception on this ground was taken below; the point is not within the scope of the questions presented in the petition for certiorari, and indeed was not even mentioned in the petition and supporting brief. Moreover, petitioner acquiesced in the delayed admission of the decrees. The record shows that after the court explained to counsel why it was deferring a final ruling on admissibility until the end of the case, and pointed out that it could not see how such a deferred ruling could be prejudicial to petitioner, petitioner's trial counsel stated: "I will be happy to be governed by Your Honor's wishes" (R. 495). It was clearly within the discretion of the trial court under the *Enrich* case to control the order of proof in this respect. If anything, delaying the reception of the decrees until the conclusion of the entire case, and then instructing the jury as to their *prima facie* effect shortly before the charge, and amplifying those instructions in the charge itself, gave added prominence to this evidence, to petitioner's advantage and respondents' disadvantage.

junctive provisions of the decrees—delivered an argument in summation based upon those provisions and their effect as *prima facie* evidence (R. 1025-26, 1077, 1082-83, 1084, 1085-86, 1090-91.[1]

The court thereupon instructed the jury in its charge a second time with respect to the *Paramount* decrees (R. 1104-05), as quoted at pages 78-80 *supra*.

From the foregoing it is apparent that petitioner did not seek any precise and detailed analysis of the *Paramount* decision and its effect upon the case at bar. Indeed, petitioner would have shunned such an analysis since it would have demonstrated the highly tenuous nature of its reliance on the *Paramount* adjudication. All that petitioner sought was to have the record afford a basis for it to urge that the jury punish respondents for their past violation. That purpose was accomplished when the decrees were admitted and was facilitated by the general nature of the court's instructions.

### (3) *The charge on burden of proving reasonableness of clearances.*

Petitioner in its brief complains in passing of that part of the trial court's instructions which related to the burden of proving the reasonableness of clearances (Br. 56). Here

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[1]Petitioner's argument in summation is epitomized by the following passage: "Perfectly true, it was not in a criminal case, it was in an equity case, but they have committed conspiracy in order to exclude independents from having access to the first-run field, and I feel confident His Honor will so explain that to you when he comes to discuss the effect and impact of the Paramount case. So, if they committed conspiracy before, they are perfectly capable of coming in and committing conspiracy again, because the Courts have recognized there was a strong temptation on the part of people who for a period of 20 years continued a uniform conduct and uniform course of action, to continue with that course, and it came out here before from other counsel." (R. 1085).

again no objection was taken by petitioner at the trial. The record shows that it was respondents who objected and not petitioner (R. 1119). Hence the propriety of these instructions is not reviewable.

In any event, the charge was much more beneficial to petitioner than it had any right to expect. The charge was based on the following portion of the *Paramount* decrees: "Whenever any clearance provision is attacked as not legal *under the provisions of this decree*, the burden shall be upon the distributor to sustain the legality thereof" (R. 1003) (emphasis added).

It is well settled that the entry of a decree confers no rights upon strangers to it. See *United States* v. *Paramount*, 75 F. Supp. 1002 (S. D. N. Y., 1948). It is patent that the only way in which the legality of a clearance could be attacked under the terms of the decree would be in a contempt proceeding brought by the Government, and that the District Court in including such a provision in its decree had no intention of formulating a novel, substantive rule of law that would have universal application akin to a statute in every treble damage action which might thereafter be brought against the defendants.

Furthermore, petitioner's interpretation of the word "clearance" in the decree is far too sweeping. The accepted meaning of that term, as we have pointed out, is the period of time elapsing between successive runs. It is in this sense that the decree refers to clearance when it provides for shifting the burden of proof. The reasonableness of the 21-day clearance having been conceded by Myerberg, clearance was not an issue in the case. The sole issue was whether there had been a conspiracy to deny petitioner a first run. There was accordingly no necessity for any

charge whatsoever relating to the burden of proof as to the reasonableness of clearance. To the extent that the trial court did place such a burden on respondents, it is clear that petitioner was benefited rather than harmed.

(4) *The charge as to the right of Warner and Loew's to place their pictures in their own theatres.*

The trial court instructed the jury that Warner and Loew's each had a right, as a distributor, to prefer its own theatres, and that such preference was not, *in and of itself*, proof of conspiracy on their part (R. 1103). Petitioner objected to these instructions below, and reiterates its objection now (Br. 56-57), on the ground that the trial court should have pointed out to the jury that "even though these distributors might have some right to put their own pictures into their own theatres, there would be the element of day and date and the prohibition in the *Paramount* decree, on the part of these distributors in granting clearances to theatres not in substantial competition" (R. 1113). The trial court, however, had previously adequately charged the jury in regard to petitioner's claim for a day and date first run with the downtown theatres (R. 1095-96, 1102), and as to the significance of substantial competition in determining the legitimacy of that claim (R. 1001, 1102). Since its earlier instructions were clearly sufficient, there was no necessity for repetition of those instructions in dealing with Loew's and Warner.

Contrary to petitioner's assertion (Br. 57), the trial court at no time told the jury that Warner and Loew's "had the absolute legal right to place their own pictures in their own theatres, on any terms they saw fit", and no such objection was made on this ground below.

Petitioner now advances a further objection to this phase of the charge which was not interposed below (Br. 58). It argues that since the final decrees against Loew's and Warner were not entered until February, 1950, the proviso in the decrees permitting those companies to license their pictures in their own theatres "in such manner, and upon such terms, subject to such conditions as may be satisfactory to it," for a period of three years, merely gave them immunity from contempt action by the Government for the period allowed for theatre divestiture, but did not confer retroactive validity to the prior licensing of their theatres. There is no merit to this contention. The instruction does not depend on the decrees alone for its validity. For such an instruction merely explains, as this Court held in the *Paramount* case, and in *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948), that vertical integration is not illegal *per se*.[1] The present contention in essence is that the licensing by a distributor of its own pictures in its own theatres is a *per se* violation of law unless protected by judicial decree.

Moreover, the issue here was conspiracy. As Judge Augustus N. Hand said in the *Dipson* case, 190 F. 2d at 960, the action of the distributors in favoring their own theatres "was to be expected, and the fact that they did so is no evidence that they conspired to do so jointly rather than doing so individually".

**(3) *Refusal to grant petitioner's requests to charge.***

Petitioner's objection to the failure of the court to charge as to the *Paramount* decrees pursuant to its requests is both unavailable and unavailing.

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[1]Petitioner expressly recognized this basic legal principle in the trial court (R. 213).

(a) *Petitioner did not properly except below.*

The only objection which petitioner noted after the trial court had failed to charge as requested consisted of a general exception to its failure to charge pursuant to "our requests submitted to you, which we believed should be given to the jury with respect to specific aspects of the *Paramount* case" (R. 1113-14), followed by a numerical enumeration of some 58 requests, including 16[1] relating to the *Paramount* case (R. 1116-17). Petitioner made no effort to demonstrate to the court in what respects, if any, its charge concerning the *Paramount* decrees was inadequate, or wherein petitioner's proposed instructions were preferable.

It was just such an omnibus objection as this that Rule 51 of the Federal Rules of Civil Procedure was designed to prevent. That rule explicitly provides that "No party may assign as error . . . the failure to give an instruction unless he objects thereto . . . stating distinctly the matter to which he objects and the grounds of his objection." This is but a restatement of what has always been the law in the federal courts. For it is a settled rule of appellate review that a catch-all exception such as petitioner employed below, which merely objects to the denial of a series of requests without apprising the trial court of the respects in which refusal of any of the requests is claimed to be error, does not preserve for review the propriety of rejecting any individual requests.[2]

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[1]Nos. 12, 31, 61, 70-80, 83 and 93 (R. 38, 43-44, 51, 53-55, 56, 57).

[2]*Beaver* v. *Taylor*, 93 U. S. 46 (1876); *Jones* v. *East Tennessee, V. & G. R. Co.*, 157 U. S. 682 (1895); *Hansen* v. *St. Joseph Fuel Oil & Manufacturing Co.*, 181 F. 2d 880, 886 (8th Cir., 1950); *United States* v. *Daily*, 139 F. 2d 7, 9 (7th Cir., 1943); *Baker* v. *United States*, 21 F. 2d 903, 906-907 (4th Cir., 1927); *Buckeye Powder Co.* v. *E. I. Du Pont de Nemours P. Co.*, 223 Fed. 881,

The reason for the rule is that fairness to the trial court and to the parties requires that "objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer* v. *Hoffman*, 318 U. S. 109, 119 (1943).

Petitioner's failure to comply with this rule is inexcusable because it had more than the usual opportunity and notice to do so—the court having read its proposed charge concerning the *Paramount* case to counsel before actually delivering it to the jury (R. 1040-41), and having notified petitioner that objections should be made to the charge if it was considered inadequate (R. 1000).

Accordingly, whether the trial court should have granted any of petitioner's requests for instruction may not properly be considered here.

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886-87 (3rd Cir. 1915), aff'd 248 U. S. 55 (1918); *cf. Palmer* v. *Hoffman*, 318 U. S. 109, 119-20 (1943).

As stated in *Buckeye Powder Co.* v. *E. I. Du Pont de Nemours P. Co., supra*: "Some of the assignments are not the subject of a proper exception. At the close of the evidence the plaintiff submitted a series of 27 requests for instruction, and the trial judge did not answer them specifically, believing that he had substantially answered them in his general instructions, as of course he had a right to do. This is evident from what he said at the end of the charge:

> "'As to the plaintiff's requests, as I recall it, I have touched upon every one of these requests, and I therefore will not charge them in the language requested, but counsel may take an exception, of course, to the fact that I do not specifically charge in the precise language requested.'

"This, of course, invited counsel to point out which instructions, if any, they did not regard as sufficiently answered in the general charge. Many decisions declare that fairness to the court requires this to be done; but the plaintiff's counsel, instead of specifying errors or omissions or insufficient answers, asked for an exception in the most general language possible: 'We also except to that portion of your honor's charge which refuses to give our instructions, except as charged.' The Supreme Court has several times decided that such an exception does not call the court's attention properly to what is objected to, and is therefore insufficient. [Citing cases]."

(b) *Refusal of petitioner's requests was not error.*

Apart from the fact that it is not open to petitioner to challenge the action of the trial court in refusing its requests to charge, such action was in each case a proper exercise of the court's discretion.

In the *Emich* case this Court refused to lay down any "mechanical rule . . . to control the trial judge" in explaining to the jury the effect of a prior Government decree admitted pursuant to Section 5, observing that the judge

> "must take into account the circumstances of each case. He must be free to exercise a 'well-established range of judicial discretion.'" 340 U. S. at 571.

Each of the sixteen requested instructions falls into one or more of the following categories:

(i) Requests which were superfluous or adequately covered in the court's instructions.

Most of the requests were cumulative and repetitious, and the trial court's refusal to grant them may be justified on that ground alone. *Good Holding Co.* v. *Boswell*, 173 F. 2d 395, 401 (5th Cir., 1949). Although there were some differences in phraseology between the court's charge and petitioner's requested instructions, it can hardly be said that the court's decision to use its own language rather than that suggested by petitioner was error.

Thus petitioner in effect requested the court to instruct the jury in six different ways that the *Paramount* decrees adjudicated that respondents had caused the exclusion of independents from the first run field by fixing runs and clearances (Nos. 70, 71, 76, 77, 78, 79; R. 53-55). The language actually employed by the court was that it was

found in *Paramount* that respondents had "conspired together in restraint of trade . . . in restricting to *themselves* first run and in establishing certain clearances in numerous places throughout the United States" (R. 1105) (emphasis added).

In view of this specific instruction as to the nature of the conspiracy adjudicated in *Paramount*, Request No. 74, that "the best customers of each of the big five defendants were ordinarily one or more of the other defendants" (R. 54), was clearly superfluous. Moreover, this instruction was plainly inapplicable to the theatre situation in Baltimore.

Requests Nos. 75 and 76, which are couched in terms of the defendants having been "convicted" of conspiracy to fix runs and clearances in the *Paramount* case (R. 54), were definitely improper because they erroneously implied that *Paramount* was a criminal prosecution in which the defendants were found guilty beyond a reasonable doubt. Furthermore, their content was adequately covered in that portion of the court's charge which described the conspiracy found in the *Paramount* case.

Similarly, Request No. 80, that the court instruct the jury that the decrees in the *Paramount* case were *prima facie* evidence of the wrongful conspiracies and conduct found in that case (R. 55), was fully—indeed, more elaborately—covered in the court's charge (R. 1104-05).

Request No. 83—that the distributors were under a duty to license their films theatre by theatre without discrimination in favor of affiliates—was specifically covered in the trial court's instructions to the jury at the time the decrees were received in evidence (R. 1001).

Needless to say, the failure of the court to adopt and give repeated effect to petitioner's flamboyant language in

many of these requests was by no means a breach of the "well-established range of judicial discretion" entrusted to it under the *Enuch* case.[1]

(ii) Requests relating to respondents' "proclivity" to unlawful conduct.

Four of the proposed instructions (Nos. 12, 61, 72, 73) were nothing more than varied ways of apprising the jury that since respondents had been found to have violated the Sherman Act in the past, it could be assumed that they were violating that statute during the period covered by the complaint (R. 38, 51, 54). The impropriety of any such charge has already been demonstrated, *supra* pp. 73 to 74. Moreover, petitioner's counsel argued "proclivity" to the jury at length both in his opening and summation. (See, *e.g.*, R. 107-09, 1025-26, 1085, 1090-91.) Hence petitioner's complaint really is that the court breached its discretion in failing to repeat under its aegis and blessing the prejudicial and erroneous arguments which petitioner had already made to the jury.

(iii) Requests which were misleading because of their failure to limit the temporal coverage of the Paramount findings.

It is hornbook law that unless a request for instructions is entirely correct, has no tendency to be misunderstood, and may properly be given without qualification, there is no error in refusing to grant it.[2] Each of petitioner's requests

[1] The trial court characterized petitioner's 97 requests to charge as "pretty much in the nature of a brief for the plaintiff" (R. 956).

[2] *Palmer* v. *Hoffman*, 318 U. S. 109, 120 (1943); *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 393 (1924); *Catts* v. *Phalen*, 2 How. 376 (1844); *Coney Island Co.* v. *Dennan*, 149 Fed. 687, 692 (6th Cir., 1907).

which relates to the findings in the *Paramount* case suffers from the same basic infirmity of failing to specify the time as of which the conduct described in the finding took place.[1] Thus, to have granted these requests in the form proposed would have been grossly misleading, since the jury might well have supposed that the conduct occurred during the period of petitioner's business existence instead of several years earlier. Obviously this would have been highly prejudicial to respondents since the existence of a post-1945 conspiracy was the very point in controversy.[2]

If petitioner was entitled to any advantage at all under section 5 (and we submit that it was entitled to none), the trial court accorded it as large a benefit as could conceivably be derived from that section. In no event, therefore, is petitioner in a position to complain of the court's charge with respect to the *Paramount* decrees.

IV

[1] Requests Nos. 70, 71, 72, 74, 75, 76, 77, 78, 90 and 80.

[2] The only other requests refused by the trial court that had any conceivable bearing on the *Paramount* case were Nos. 31 and 93. The former, referring to this Court's condemnation of "any system of clearances which has acquired a fixed and uniform character," was properly refused because it states an abstract proposition of law, without relating it to the particular facts of this case. Moreover, the trial court adequately described in its instructions to the jury what was adjudicated in the *Paramount* case with respect to runs and clearances (R. 1001, 1105). As for request No. 93, relating to the burden of proof with respect to the reasonableness of clearance, it was clearly improper for the reasons discussed *supra*, pp. 88-90.

## CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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